

Recent DOJ Guidance on Corporate Compliance, Cooperation, and Compensation

May 24, 2023

Introduction

Over the first quarter of this year, the Department of Justice announced notable policy changes for corporate compliance programs. These policy changes are particularly relevant to in-house counsel who may need to understand and explain these policies to corporate stakeholders.

In February, the DOJ issued a [corporate voluntary self-disclosure policy](#) to formalize its efforts to incentivize voluntary self-disclosure. The policy, for the first time, applies to all U.S. attorney's offices in an effort to promote transparency and uniformity across the DOJ. The policy builds on the department's revised [voluntary self-disclosure policy for corporate criminal enforcement](#), issued in January, which offers significant incentives for companies to self-disclose corporate misconduct, cooperate with the DOJ, and remediate wrongdoing.

Most recently, in March, the DOJ released several updates to its guidance on corporate compliance programs, including a new policy to incentivize compliance-driven compensation and bonus plans to combat corporate crimes. As part of the new policy, the DOJ launched the first-ever [pilot program on compensation incentives and clawbacks](#). The three-year pilot program consists of two parts. First, in every corporate resolution with the DOJ Criminal Division, companies must include certain compliance-promoting criteria within their compensation and bonus systems. Second, the Criminal Division will provide fine reductions to companies that seek to claw back corporate compensation from wrongdoers.

Voluntary Self-Disclosure

Some of the most notable changes in the DOJ's corporate criminal enforcement policy include (i) increased potential for "declinations" (where the DOJ "declines" to prosecute), (ii) the ability for a

company to obtain cooperation credit, even if it has experienced similar misconduct in the past, and (iii) an increased reduction of fines for companies that self-disclose or provide significant cooperation during an investigation.

Not surprisingly, these incentives come with more significant self-disclosure requirements than existed under the DOJ's prior policies, such as "immediately" disclosing misconduct, providing "extraordinary" cooperation, and undertaking "extraordinary" remediation.

Along with the DOJ's corporate criminal enforcement policy, the new voluntary self-disclosure policy codifies a host of substantial benefits afforded to companies that timely disclose misconduct to the department. Companies seeking those benefits must also meet exacting requirements.

The voluntary self-disclosure policy raises three important considerations for companies. First, timing is critical. The DOJ emphasizes the need for companies to make "reasonably prompt" self-disclosures, possibly even before the company's own investigation concludes.

Second, any disclosure must include all relevant facts known at the time. The voluntary self-disclosure policy anticipates that a company may learn additional facts after its disclosure. The failure to disclose all known facts at the time of disclosure, however, may disqualify a company from meeting the voluntary self-disclosure standard.

Third, companies must preserve, collect, and produce documents and evidence in a timely manner to secure any benefits.

Takeaway: Voluntary self-disclosure cannot be taken lightly. It is important to analyze all information before deciding to self-disclose, as disclosure can result in consequences that go beyond the self-disclosed information.

Communication Devices Guidance

The DOJ recently revised its guidance for federal prosecutors when evaluating the adequacy of a company's compliance program. The updated guidance addresses the timely preservation, collection, and production of evidence and focuses on employees' use of personal devices and communication platforms. Per the updated guidance, prosecutors will now consider corporate policies on the use of personal devices and messaging applications, and the preservation of communications from both personal devices and messaging apps, when considering the corporation's risk profile. Notably, prosecutors will more actively seek data from messaging apps, and a company's failure to preserve and produce such data may affect any cooperation incentives or benefits.

Takeaway: If a company is aware, or should be aware, of corporate communications on third-party messaging apps or employees' personal devices, the company should have a plan to preserve and produce those communications.

Compensation Policy

The DOJ incorporated its new compliance-driven policy on corporate compensation structures into its revised corporate compliance programs guidance. Prosecutors will proactively assess whether a company offers “incentives for compliance and disincentives for non-compliance” and “has clear consequence management procedures in place” to identify, investigate, discipline, and remediate violations of law, regulation, or policy. Prosecutors will further assess whether the company enforces those procedures consistently across the organization.

Takeaway: Prosecutors will also assess the extent to which the company emphasizes and promotes its commitment to a culture of compliance.

Pilot Program Fine Reductions in Practice

Under its three-year pilot program, the DOJ intends to track good faith efforts to claw back compensation from both individuals involved in the misconduct and supervisors with knowledge of the misconduct. In practice, a company will pay any applicable fine at the time of a resolution, minus the amount the company attempts to claw back from culpable executives or employees. The company may retain the compensation it successfully recovers from culpable parties. Even if the company is not successful in clawing back compensation, it may be eligible for a fine reduction of up to 25% of the compensation that it sought to recover, if it can demonstrate good faith recovery efforts.

Takeaway: The DOJ's focus on clawbacks aligns with recent efforts by the Securities and Exchange Commission to claw back compensation from senior executives when their companies have to reissue an accounting statement because of misconduct, regardless of whether an executive participated in, or was even aware of, misconduct.

Conclusion

The DOJ's recent announcements and revised policies encourage companies to analyze and update their corporate compliance programs. Given the department's expanded focus on timely self-disclosure, cooperation, and remediation efforts, companies should review and revise any internal assessments or audits that could result in self-disclosure activities and ensure such activities either reflect or consider the DOJ's emphasis on “timely” and “immediate” disclosures.

Similarly, the DOJ's new pilot program on compensation incentives and clawbacks offers tangible benefits to corporations. Any such benefits, however, are likely to turn in large part on how the department interprets "good faith efforts" to recover compensation from wrongdoers. Companies should review or implement compensation policies linked to the corporate compliance program.

In light of the evolving guidance from the DOJ on corporate communication channels and the policies around them, companies should consider analyzing how and where employees communicate, how to preserve and produce that communication, and update relevant policies accordingly.

Finally, companies should identify strategic messaging to communicate any updates to the compliance program and highlight a top-down commitment to compliance.

Authored By



Adam P. Schwartz



Erin J. Hoyle

Related Practices

[White Collar Crime & Government Investigations](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.

