

White Collar Defense & Investigations



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“We Have Ways of Making You Talk,” New DOJ Incentives for Self-Reporting Corporate Misconduct

Last week, Assistant Attorney General for the Criminal Division Kenneth A. Polite, Jr. (“AAG Polite”) [announced revisions](#) to the Department of Justice Criminal Division’s Corporate Enforcement Policy (the “CEP”). These revisions come soon after Deputy Attorney General Lisa Monaco’s September 15, 2022, memorandum and are, according to AAG Polite, “the first significant changes to the Criminal Division’s Corporate Enforcement Policy since 2017.”¹ The updated CEP now applies to all corporate criminal matters handled by the Criminal Division, including all Foreign Corrupt Practices Act (“FCPA”) cases nationwide, all fraud cases, and all money laundering cases.

THREE MAIN CHANGES

1. Expanded Eligibility for Declinations After Voluntary Disclosure

Previously, companies that voluntarily disclosed misconduct to the Criminal Division, fully cooperated, and timely and appropriately remediated any misconduct, were presumptively eligible for declination absent certain aggravating circumstances. Examples of aggravating circumstances included egregious or pervasive misconduct, involvement by executive

management, significant resulting corporate profits, or criminal recidivism.

Now, under the revised CEP policy, the Department of Justice (“DOJ”) may determine that a corporate declination is still appropriate, even with aggravating circumstances, if the following three conditions are met:

- i. The company voluntarily disclosed immediately upon becoming aware of the allegation of misconduct;
- ii. At the time of the misconduct and disclosure, the company had an effective compliance program in place, together with a system of internal accounting controls that enabled the identification of the misconduct and led to the voluntary self-disclosure; and
- iii. The company engaged in “extraordinary” cooperation and remediation.

In other words, even if aggravating circumstances exist, including prior criminal conduct, a company may still get a declination.

2. If the Company Does Not Receive a Declination, It May Receive More Credit

Under the prior policy, if a company voluntarily self-disclosed misconduct, fully cooperated, and timely and appropriately remediated, but did not receive a declination under the CEP, DOJ would recommend a reduction of around 50 percent off of the low end of the Sentencing Guidelines. DOJ will now recommend a reduction of at least 50 percent and up to 75 percent off the low end of the Guidelines range.

3. Even Where Companies Do Not Self-disclose, DOJ Will Provide Further Incentives for Companies to Engage in Cooperation and Remediation

The DOJ clearly wants to encourage self-disclosures, but even when a company fails to self-report, DOJ may grant a recommended fine reduction of up to 50 percent off the low end of the Guidelines range, provided that the company is not a criminal recidivist and provides “extraordinary” cooperation and remediation. This is a marked change from the previous CEP, which provided for a maximum penalty reduction of 25 percent off of the low end of the Guidelines range, absent voluntary self-disclosure.

KEY TAKEAWAYS

- The new policy provides an opportunity for companies to reduce their fines by larger amounts than under the prior policy.
- What DOJ may consider “extraordinary” cooperation remains to be seen. AAG Polite noted its subjective nature, but in looking at what is “extraordinary” the DOJ will consider immediacy, consistency, degree, and impact.
- The new policy provides for incentives, not guarantees. These incentives are not applied automatically, and companies are not presumptively entitled to the reductions. Every company under investigation starts with “zero credit” and earns credit for remediation and cooperation based on degree.

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1. DOJ, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, JUSTICE MANUAL § 9-47.120 (2023).