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DOJ PROVIDES EMPLOYERS WITH PLAYBOOK FOR AVOIDING CRIMINAL PROSECUTION THROUGH SELF-DISCLOSURE: 4 BIGGEST TAKEAWAYS

Insights
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DOJ Provides Employers With Playbook for Avoiding Criminal Prosecution Through Self-Disclosure: 4 Biggest Takeaways

If your company discovers that it may have committed criminal misconduct, you may be able to avoid prosecution entirely – but only if you act quickly and follow a newly streamlined federal roadmap. The US Department of Justice announced its first-ever agency-wide Corporate Enforcement and Voluntary Self-Disclosure Policy last week, allowing employers to reduce or even completely eliminate criminal penalties by self-disclosing the wrongdoing and taking other administrative steps. What are the four key takeaways you need to know about this March 10 announcement?

What are the DOJ's Goals in Rolling Out the New CEP?

The CEP, which you can read here, is in line with the May 2025 update to the DOJ's Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy. DOJ described the CEP rollout as intended to promote "uniformity, predictability, and fairness in how it pursues white-collar cases." This new policy is intended to supersede previously in-place DOJ component or district-specific corporate enforcement programs.

What Does This Mean for Employers?

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The CEP is applicable to potential criminal penalties an employer may face for violating various laws such as safety and health regulations, environmental compliance, immigration and anti-bribery provisions. Antitrust matters are excepted from the policy. If found guilty of these criminal laws, an employer could face hundreds of millions of dollars in penalties, restitution and ongoing external compliance monitoring.

But if employers discover misconduct, the new policy means that all hope is not lost. Employers can reduce or even completely eliminate these penalties by self-disclosing and entering into some type of CEP agreement. The agency-wide CEP approach enhances predictability and streamlines corporate decision-making regarding voluntary self-disclosures.

Overview of the New, Comprehensive CEP

Like the former Criminal Division Policy, the CEP includes three paths under which a company may benefit from self-disclosure:

- Declination Under the CEP;
- "Near Miss" Voluntary Self-Disclosures or Aggravating Factors Warranting Resolutions"; and
- Resolutions in Other Cases.

However, the hallmark tenants of the new CEP include revisions to the requirements and benefits under the policy.

Path #1: What Makes a Declination?

Mirroring the Criminal Division Policy, if a company voluntarily self-discloses misconduct, DOJ will decline to prosecute so long as the company:

- timely and voluntarily discloses the misconduct to an appropriate DOJ component or agency;
- fully cooperated with DOJ's investigation; and
- timely and appropriately remediated the misconduct where no aggravating circumstances exist.

Importantly, declinations approved under the CEP will be **publicly announced.** Employers must also meet a number of

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requirements to qualify for declination of prosecution under the CEP.

- ***Voluntariness of the self-disclosure.*** To be considered voluntary, the company must report to the appropriate Department with the DOJ prior to an imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the misconduct.

- ***Factual disclosures of misconduct.*** Next, full cooperation requires disclosure of *all facts and non-privileged information* relevant to the misconduct including identification of all individuals (both internal and external to the company) involved in or responsible for the misconduct.

- ***Timeliness of the self-disclosure.*** Finally, timely and appropriate remediation requires effective root cause analysis of the wrongdoing and prompt remediation of the root causes which allowed the conduct to occur.

Previously, self-disclosure needed to be made within 120 days of the whistleblower's report. Now, corporations must self-report "as soon as reasonably practicable *but no later than 120 days* after receiving the whistleblower's internal report." This makes timely disclosure paramount.

Companies should also implement an effective compliance program if one did not previously exist.

Path #2: "Near Miss" Voluntary Self-Disclosures of Aggravating Factors Warranting Resolution

The "Near Miss" path applies to companies that do not qualify for routine declination under Part I solely because:

- it acted in good faith by self-reporting the misconduct but that self-report did not qualify as a voluntary disclosure; and/or

- it had aggravating factors that warrant a criminal resolution.

Under the "Near Miss" path, companies *will* receive a non-prosecution agreement with a term of fewer than three years, no independent compliance monitor, and a 50 to 75% reduction off the low end in the fine range due under the U.S. Sentencing Guidelines. The Criminal Division Policy provided for a 75% reduction. This change highlights prosecutorial discretion and the necessity of having a strong advocate when self-disclosing to DOJ.

Path #3: Resolutions in Other Cases

This section remains mostly the same under the new CEP. If a company is ineligible for the preceding paths, DOJ retains discretion to determine appropriate resolution. This can include reductions in fines and penalties, with only a maximum 50% reduction in the monetary penalty available for companies who are ineligible for Parts 1 or 2.

What the CEP Means for Corporate Self-Disclosure Moving Forward

The CEP's main benefit to corporations is the uniformity it imposes on the self-disclosure process. Under the CEP, there are no division-specific or jurisdiction-specific requirements to be eligible for declination of prosecution or other benefits associated with self-disclosure. Companies of all sizes will benefit from well-established compliance systems and related internal reporting programs which will support early detection and correction of potential wrongdoing.

Importantly, the CEP applies only to *criminal* investigations, not civil investigations. Companies should ensure they consider the impact of self-disclosure under the CEP on parallel or subsequent civil investigations or enforcement actions.

Superseded Policies

As previously noted, the new DOJ-wide CEP not only replaces the Criminal Division Policy, but also preempts corporate enforcement policies from other United States Attorneys' Offices. This results in uniformity for corporations and their representation regardless of the jurisdiction or misconduct at issue.

Specific DOJ components and USAOs have the discretion to develop practices that comport with and do not run afoul of the new CEP. However, the release of the new CEP led to component- or district-specific formal policies being preempted as of March 10.

That said, there are still some unanswered questions. One hot-button issue is how the new CEP affects the Southern

District of New York's USAO's Corporate Enforcement and Voluntary Self-Disclosure Program for Financial Crimes, issued on February 24 of this year.

4 Key Takeaways for Employers

- **Now is the time for the companies to review and evaluate their compliance policies to ensure they are educating all employees on the company's compliance expectations and internal reporting systems when noncompliance is suspected.** Speed is key. Although the decision to self-disclose is fact-specific and difficult, the CEP incentivizes swift disclosures and punishes delays.
- **Take this opportunity to educate senior management on the self-disclosure requirements and the benefits for self-reporting potential criminal wrongdoing.** These changes reflect the need for effective internal controls and robust compliance programs. This will support efficient decision making should the organization need to make a rapid decision regarding potential self-reporting.
- **Internal investigations must be thorough and well documented**. The relevant facts and individuals involved may need to be disclosed, if the company wishes to obtain credit for self-disclosing to the DOJ.
- **There is now uniformity, given the new Department-wide CEP applies to all criminal matters (with the exception of antitrust).** Companies considering self-disclosure will need to assess where to self-report based on a DOJ component, USAO's jurisdiction or professional relationships established.

Conclusion

For more information and assistance in reviewing your workplace compliance systems and related investigation processes or taking the actions described above, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Corporate Compliance and Governance Practice Group. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.