Professional Perspective

DOJ Expectations for Corporate Environmental Compliance Programs

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In March 2023, the Environmental Crimes Section (ECS) of the US Department of Justice (DOJ) Environment and Natural Resources Division (ENRD) issued revisions to its Voluntary Self-Disclosure (VSD) Policy. The VSD Policy follows guiding principles issued by the Department, particularly the September 2022 memorandum by Deputy Attorney General Lisa Monaco (Monaco Memo) and more recently the DOJ's Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP).

As ECS continues to stress the importance of robust environmental compliance programs and a sustained culture of compliance, it is important for companies, executives, boards, and investors to understand DOJ's expectations and, in turn, how meeting these expectations can protect the company's continued success. In a recent podcast, Todd S. Kim, the Assistant Attorney General (AAG) for ENRD, emphasized the Department's expectations for companies to develop and maintain a culture of ethical environmental compliance.

As the Biden administration and capital markets ramp up pressure on climate change, environmental, social, and corporate governance, and environmental compliance, DOJ's ECS recently released policy informs how companies build, maintain, and communicate strong environmental compliance programs.

Implementation of Robust Compliance Programs

Current ECS Policy

In its first revisions since 1991, ECS's updated VSD Policy underscores the significance of voluntary self-disclosure as indicative of a company's commitment to a culture of compliance, including the need for implementation of robust environmental compliance programs. Through this policy, ECS focuses its efforts on encouraging self-audits and the voluntary disclosure of potential environmental violations. ECS's policy also emphasizes the Department's goal of transparent self-policing.

VSD Cooperation Credit Criteria

Though not an absolute shield against prosecution, to incentivize such self-policing, ECS will beneficially credit companies self-disclosing environmental noncompliance in accordance with the VSD Policy as provided below.

To receive self-disclosure credit from the Department, several VSD criteria must be met by companies. The self disclosure must be:

- Voluntary, based on conduct previously unknown to the government, and not otherwise required to be reported.
- Timely, meaning not made immediately prior to the government's independent discovery of the information.
- Made to DOJ—ECS or the relevant US Attorney's Office—directly, rather than to any other governmental entity.
- Complete, including all relevant facts concerning the misconduct and individuals involved, to the extent known to the company when the disclosure is made to the DOJ.

Additionally, the policy provides preferential treatment for disclosures that are based on discoveries that occurred in the context of a "meaningful ethics and compliance program," although it does not preclude self-disclosures that arise in other ways.

Finally, in the case of acquisitions, acquiring companies are expected to fully cooperate and disclose any potential misconduct discovered during the acquisition transaction.

If the self-disclosure criteria are met, and the entity also fully cooperates with the government and takes timely remedial action, ECS will not "seek a guilty plea" in the matter. The policy does not promise that no criminal investigation will occur, however.

Aggravating & Disqualifying Factors

The VSD Policy also discusses aggravating and disqualifying factors that may nonetheless warrant prosecution, notwithstanding a voluntary disclosure. These factors include but are expressly not limited to:

- Whether the misconduct posed a threat of serious impact to public health or the environment.
- Whether the misconduct involved knowing endangerment of, serious injury to, or death to an individual.
- Whether the misconduct was deeply pervasive throughout the company.
- Whether the misconduct involved the attempt to conceal it or obstruct justice on the part of senior management.
- Whether there was lack of full corporation from the investigated company.
- Whether the misconduct was followed by a lack of appropriate remediation measures by the same company.

While the DOJ offers a list of non-exhaustive misconduct that would be deemed an aggravating factor, the presence of any such factors would not necessarily mean that a guilty plea will be ultimately sought by the Department. Cases are assessed individually—hence, having in place internal methods for detecting and addressing environmental violations unquestionably places corporations in an advantageous position when negotiating a resolution with the ECS.

The VSD Policy also clarifies that any non-prosecution decision only applies to known, disclosed conduct and not any other potential criminal conduct or any civil or administrative matter.

Proactive Self-Policing & Full Cooperation

Following DOJ's agency-wide stance on VSD—see, e.g., Monaco Memo and CEP above—prosecutors are instructed by the to inquire into three specific "fundamental questions":

- Whether the corporation's compliance program is well designed.
- Whether the program is adequately resourced and empowered to function effectively.
- Whether the corporation's compliance program actually works in practice.

The Department's evaluation of the effectiveness of the compliance program evaluates these factors both at the time of the close of DOJ's investigation and at the time of the underlying misconduct.

Considering the above fundamental questions, the Evaluation of Corporate Compliance Programs underlines the following factors as "hallmarks" of an effective compliance program:

- Appropriately tailored training and communications.
- The existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct.
- The establishment of incentives for compliance and disincentives for non-compliance.
- The capacity to improve and evolve.
- The existence of a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents.
- The extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

ECS recommends that internal audit systems be designed to establish accountability all the way up the corporate structure, beginning with top leaders, i.e., senior, and middle management, who, through their words and actions, are expected to proactively encourage company-wide compliance while rigorously enforcing audit programs—often referenced as the "tone at the top."

The Department gives great significance and expects that internal audit systems will play a vital role in achieving a sustained culture of compliance. The implementation of effective programs—adequately tailored to each company's line of business—would then unquestionably place corporations in a better position to avoid enforcement as well as to remediate potential problems that arise amid an investigation.

Reinforcing the Department's stance on VSD and compliance programs, DOJ encourages companies to keep track of their audit efforts, including the steps taken to discipline non-compliant employees and third-party agents. In other words, by showing a pattern of compliance and remediation, companies are strongly equipped to argue that a particular investigation is unjustified.

Practical Considerations for Compliant Audit Programs

While the ultimate decision to self-disclose and cooperate with DOJ requires complex, fact-specific considerations and discussions within each company, maintaining rigorous environmental internal audit programs places companies in a better position when confronting a DOJ enforcement action. Establishing effective environmental audit programs significantly reduces compliance gaps and decreases the likelihood that companies or their employees would face criminal and civil enforcement.

As a threshold matter, the DOJ will look at how a compliance program is structured, and whether it is sufficiently staffed and resourced to have, for instance, direct access to the board of directors or the audit committee. This requirement is closely connected with the expectation that the tone of a company's commitment to a culture of compliance must begin at the top, i.e., with the board of directors and executives.

When those at the top exhibit a serious commitment to ethics and compliance, the rest of the employees—particularly those in lower management roles—ensure that the same tone is integrated throughout the company.

The DOJ's goal in emphasizing a "tone at the top" commitment serves to send a clear message to employees and third-party agents that unethical behavior will not be tolerated but swiftly punished, irrespective of the role or level of seniority of the person engaged in the misconduct.

Effective compliance program should focus on high-risk areas for environmental misconduct based on each company and underscore the consequences of non-compliance. When applicable, these programs should highlight prior misconduct and how a company's program effectively addressed it—lessons learned.

To meet DOJ's expectations, a company's policies and procedures should strive to be fully integrated into its business model, and regularly updated. At a minimum, a company is expected to have a code of conduct that unequivocally sets forth its commitment to compliance efforts. In furtherance of these compliance efforts, companies are also expected to offer regular training and certifications for directors, officers, employees, as well as third-party partners.

The Department considers confidential reporting mechanisms "highly probative" of a program that can identify and avoid misconduct. Accordingly, companies should implement clear policies and procedures for employees—at all levels—to anonymously report wrongdoing, as well as potential wrongdoing, without fear of retaliation. Such mechanisms should be conspicuously discussed in company training and distributed materials, including whistleblower protections and incentives for reporting misconduct—or suspicions of misconduct.

For instance, a company should not discipline an employee who reports a compliance concern in good faith that may ultimately be unsubstantiated, as this would clearly discourage future complaints. Companies must have in place proper procedures for handling complaints to ensure they are appropriately investigated and that employees are not retaliated against, regardless of the outcome of an investigation.

Once policies and procedures are in place as part of a company's environmental compliance program, management must diligently ensure that employees, as well as third-party agents and partners be familiar with these directives and conscious of the consequences of any potential misconduct. This goes back to the "tone at the top" behavior that must be consistently exhibited by and is expected from a company's leadership.

At the same time, management personnel should be readily available to assist employees and third-party agents with clarifications regarding a company's ethical compliance programs in a committed effort to diminish the possibility of environmental misconduct. Open channels of communications ultimately lead to strengthening the creation of a culture of compliance into a company's day-to-day operations.

When misconduct is corroborated, internal systems should include clear remediation measures such as employee discipline through compensation claw back mechanisms, suspension, and potential termination. The publication of remedial actions taken would serve as an effective deterrent of future misconduct. Simultaneously, the DOJ expects incentives to employees that consistently perform according to a company's code of conduct or compliance program.

When it comes to third-party relationships, a company may wish to consider proactively conducting due diligence, training, audits, and compliance certifications to detect and eliminate any compliance gaps that may occur because of engaging non-employees. Emphasis is again placed on the system's ability to detect and prevent misconduct that is likely to occur in the company's line of business.

By demonstrating a consistent and good faith commitment to internal environmental auditing measures—thus, setting the tone on the importance of ethics and compliance—companies place themselves in an advantageous position because the DOJ is more inclined to negotiate the resolution of enforcement actions with those that self-reported and developed a committed structure of compliance. At the end of the day, what truly makes a difference before ECS is that a company can show it has in place a well-functioning program for detecting, investigating, and remediating environmental misconduct by its employees and third-party agents.

Conclusion

ECS has updated its VSD Policy to align better with current DOJ policies and to provide the regulated community clearer guidance with respect both to self-disclosures and compliance programs more generally. The decision whether to make a self-disclosure still requires, as it has in the past, a detailed case-specific analysis of the facts and circumstances.

Given the complexities of the federal environmental statutes, including the potentially grey line between civil and criminal conduct, as well as the fairly stringent requirements for self-disclosure—not to mention the many aggregating factors—self-disclosure may not be the right choice in all cases.

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