



A Robinson+Cole Legal Update

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DOJ Announces Significant Corporate Compliance Initiatives

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The U.S. Department of Justice (DOJ) recently announced several new policies and programs aimed at incentivizing corporate compliance. These programs underscore the need for companies to investigate, mitigate and resolve corporate wrongdoing before it comes to the government's attention. The DOJ has been retooling to confront emerging national security threats, promote voluntary self-disclosure, and encourage executive compensation structures that foster responsible corporate behavior.

Companies May Reduce or Avoid Criminal Liability Through Voluntary Self-Disclosure

Every DOJ component that prosecutes corporate crime now has in place a voluntary self-disclosure program that has been standardized across all 94 U.S. Attorney's Offices. Through this program, the DOJ will not seek a criminal guilty plea, and has discretion to seek lower criminal penalties or decline any imposition of criminal penalties where a company self-discloses wrongdoing, cooperates with the government and remediates the conduct. Handling voluntary self-disclosures more uniformly should assist corporations better assess the risks and rewards of disclosing wrongdoing to the government.

To qualify for the DOJ's self-disclosure programs, the disclosure must be voluntary, reasonably prompt after the company learns of misconduct (and before an imminent threat of disclosure, or actual disclosure, to the government) and include all relevant facts about the misconduct known to the company. Companies may make disclosures based on limited inquiries but must update the disclosure as new facts are discovered.

The DOJ will Reward Compliance-Based Executive Compensation Programs and Attempts to Claw Back Compensation from Individual Wrongdoers

The DOJ also announced a policy, incorporated into its Evaluation of Corporate Compliance Programs (ECCP), to reward companies that have compliance-promoting compensation programs. The ECCP advises prosecutors to "assess whether the company has clear consequence management procedures (procedures to identify, investigate, discipline and remediate violations of law, regulation, or policy) in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations." It continues that prosecutors "should also assess the extent to which the company's communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct."

Every criminal corporate resolution will now include a requirement that the company develop compliance-promoting criteria within its compensation and bonus system. For example, in one such program, executives that failed to satisfy compliance metrics failed to receive bonuses.

This policy will be implemented through a three-year pilot program that will reduce fines for corporate wrongdoing for companies that seek to claw back compensation from individual responsible employees. The DOJ will permit companies to retain any money that they are able to claw back, and the applicable fine will be reduced by 25 percent of the compensation companies seek to recover. Even companies that seek to claw back compensation in good faith, but are unable to do so, will be eligible for fine reductions.

The stated goal of these two programs is to "shift the burden away from uninvolved shareholders and onto those more directly responsible."

The DOJ Will Focus on Preservation and Access to Third-Party Communication Platforms, Including on

Personal Devices

The DOJ's revisions to the ECCP also include new guidance concerning the use of personal communications devices and platforms, including those that offer "ephemeral"—or automatically deleted—messaging. Under the revised ECCP, the DOJ will consider how policies governing ephemeral messaging applications should be tailored to a company's risk profile and specific business needs to ensure that business-related electronic communications are preserved and accessible. As such, the DOJ will ask in investigations how these messaging applications are used by a business, how such messages are preserved, and how the company preserves business-related information on employee-owned devices. During an investigation, if a company has not produced communications from third-party messaging applications, prosecutors will ask questions about the company's ability to access such communications.

The DOJ is Expanding its Focus on Sanction Evasion and Export Control Violations

In recent years, the DOJ has added substantial assets to combat cryptocurrency-related crime. Last week, it announced a surge of resources to address national security challenges. It will add prosecutors to investigate and prosecute sanctions evasion, export control violations and similar economic crimes. It will also issue joint advisories with the Commerce and Treasury Departments to inform the private sector of trends concerning national security-related compliance.

Key Takeaways

- The DOJ continues to focus on corporate efforts to enhance individual accountability for compliance violations. Companies would be well-advised to evaluate and revise executive compensation programs to promote individual accountability and enable claw backs for individuals responsible for wrongdoing.
- Companies should also examine their policies concerning third-party messaging applications, both on company-owned and personal devices—to ensure preservation of business-related communications and the ability to access them.
- The importance of conducting prompt and effective internal investigations into suspected corporate wrongdoing cannot be overstated. Doing so will enable companies to evaluate the potential benefits of voluntary self-disclosure and mitigate potential damages before the government becomes involved.
- Finally, with additional resources being added to DOJ units focused on national security, companies should expect increased enforcement activity related to money-laundering, sanctions, export control, and related economic crimes, and should review their policies and procedures in those areas.

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