

January 19, 2023

U.S. Department of Justice Announces Changes to Corporate Enforcement Policies

Assistant Attorney General Kenneth Polite Announces Additional Incentives for Companies to Voluntarily Disclose Misconduct, Cooperate, and Remediate

SUMMARY

On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. announced changes to the Criminal Division's Corporate Enforcement Policy.¹ The policies apply to all corporate criminal cases prosecuted by the Criminal Division, including Foreign Corrupt Practices Act cases, and these changes represent the first significant revision to the Corporate Enforcement Policy since its enactment in 2017.

AAG Polite stated that the revised policy further incentivizes corporations to voluntarily disclose misconduct, fully cooperate with prosecutors, and timely remediate. In particular, AAG Polite announced two main changes: *first*, to expand eligibility to more corporations for a declination of prosecution in certain circumstances; and *second*, to create the possibility of additional discounts on potential fines even for companies for whom a declination is not appropriate.

A. DECLINATION OF PROSECUTION

Under the DOJ's Corporate Enforcement Policy, companies who voluntarily self-disclose, fully cooperate, and timely and appropriately remediate are, absent aggravating circumstances, subject to a presumption of a declination of prosecution, with a requirement to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct. AAG Polite called this ability to obtain a criminal declination "the greatest incentive" offered to corporations. Under the previous version of the policy, companies could not obtain a declination if any aggravating circumstances were present. Aggravating circumstances could include involvement by executive management in the misconduct, a significant profit to the company from the

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misconduct, egregiousness or pervasiveness of the misconduct, or a company's history of criminal resolution. Under the revised policy, even in cases where such aggravating factors are present, prosecutors may decline to prosecute a corporation if the company demonstrates each of the three following factors:

1. The company *immediately* self-disclosed the conduct upon becoming aware of alleged misconduct;
2. The company maintained an *effective* compliance program and system of internal accounting controls that enabled the identification of the misconduct and led to the voluntary self-disclosure; and
3. The company provided *extraordinary* cooperation to the DOJ and undertook *extraordinary* remediation.

Although these changes may offer relief to certain companies not previously eligible for a criminal declination, the practical effect of the expansion of the policy may be more limited. Each of the three factors sets a high standard. While the Criminal Division has provided guidance regarding what constitutes effective compliance and ethics program,² concepts like “immediately” and “extraordinary” are not well-defined. For example, neither the Corporate Enforcement Policy nor AAG Polite addressed what time frame constitutes “immediate” disclosure upon learning of an allegation of misconduct. Moreover, it is unclear what will distinguish “extraordinary” cooperation from “full” or “complete” cooperation. AAG Polite explained that prosecutors may look for: (i) corporations that “immediately” cooperate and “consistently tell the truth”; (ii) corporations that allow prosecutors to “obtain evidence” otherwise unobtainable, for example, “quickly obtaining and imaging [] electronic devices”; and (iii) “cooperation that produces results,” for example, “testifying at a trial or providing information that leads to additional convictions.”

B. DISCOUNTS ON POTENTIAL FINES AND OTHER BENEFITS

Even if a corporation does not meet the three factors, and thus does not qualify for a declination, prosecutors may recommend substantial discounts on potential fines. Specifically, a corporation that voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, but does not qualify for a declination, may obtain up to a 75% discount from the low end of the U.S. Sentencing Guidelines penalty range, unless the corporation is a criminal recidivist. This represents an increase to the previous 50% maximum reduction offered. In addition, prosecutors will generally not require a guilty plea, even for criminal recidivists, to companies that self-report, cooperate, and remediate absent the presence of “particularly egregious” or “multiple aggravating” circumstances. Finally, if a company has demonstrated that it has implemented and tested an effective compliance program and remediated the root cause of the misconduct at the time of resolution, the appointment of a corporate compliance monitor will generally not be required.

For corporations that do not self-disclose misconduct, but fully cooperate and appropriately remediate, the new policy offers up to a 50% reduction off the low end of the Guidelines penalty range. AAG Polite made

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clear, however, that a reduction of 50%, while an increase to the prior 25% maximum available discount, “will not be the new norm.” Instead, it will only be granted to companies that “demonstrate extraordinary cooperation and remediation.”

According to AAG Polite, a greater range of potential available credit encourages prosecutors to parse “distinctions among the quality of companies’ cooperation and remediation.” In all cases, prosecutors will “have discretion to determine the specific percentage reduction and starting point in the range.”

C. IMPLICATIONS

The new policy is consistent with the Criminal Division’s continued, sustained emphasis on individual accountability. In his speech, AAG Polite acknowledged that the Department is best able to hold accountable those who are criminally culpable when their employers come forward to report wrongdoing and thereafter provide maximum cooperation with the DOJ’s investigation. By expanding the availability of criminal declinations and increasing the potential discounts to criminal penalties, the Department’s revised policies are plainly designed to influence companies faced with the “complex” decision to disclose wrongdoing and those deciding what level of resources to devote to cooperation and remediation.

The impact that these changes will have on individual cases, however, remains to be seen. The standards to qualify for the expanded benefits are not yet well defined, but it is clear from AAG Polite’s remarks that the DOJ will set the bar high. And DOJ prosecutors retain broad discretion to determine what benefits companies are entitled to and to weigh companies’ cooperation and remediation against numerous other “aggravating factors” that will largely be out of the companies’ control by the time an investigation begins. Companies that identify wrongdoing or find themselves the subject of a DOJ investigation will be well served to study carefully the new guidance, and companies seeking to avail themselves of these expanded incentives must understand that they will have to meet exacting DOJ expectations.

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ENDNOTES

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- ¹ Criminal Div., *Corporate Enforcement and Voluntary Self-Disclosure Policy*, U.S. DEP’T JUST. (Jan. 2023), <https://www.justice.gov/criminal-fraud/file/1562831/download>.
 - ² Criminal Div., *Evaluation of Corporate Compliance Programs*, U.S. DEP’T JUST. (June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

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