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An Unpredictable Journey: What Companies Should Know Before Self-Disclosing to DOJ

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In recent years, the U.S. Department of Justice (DOJ) has been beating the self-disclosure drum with a series of policies designed to encourage and reward corporate self-disclosure of misconduct. Under the policies, the ultimate reward—a declination—is within reach for most companies willing to come forward and "timely" self-disclose misconduct.

Yet, these policies, and recently publicized declinations and resolutions, also make clear that self-disclosure alone does not beget a declination. To the contrary, self-disclosure is only the beginning of a long road for companies hoping to achieve a declination. While "timely" is not defined in most of the policies, recent resolutions suggest that, to earn a declination, companies need to disclose within weeks, or perhaps even hours, of confirming the existence of any misconduct. After making the fraught decision to disclose without full information, a company's ongoing cooperation obligations begin.

Indeed, the DOJ's policies outline substantial cooperation requirements, including an ongoing obligation to disclose non-privileged facts and the voluntary preservation, collection, and disclosure of relevant documents, including documents that are overseas and potentially subject to foreign disclosure prohibitions or other limitations. Likewise, companies can expect their

compliance program to be scrutinized—both at the time of the misconduct and the time of resolution—and there will be an expectation of substantial remediation.

That remediation will now be expected to include compliance with, among other things, the DOJ's new Pilot Program on Compensation Incentives and Clawbacks. Taken collectively, these cooperation requirements impose real burdens on companies considering self-disclosure and, while the DOJ has made its position on self-disclosure clear, companies must consider—in a compressed time frame—numerous and weighty considerations before making the decision to disclose misconduct.

The Weight of Cooperation

The DOJ's Criminal Division has defined "fighting corporate crime" as one of its top priorities (*See* "Criminal Division's Voluntary Self-Disclosure Pilot Program for Individuals", DOJ Office of Public Affairs, Blog Post (April 2024)). And, at the same time, DOJ has emphasized the importance of the private sector essentially policing itself, as it has ratcheted up guidance around compliance programs while simultaneously issuing policies encouraging self-disclosure (*See* "Evaluation of Corporate Compliance Programs", Department of Justice (last visited June 26, 2024); U.S. Department of Justice, Just. Manual, §98-28.300 (2024); U.S. Department of Justice, Just. Manual, §9-47.120 (2023)).

As is clear from its most recent policy in this area—the Criminal Division's Voluntary Self-Disclosure Pilot Program for Individuals—the DOJ is not giving up hope that whistleblowers and other cooperators will come forward. However, in the criminal context, the corporate voluntary disclosure programs remain the cornerstone of the DOJ's self-disclosure efforts.

Beyond that first decision to come forward and advise DOJ of potential misconduct, there are a myriad of other, burdensome hurdles to overcome before a declination is within reach. At the outset, there is the requirement that the company cooperate, and that means cooperate as the DOJ has defined it, including:

- Timely disclosure of all non-privileged facts relevant to the wrongdoing at issue;
- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the DOJ's Criminal Division to obtain relevant evidence not in the company's possession and not otherwise known to the Criminal Division, it must identify those opportunities;
- Timely voluntary preservation, collection, and disclosure of relevant documents and information relating to their provenance, including: (a) disclosure of overseas documents, the locations in which such documents were found, their custodians, and individuals who authored and/or located the documents; (b) facilitation of third-party production of documents; and (c) where requested, provision of translations of relevant documents in foreign languages;
- De-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation to prevent the company's investigation from conflicting or interfering with the Criminal Division's investigation; and

- Making company officers and employees who possess relevant information available for interviews by the Criminal Division. This may include officers, employees, and agents located overseas, as well as former officers and employees, and, where possible, the facilitation of interviews of third parties (*See* Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, at 4).

In other words, company counsel must, for all intents and purposes, become the prosecutor. While that may be the norm in an internal investigation where outside counsel is called upon to determine what happened and then defend the company to the DOJ, the voluntary disclosure policies contemplate something different.

The level of cooperation that the DOJ expects—if a declination is to remain a possibility—involves company counsel essentially collaborating with the DOJ in the DOJ's investigation of the company. Any foot fault in terms of the level of cooperation, could be considered negatively by the DOJ, which has made clear that the "extent and quality of a company's cooperation will be an important part of the Criminal Division's overall analysis of the case and impact of the proposed form of the resolution, as well as the fine range and fine amount."

Moreover, as recent resolutions have made clear, the duty to cooperate does not end when the declination decision has been made. To the contrary, there will be an ongoing obligation to cooperate post-declination decision, which could include making current and former employees available for interviews and/or testimony and the ongoing provision of information, including in connection with DOJ's prosecution of individuals deemed responsible for the misconduct.

Remediation and Scrutiny of a Company's Compliance Program

Before self-disclosing, companies will also need to consider what remediation will entail, as that too will be required, along with how the company's compliance program will fare under scrutiny from the DOJ. While improvements to the compliance program will almost certainly be made following disclosure and as part of the remediation process, the state of the compliance program at the time of the misconduct will be examined.

If the compliance program did not already incorporate many of the attributes the DOJ considers important, that deficiency could be considered an aggravating factor that might counsel against a declination. As a result, companies that have not had the opportunity to invest in a strong compliance program in the first place may need to think long and hard before deciding that self-disclosure is appropriate and/or have a clear plan in place to improve the compliance program dramatically and advocate to DOJ why that should still nonetheless merit a declination.

The DOJ will assess a company's compliance program based on a variety of factors, including the following:

- The company's commitment to instilling corporate values that promote compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
- The resources the company has dedicated to compliance;
- The quality and experience of the personnel involved in compliance and the authority and independence of the compliance function, including the access the compliance function

has to senior leadership and governance bodies and the availability of compliance expertise to the board;
- The effectiveness and the manner in which the company's compliance program has been tailored based on that risk assessment;
- Policies and procedures regarding ephemeral messaging and preserving any such communications;
- The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors; and
- The testing of the compliance program to assure its effectiveness (*see* Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, p. 5).

Another recent addition to the DOJ's protocols includes the Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks, which requires that every corporate resolution include new compensation-related elements, specifically:

(1) a prohibition on bonuses for employees who do not satisfy compliance performance requirements; (2) disciplinary measures for employees who violate applicable law and others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct; and (3) incentives for employees who demonstrate full commitment to compliance processes (*See* Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks, p. 2).

While these elements will necessarily be a part of a resolution, now that the Pilot Program has been in place for more than a year, DOJ expects these "compensation-related criteria" to be considered during the design of any compliance program. Thus, in order to not foreclose a future declination, companies should consider integrating all of these elements into their compliance program now.

Conclusion

There are undoubted benefits to corporate self-disclosure the DOJ, specifically the possibility of a declination and reduced fines (although disgorgement is still required). Because of that, companies should keep their options open by taking proactive steps to uncover and remediate misconduct through an effective compliance program. That said, companies need also be cognizant of the sometimes-burdensome expectations necessary to earn a declination, including significant and ongoing cooperation, remediation, and related scrutiny of the compliance program.

While self-disclosure, and the attendant possibility of a declination and reduced financial penalties, may well be worth it to many companies, there are significant countervailing considerations that must be weighed in a short time horizon and with limited information before embarking down the self-disclosure path.

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