

## **A Critical Look at DOJ's Voluntary Self-Disclosure Policies: Is Self-Disclosure Worth It?**

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Device Ethics and Compliance Congress*

# Individual Voluntary Self-Disclosure Policies

Pursuant to a memorandum from Deputy Attorney General Lisa O. Monaco, individual Department of Justice components have now established their own voluntary self-disclosure policies that are distinct:

- 1) **Antitrust Division:** Leniency Policy and Procedures
- 2) **Criminal Division:** Corporate Enforcement and Voluntary Self-Disclosure Policy
- 3) **Consumer Protection Branch:** Voluntary Self-Disclosure Policy for Business Organizations
- 4) **National Security Division:** Enforcement Policy for Business Organizations
- 5) **Tax Division:** Corporate Voluntary Self-Disclosure Policy
- 6) **Environment and Natural Resource Division:** Voluntary Self-Disclosure Policy
- 7) **U.S. Attorney's Office:** Self-Disclosure Policy

DOJ has created a Compliance Certification Policy and updated its Evaluation of Corporate Compliance Guidelines to work in conjunction with these policies.

## **Prioritize Speed**



Prosecutors are asked to consider whether the criminal conduct at issue came to light as a result of the corporation's timely voluntary self-disclosure, and to credit such disclosure appropriately.

## **Individual Culpability**



Prosecutors are expected to focus on the culpable individuals from the outset of the investigation.

## **Robust Compliance Program**



Prosecutors are asked to assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (1) the time of the offense, and (2) the time of a charging decision.

## **Compensation Incentives to Build in Cooperation and Punishment**



Prosecutors are asked to consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior.

- This consideration was incorporated into the Criminal Division's Evaluation of Corporate Compliance Guidelines.

## **Deter Repeat Conduct**



Prosecutors are asked to consider the corporation's record of past misconduct, including prior criminal, civil, and regulatory resolutions, both domestically and internationally.

## **Do More of the Work for DOJ**



Prosecutors are asked to consider whether a corporation has instituted policies to ensure that it will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation.

## **Preserve Communications on Personal Devices and Third-Party Messaging Applications**



Prosecutors are asked to consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms, to ensure that business-related electronic data and communications are preserved.

- This consideration was incorporated into the Criminal Division's Evaluation of Corporate Compliance Guidelines.

## ❑ Prioritize Speed

- **Best Practice:** Companies should work to disclose sufficiently early in the investigation to provide maximum assistance to the prosecution.
- **BUT...**

## ❑ Focus on Individual Culpability

- **Best Practice:** Companies should focus their document review and early investigation on assessing individual culpability.
- **BUT...**

## ❑ **Maintain a Robust Compliance Program**

- **Best Practice:** Companies should work to improve and tighten their compliance programs before and during an investigation, rather than waiting until after the investigation.
- **BUT...**

## ❑ **Preserve Communications on Personal Devices and Third-Party Messaging Applications**

- **Best Practice:** Companies should evaluate existing policies or implement new policies regarding the use of personal devices and third-party applications, particularly ephemeral messaging applications, for business communications.
- **BUT...**

# Is Self-Disclosure Worth it?

## Benefit

1. Even if all the components for full cooperation are not met, companies may still receive a considerable benefit (although markedly less) for their voluntary self-disclosure.
  - *Albemarle Corp.:* Received a 45 percent discount from the bottom of the U.S. Sentencing Guidelines fine range even though DOJ found that it did not timely disclose.
2. Non-prosecutorial agreements can resolve other potential liability.
  - *Albemarle Corp.:* Resolved an SEC investigation into the Company for the same misconduct.

## Cost

1. Companies that voluntarily self-disclose will likely still pay a large penalty.
  - *Albemarle Corp.:* Voluntarily self-disclosed but was still required to pay \$98.2 million criminal penalty and forfeited \$98.5 million in profits.
  - *Normura Securities Int'l:* Paid a monetary penalty of \$35 million and \$800,000 in restitution to victims after self-disclosure.
  - *Oliver Street Dermatology Mgmt.:* Fined \$8.8 million, which included \$5.9 million in restitution, after self-disclosing.
2. Companies will have to expend considerable time and effort to comply with self-disclosure requirements and the benefits of disclosure are not guaranteed.
3. Companies may have to share "all relevant facts" with government before completing a full internal investigation to meet the "timely" requirement.
  - New M&A safe harbor policy places an enhanced premium on timely disclosure.
4. Potential privilege waivers, depending on jurisdiction

# Thank you

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