

DOJ's Changes to Corporate Enforcement Policy Present Obstacles

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On Jan. 17, Assistant Attorney General Kenneth Polite announced revisions to the Department of Justice's corporate enforcement policy, describing them as the first significant changes since 2017.

Polite says the changes will strengthen the way the DOJ responds to corporate crime by providing "specific, additional incentives to companies for voluntary self-disclosures, as well as for cooperation and remediation." However, the changes reveal several challenges and dangers companies face when seeking cooperation credit from the DOJ.

Under the revised policy, prosecutors may now provide cooperation credit to a company, which can lead to a declination, even if there are aggravating circumstances. But before that company can obtain a declination, the company must demonstrate it has met each of these three factors:

- The company "immediately" made a voluntary self-disclosure after "becoming aware" of the alleged misconduct
- The company had an effective compliance program and internal accounting controls in place to identify the alleged misconduct and led to the company's voluntary self-disclosure
- The company "provided extraordinary cooperation" with the DOJ and "undertook extraordinary remediation"

Determining Self-Disclosure

Significantly, the DOJ did not define what is meant by immediately, nor did it define when a company is deemed aware of a misconduct allegation.

Disclosing quickly to meet the DOJ's requirement that it be immediate could have serious unintended consequences for a company. For example, the company might not have a sufficient understanding of the facts, including who at the company was aware of the misconduct.

Thus, companies should consult with counsel and weigh the risks and benefits of voluntary self-disclosure to the DOJ. This involves carefully considering how quickly to make a disclosure.

Adequate Compliance Program

Relying on the perceived effectiveness of a compliance program also poses risks.

A company may view its compliance program as robust and effective, but this does not mean the DOJ will agree. Key to the DOJ's assessment of any compliance program is whether it "enabled the identification of the misconduct that led to the company's voluntary self-disclosure."

Proving this causal connection might be difficult, especially if the program is not what led directly to the identification of the misconduct. Therefore, the company and counsel should carefully analyze the program before making any decision about voluntary self-disclosure.

The DOJ also failed to define extraordinary cooperation or extraordinary remediation. This leaves it to companies to navigate this without guidance.

Meeting the Requirements

The DOJ did specify that if the three factors are met, and if there are no "multiple or particularly egregious aggravating circumstances," it generally will not require a corporate guilty plea, even for a criminal recidivist.

However, although the policy provided examples of "particularly egregious aggravating circumstances," it states that such circumstances are not limited to those examples. Ultimately this determination is up to the DOJ's sole discretion.

The DOJ also explained that if the requirements are met in cases where the department is seeking a criminal disposition, the prosecutor may recommend a sentencing reduction to the court. This could be at least 50%, and up to 75%, off the low end of the US Sentencing Guidelines.

However, it is important to note that a prosecutor is not required to recommend a lowered sentence. Polite warned that "failing to self-report, failing to fully cooperate, [and] failing to remediate, can lead to dire consequences."

The DOJ has presented the changes as providing more specific guidance for companies seeking declinations where aggravating circumstances exist. But the changes reveal significant dangers and challenges for companies faced with the voluntary self-disclosure decision.

There are no guarantees that meeting any of the three factors will allow a company to avoid a guilty plea or the imposition of hefty fines.

The bottom line is that the DOJ retains wide discretion to determine significant aspects of the requirements for obtaining a declination where aggravating factors exist. This includes whether the self-disclosure was immediate, whether the company's compliance program was effective, and whether the company's cooperation and remediation were extraordinary.

This is why a company must carefully consider whether it is appropriately positioned to voluntarily self-disclose misconduct to the government, including the appropriate timing of such disclosure. A company must also take considerable steps to ensure that it can establish it has met all three requirements, including the vague and discretionary aspects of those requirements, to the DOJ's satisfaction.

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