



DOJ Implements Corporate Self-Disclosure Policy for Criminal Misconduct

By: Channing J. Martin

04.03.2023

A new voluntary self-disclosure policy issued by the United States Department of Justice (DOJ) provides incentives for companies that voluntarily report criminal misconduct by their employees or agents. The policy applies in the context of federal criminal enforcement actions brought by U.S. Attorneys' Offices against companies, and it has significant implications for companies subject to federal or federally enforceable environmental laws and regulations.

Incentives

Under the policy, if a company voluntarily self-discloses misconduct by an employee or agent, fully cooperates, and timely remediates the misconduct (including agreeing to pay all disgorgement, forfeiture and restitution associated with the misconduct), it is eligible to receive these benefits:

- Prosecutors will not seek a guilty plea by the company.
- Prosecutors are given discretion not to seek any fines against the company.
- If fines are deemed appropriate, prosecutors are to reduce them to no more than 50% below the low end of the range in the U.S. Sentencing Guidelines.
- Prosecutors will not seek appointment of an independent compliance monitor to ensure the company implements an effective compliance program instituted as part of any timely remediation.

Qualification Criteria

The policy details what a company must do to qualify. Under the policy, the U.S. Attorney's Office must ensure the disclosure meets each of the following criteria for the company to be eligible for benefits:

1. The disclosure must be made voluntarily and not pursuant to a regulation, a contract, or a prior DOJ resolution such as a deferred prosecution agreement.
2. The disclosure must be made prior to an imminent threat of disclosure or government

investigation, prior to the misconduct being publicly disclosed or otherwise known to the government, and within a reasonably prompt time after the company becomes aware of the misconduct.

3. All relevant facts concerning the misconduct then known to the company must be disclosed at the time of the disclosure. Further, the company must move quickly to preserve, collect and produce relevant documents and/or information.

However, even if these criteria are met, not every company will be eligible for benefits. The policy indicates there may be aggravating circumstances where a guilty plea is nevertheless warranted. These include, but are not limited to, misconduct that poses a grave threat to national security, public health or the environment, or is deeply pervasive throughout the company, or involves current executive management of the company. In those circumstances, however, if the company has otherwise met the requirements of the policy, the U.S. Attorney's Office will recommend to the court at least a 50%, and up to a 75%, reduction in fines off the low end of the range in the U.S. Sentencing Guidelines.

In addition to the self-disclosure policy, DOJ has begun a pilot program developed by its Criminal Division to reduce fines for companies that claw back compensation paid to employees and executives found guilty of criminal violations. Even if the company is unable to claw back all compensation, DOJ has indicated it will still discount fines for companies that make a good faith effort to do so.

Takeaways

These two policies show that DOJ is seeking to enlist companies in identifying and prosecuting law-breaking activity by their employees. The self-disclosure policy likely means that prosecutors will look less favorably on a company that *fails to* self-report even if the company later cooperates and remediates the criminal misconduct. That said, companies that learn of potential misconduct face difficult choices. First, reporting activities that are ultimately determined not to be criminal could lead to significant disharmony between front line environmental personnel and management, not to mention the possibility of civil litigation by employees. Second, making a disclosure before all facts are known could trigger disclosure obligations to others, including investors, shareholders, and lenders. Third, the entity that gets to decide if the company has met the criteria is DOJ itself. That means making the disclosure is no guarantee of obtaining benefits.

Accordingly, companies need to have procedures in place to allow them to conduct investigations quickly and thoroughly. Outside counsel should be involved to assist with both the investigation and counseling the company as to if and how to use the self-reporting policy. Taking steps now will increase the likelihood the company will be ready to take advantage of the policy if the need ever arises.

United States Attorneys' Office's Voluntary Self-Disclosure Policy (U.S. DOJ Feb. 22, 2023)

The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks (U.S. DOJ March 3, 2023)

Related People

- Channing J. Martin ? 804.420.6422 ? cmartin@williamsmullen.com

Related Services

- Environment & Natural Resources