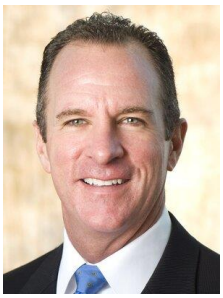
How DOJ Self-Disclosure Policy Affects Internal Investigations

By **Robin Mark and Jim Hoover** (April 13, 2023)

Robin Mark



Jim Hoover

Alert companies can preempt the ravages of whistleblower fallout by taking swift and decisive actions.

On Feb. 22, the U.S. Department of Justice announced updated guidance on the voluntary self-disclosure policy, which took effect immediately in every U.S. attorney's office across the country and offers valuable incentives to companies satisfying the standards for voluntary self-disclosure of misconduct.

The benchmark standards for voluntary disclosure have been defined by the DOJ as timely and substantive, and the benefits of self-disclosure range from the possibility of a nonprosecution or deferred prosecution agreement to lesser criminal or monetary penalties. As a result, companies can avert disaster by immediately reviewing their internal complaint investigation protocols and revising policies to trigger voluntary self-disclosure.

The DOJ has highlighted that timing is a key component of a beneficial self-disclosure.

For example, a voluntary disclosure will be considered timely when it is made promptly after a company becomes aware of the misconduct. It must be before any public disclosure or otherwise becomes known to the government, and a company bears the burden to demonstrate such timeliness.

The voluntary self-disclosure policy does indicate that self-disclosure will still receive favorable treatment if the government was previously aware of the misconduct, but the DOJ is increasingly focused on the disclosure's punctuality once the company discovers the misconduct. Thus, the policy reiterates the need to conduct a swift and complete internal investigation into whistleblower complaints.

In the event a company determines that voluntary disclosure may be warranted, the timing of self-disclosure becomes even more important to secure any potential benefits available under the policy. As a result, companies should consider the policy's impact on their handling of internal investigations of complaints — which could be whistleblower complaints — and the company's response to them.

Readiness to launch an internal investigation protects the company by identifying possible violations and illuminating the pros and cons of voluntary self-disclosure. Thus, time is of the essence to conduct an internal investigation to determine the merit of a potential whistleblower complaint.

Particularly disturbing is the potential that a company may not receive all of the benefits of voluntary self-disclosure if a whistleblower has already informed the DOJ about the alleged misconduct, and even more challenging is the fact that the company likely will not know whether the whistleblower has notified the government.

In recent years, the enormous financial incentives associated with filing a qui tam action

raise the likelihood that a whistleblower will make a report to a regulatory agency or file a qui tam complaint under seal.

So, what happens if a whistleblower has already reported a complaint to the government?

Even if all of the standards of the policy are not satisfied, the government has indicated favoring disclosure rather than nondisclosure. The DOJ made clear that it both favors and rewards companies that own up to misconduct rather than attempting to cover up or downplay it.

Under these circumstances, the government is likely to evaluate the timeliness of disclosure in light of how quickly a company investigates and responds to an internal complaint — all the more reason to take internal complaints or allegations of misconduct seriously and to act swiftly to put the company in the best position to evaluate all available options, including whether to take advantage of voluntary self-disclosure policy benefits.

In addition to evaluating the disclosure's timeliness, the government will likely consider whether the company has implemented an effective compliance program.

Federal investigators evaluating misconduct will target the integrity of a company's compliance program to uncover what, if anything, contributed to the misconduct, how the company could have prevented the misconduct through internal policies and procedures, and what proactive steps have been taken to quickly remediate the situation.

Based on a favorable evaluation, the DOJ can forgo imposing an independent compliance monitor — a usually expensive and time-consuming penalty requiring the company to regularly submit audits, reports and communications for the monitor's approval.

The updated guidance regarding the DOJ's voluntary self-disclosure policy creates a great opportunity for companies to educate compliance officers, C-suite members and directors on the updated policy's obligations and benefits.

Part of this process should also include companies reexamining their internal investigation procedures, with a particular focus on the urgency of investigation, evaluation of claims and immediate steps to remediate misconduct. Companies must have a baseline understanding that self-disclosing to the DOJ may actually save an imperiled company.

The bottom line is if the government learns of misconduct first and the company has failed to take any steps to investigate and remediate the situation, the government will likely have the upper hand.

Robin B. Mark is a partner at Burr & Forman LLP and previously served as an assistant U.S. attorney and deputy chief of the criminal division for the U.S. Attorney's Office for the Northern District of Alabama.

Jim Hoover is a partner at the firm.