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U.S. Department of Justice Announces Changes to Policies for Prosecuting Corporate Crime

Deputy Attorney General Lisa Monaco and Assistant Attorney General Kenneth Polite Discuss Guidance Regarding Department Policies Concerning Corporate Self-Disclosure, Compliance-Related Compensation Incentives, Employees' Electronic Communications, and Corporate Monitors

SUMMARY

On March 2 and 3, 2023, Deputy Attorney General Lisa Monaco and Assistant Attorney General Kenneth Polite gave speeches announcing new and amended Department of Justice policies and guidance for prosecuting corporate crime. Both sets of remarks—which built on earlier speeches in October 2021 and September 2022—expanded and clarified the Department's positions with respect to four key areas of criminal corporate enforcement: (1) voluntary self-disclosure; (2) compliance-related compensation incentives; (3) employees' use of messaging platforms and personal devices; and (4) corporate monitorships. These remarks offer guidance for companies seeking to meet the Department's revised and expanded expectations pursuant to the Justice Manual, the memorandum on the Evaluation of Corporate Compliance Programs (or "ECCP"), the memorandum on the Selection of Monitors in Criminal Division Matters, and the newly-issued memorandum on the Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks.

A. VOLUNTARY SELF-DISCLOSURE

Deputy AG Monaco announced that every component of the Department that prosecutes corporate crime now has in place "an operative, predictable, and transparent self-disclosure program." Monaco stated that while each component has tailored its policies according to its specific mission, the common principle will

be that "absent aggravating factors, no department component will seek a guilty plea where a company has voluntarily self-disclosed, cooperated and remediated the misconduct." The corresponding revisions to the Justice Manual delegate to each Department component the discretion to define those aggravating factors.[1] Deputy AG Monaco and Assistant AG Polite noted that with respect to the Criminal Division, companies that voluntarily self-disclose misconduct, fully cooperate with prosecutors, and timely and appropriately engage in remediation will benefit significantly, including by having a presumption in favor of a declination and possible reduced financial penalties. The components' policies vary on this point, however—for instance, both the recent US Attorney's Offices' and Tax Division policies provide a presumption against a guilty plea rather than in favor of a declination. The recent amendments to the Justice Manual clarify that self-disclosure is only "voluntary" when it is not made pursuant to a pre-existing obligation to disclose, such as a regulation, contract, or prior Department resolution. The revisions further make clear that a company's voluntary self-disclosure and cooperation "are to be treated as two separate and independent factors in connection with charging and resolution decisions."[2]

B. COMPENSATION AND CLAWBACK PROGRAMS

The Department's announcements also reflect increased focus on corporate compensation and clawback programs as a mechanism to incentivize compliance. Deputy AG Monaco stated that the best way companies can make sure that "executives and employees are personally invested in promoting compliance" is "through direct and tangible financial incentives." Accordingly, the revised ECCP memorandum directs prosecutors—when evaluating the effectiveness of a corporate compliance program as a component of their charging decisions—to, for example, "consider whether a company has publicized disciplinary actions internally" as well as to "examine whether a company has made working on compliance a means of career advancement, offered opportunities for managers and employees to serve as a compliance 'champion', or made compliance a significant metric for management bonuses."[3] Prosecutors are also directed to consider whether a corporation has implemented additional incentives, including, for example, recoupment of compensation in the event of employee misconduct.

To that end, Deputy AG Monaco also announced the Department's launch of its Pilot Program on Compensation Incentives and Clawbacks. The program, as detailed in a March 3, 2023 memorandum, has two parts:

First, every corporate resolution involving the Criminal Division will impose a requirement that companies "develop compliance-promoting criteria" as part of their compensation and bonus systems, and report to the Division annually about their implementation during the term of the resolution. The memorandum sets forth a non-exhaustive list of such criteria.

Second, the Department will afford companies who seek to claw back compensation from individual corporate wrongdoers a fine reduction in the amount of 100% of any compensation that is successfully recouped during the period of the resolution. With respect to companies whose good faith efforts at

recouping compensation are unsuccessful by the end of the resolution period, the Pilot Program will give prosecutors discretion to provide a reduction of up to 25% of the amount of compensation that a company has attempted to claw back. Deputy AG Monaco stated that the "simple" goal of the Pilot program is "to shift the burden of corporate wrongdoing away from shareholders, who frequently play no role in the misconduct, onto those directly responsible." The Program will remain in effect for three years, after which the Department will determine whether it will be extended and/or modified.

C. USE OF COMMUNICATION PLATFORMS AND PERSONAL DEVICES

Assistant AG Polite also announced further detail regarding the Criminal Division's Evaluation of Corporate Compliance Programs in connection with employees' use of various communications and messaging platforms, including those running on personal devices. The revised guidelines direct prosecutors to consider, among other things:

- the extent to which company policies and procedures governing messaging applications are tailored to the company's risk profile and specific business needs;
- how the policies and procedures are communicated to company employees (including whether they are regularly and consistently enforced);
- whether a company has mechanisms to manage and preserve information required to be preserved in all available electronic communication channels;
- the company's policies governing preservation of and access to data and communications stored on personal devices;
- whether policies permit the company to review business communications on personal devices and/or messaging applications, including what exceptions or limitations apply;
- whether a company has imposed consequences for employees who fail to abide by these policies; and
- whether the use of personal devices or messaging applications, including ephemeral messaging applications, has impaired the company's compliance program or its ability to conduct internal investigations and respond to regulatory requests.[4]

In announcing these provisions, Assistant AG Polite stressed that if a company has not produced content from messaging applications during the course of an investigation, prosecutors will inquire about the company's ability to do so. Indeed, in the updated Principles of Federal Prosecution of Business Organizations, prosecutors are directed to factor the extent to which a company enforced effective document and data retention policies to preserve, collect, and disclose documents, data, and communications, including those on third-party messaging applications, regardless of whether such data is kept on corporate or personal devices, in assessing the company's cooperation during a criminal investigation.[5]

D. INDEPENDENT COMPLIANCE MONITORS

The Department also expanded policy guidance on the use of independent compliance monitors. Notable revisions include:

First, the revised Justice Manual clarifies and reiterates that prosecutors should carefully assess the need for the imposition of a monitor on a case-by-case basis, without applying any presumption for or against such imposition. Prosecutors are expressly directed to consider 10 non-exhaustive factors—including, for example, whether the corporation voluntarily self-disclosed its conduct and whether the corporation has implemented an effective compliance program sufficient to detect and prevent similar misconduct in the future. New language in the Justice Manual also clarifies that "[m]onitorships should not be imposed for punitive purposes," but rather, "should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."

Second, the Department's revisions to the Justice Manual and the above-referenced memorandum emphasize that monitor selections should be made in keeping with the Department's commitment to diversity, equity, and inclusion and "without unlawful discrimination against any person or class of persons."

Third, the revised memorandum extends the cooling-off period for monitors (*i.e.*, the period during which the corporation may not employ or otherwise be affiliated with a monitor) from two years to three years from the date of the termination of the monitorship.

IMPLICATIONS

These announcements and the accompanying DOJ policy revisions reflect several points of emphasis:

First, companies can expect the Department to focus increasingly on whether a company voluntarily self-reported in a timely fashion. Prosecutors will consider this factor separately from a company's cooperation, which also remains a key focus in prosecutors' charging and resolution decisions. It remains to be seen how strictly the Department will interpret the requirement that for a self-report to be "voluntary," the company must not be under any legal obligation to disclose—for example in the case of financial institutions with SAR-filing obligations.

Second, companies will be well-advised to consider how they can proactively further compliance goals through financial incentives such as compliance-based bonuses and compensation clawbacks. These incentives—or the lack thereof—will play an important part in prosecutors' evaluation of a company's compliance program.

Third, companies should develop robust and specific policies and controls concerning the use of personal devices and third-party platforms, including those with ephemeral messaging capabilities. Prosecutors will look more favorably on companies whose controls err on the side of preserving business-related content and making it accessible during an investigation. Companies operating outside of the United States will of course also need to consider foreign data protection and privacy laws, which may limit their ability to collect and produce data on personal devices. In such cases, cooperating companies will bear the burden of

establishing the existence of any restrictions and identify reasonable alternatives to provide the requested facts and evidence.

Fourth, in the event of a corporate criminal resolution, the question of whether a monitorship should be imposed will depend largely on case-specific factors, and a company's self-disclosure (or lack thereof) is now an express factor. The best ways for companies to minimize the likelihood of a monitorship as part of a corporate criminal resolution are to timely self-disclose, fully cooperate, implement and test an effective compliance program, and remediate deficiencies.

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ENDNOTES

1 JM 9-28.900.

2 JM 9-28.900.

3 ECCP at 13.

4 ECCP at 19.

5 JM 9-28.700.

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