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ALERTS

Five Ways To Improve Your Compliance Program In Wake Of DOJ Announcement

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Highlights

Self-policing remains the centerpiece of DOJ corporate enforcement policies

Disclosures must be fulsome and immediate

The DOJ continues to scrutinize individual misconduct

The U.S. Department of Justice's (DOJ) corporate enforcement efforts have long centered on self-policing. Corporate compliance is at the core of this process, with companies expected to take steps to prevent criminal conduct from occurring in the first place, along with identifying and remediating potential violations that do occur. Companies are rewarded for self-reporting to the government criminal conduct that is discovered.

On Sept. 15, 2022, U.S. Deputy Attorney General Lisa Monaco publicly announced updates to existing DOJ policies that double-down on this approach to corporate criminal enforcement. Corporations now are being encouraged, for example, to disclose violations immediately upon discovery, with Monaco noting "[i]f a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors."

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In addition to identifying and reporting individuals' criminal conduct, corporations are now being asked to consider broader and harsher penalties for those individuals, such as compensation clawbacks. In one of her most striking updates, Monaco stated, "the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct," absent aggravating circumstances.

While the DOJ continues to encourage disclosure and cooperation through evolving incentives, never has it been so categorical in promising that guilty pleas could be avoided. Similarly, Monaco stated that the DOJ will not require a monitor if a company has implemented and tested an effective compliance program – potentially saving a company millions of dollars in additional expenditures.

A key takeaway from these updated policies is for companies to continue enhancing their corporate compliance programs: more is now expected and the rewards are greater. Here are five concrete steps companies can take:

1. **Tie compensation to compliance.** Monaco indicated that compensation and values must be aligned. To this end, she highlighted that "[o]n the deterrence side, those companies [that are so aligned] employ clawback provisions, the escrowing of compensation, and other ways to hold financially accountable individuals who contribute to criminal misconduct." For companies that operate globally, this may present complications. Certain countries have laws and regulations that may restrict such arrangements. And, even in the U.S., compensation changes must be handled carefully.

   Companies now are on notice that compliance program effectiveness and disclosing violations have taken on an even greater level of importance and can be the difference between a corporate guilty plea and no guilty plea. Companies may wish to start grappling now with these changes, which are likely to take time.

2. **Improve open reporting.** With regard to disclosure, Monaco stated that "[o]ur goal is simple: to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward." Misconduct can be discovered in a number of ways, and one of the most important is through a company's open reporting system. Such systems must be promoted and have multiple channels (compliance, management, hotlines, etc.) to ensure efficacy and reliability. At least one channel must be anonymous.

   Most importantly, the system has to work and employees need to know that it does. This means sharing anonymized outcomes with employees. Serious investment in a functional, reliable open reporting system is crucial in order to take advantage of the benefits of voluntary self-disclosure

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and cooperation.

3. **Tidy up recordkeeping.** Monaco indicated that companies are "on the clock" now in investigating and disclosing misconduct. Specifically, "[g]oing forward, undue or intentional delay in producing information or documents – particularly those that show individual culpability – will result in the reduction or denial of cooperation credit."

   Once misconduct comes to light, a corporation needs to act with speed to preserve and collect relevant documents. The company whose email system, HR records, or document management system is in disarray will be at a disadvantage. Now is the time to get organized.

4. **Conduct a robust risk assessment and response.** According to Monaco, the DOJ will seek to contextualize misconduct in evaluating its severity and imposing remedies. This includes, for example, understanding whether the company previously was sanctioned for the same conduct. Similarly, "if a corporation operates in a highly regulated industry, its history should be compared to others similarly situated, to determine if the company is an outlier." Most companies today conduct risk assessments in allocating compliance resources.

   Monaco's remarks make clear that any risk assessment should factor in past misconduct and industry-specific concerns. Companies would be well served to stay vigilant on both fronts..

5. **Revisit and ensure adequate due diligence in acquisitions.** Monaco further indicated the DOJ will not penalize a company that makes an acquisition and uncovers prior bad behavior, provided the company has taken appropriate due diligence steps concerning the acquisition and ensured imposition of a compliance program at the acquired entity after the merger. She said "…"[s]eparately, we do not want to discourage acquisitions that result in reformed and improved compliance structures. We will not treat as recidivists companies with a proven track record of compliance that acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition."

   Consequently, an effective compliance program should include merger and acquisition policies that address pre-acquisition due diligence and post-acquisition integration of compliance policies and processes.

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