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DOJ Unveils Changes to the Criminal Division's Corporate Enforcement Policy to Incentivize Voluntary Self-Disclosure and Cooperation

On January 17, 2023, before an audience at Georgetown University Law Center, Assistant Attorney General (“AAG”) for the Criminal Division, Kenneth A. Polite, Jr., [unveiled the first significant changes to the Corporate Enforcement Policy](#) (“CEP”) since 2017.¹ The changes reward companies that self-disclose misconduct, cooperate, and remediate, by offering increased reductions off applicable U.S. Sentencing Guidelines ranges. The revised CEP comes on the heels of various DOJ policy announcements signaling an aggressive prosecutorial stance against corporate crime, including [Deputy Attorney General Lisa O. Monaco's September 2022 statements](#) announcing revisions to the Department's corporate enforcement policies and procedures to focus on individual accountability and cooperation.

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Consistent with the Department's position in recent years, DOJ made three key changes to the CEP signaling an effort to strike a balance between aggressive enforcement and incentives for companies to proactively disclose misconduct.

1. DOJ's New CEP Will Allow Declinations Even If Aggravating Factors Are Present Where a Company Provides “Extraordinary” Cooperation.

Under the original CEP established in 2017, DOJ could decline to prosecute if a company voluntarily self-disclosed, fully cooperated, and engaged in appropriate remediation efforts, so long as the conduct did not fall under certain “aggravating” circumstances such as criminal recidivism or executive misconduct.

AAG Polite announced that the revised CEP will now allow prosecutors to determine that declinations are warranted for companies with prior criminal convictions or other aggravating factors, provided that three conditions are met: (a) the company voluntarily disclosed the misconduct immediately upon its discovery; (b) at the time of the misconduct and at the time of disclosure, “the company had an effective compliance program and system of internal accounting controls that enabled the identification of the misconduct and led to the company's voluntary self-disclosure”; and (c) the company engaged in extraordinary cooperation with DOJ and extraordinary remediation efforts.

DOJ will consider the “immediacy, consistency, degree, and impact” of corporate cooperation in deciding whether it qualifies as extraordinary. By way of example, AAG Polite noted that DOJ would consider whether the company quickly images data from relevant phones or provides recorded conversations.

2. For Companies that Do Not Receive a Declination, Significant Fine Reductions Will Be Available for Voluntary Self-Disclosure with “Full” Cooperation.

AAG Polite highlighted that the new guidelines will incentivize voluntary self-disclosure even if a company does not meet the high bar for extraordinary cooperation. A non-recidivist company that does not receive a declination but voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, will receive a 50-75% reduction off the low end of the applicable U.S. sentencing guidelines range. In cases in which aggravating factors are present, including criminal recidivism, companies will be eligible for an up to 75% reduction off the

¹ The comparative chart highlighting what changed and what remained the same between the revised CEP and its predecessor is available [here](#).

applicable guidelines range, and prosecutors will have discretion to determine the starting point within the guidelines range. Under the prior CEP, companies could receive only a maximum 50% reduction.

AAG Polite also noted that a corporate guilty plea generally would not be required under these circumstances, including for criminal recidivists, absent particularly egregious circumstances.

3. Even If a Company Does Not Voluntarily Disclose, the New CEP Allows Prosecutors to Provide a Maximum 50% Reduction off the Low End of the Sentencing Range If the Company Engages in Extraordinary Cooperation with DOJ and Makes Extraordinary Remediation Efforts.

AAG Polite also announced that cooperation incentives extend to companies that do not voluntarily disclose. Under the new CEP, companies “that truly distinguish themselves and demonstrate extraordinary cooperation and remediation” will receive up to a 50% reduction off the low end of the applicable U.S. sentencing guidelines range—up to twice the 25% maximum reduction available under the prior CEP. While this increase is a significant incentive, AAG Polite made clear that this is a range, not a foregone conclusion: “reduction of 50% will not be the new norm; it will be reserved for companies that truly distinguish themselves and demonstrate extraordinary cooperation and remediation.”

Takeaways and Analysis

AAG Polite delivered a clear message from the Department: “come forward, cooperate, and remediate.” Companies that were dissuaded from self-disclosing under the previous CEP are now being provided a direct path to potentially lighter resolution terms. Even companies with a history of relevant misconduct (*e.g.*, “recidivists”), executive level involvement, or pervasive misconduct, may be eligible for declinations or reduced penalties for extraordinary cooperation and remediation. While there is ambiguity about the level of cooperation that DOJ will deem extraordinary, AAG Polite’s specific mention of data gathering suggests companies should be thinking critically about how to preserve, obtain, and produce information that may be of interest to the government. AAG Polite did not offer insight into what DOJ would view as extraordinary remediation. Therefore, companies should also closely follow enforcement actions to gain clarity into the remediation efforts that result in favorable settlements.

DOJ will also expect companies to affirmatively develop robust and effective compliance programs in order to take advantage of any potential benefits. Notably, companies must demonstrate that internal controls were in place at the time of the misconduct.

AAG Polite also noted that DOJ will expect that “the voluntary self-disclosure was made *immediately* upon the company becoming aware of the allegation of misconduct.” While DOJ has historically valued timeliness of self-reporting and penalized companies for delaying disclosure, companies will need to weigh DOJ’s expectation for timeliness of self-reporting against the need to conduct a fulsome investigation into allegations.

As DOJ walks the tightrope between ramping up enforcement and enticing companies to assist in its investigatory and prosecutorial efforts, companies too must balance important business considerations alongside the potential benefits and risks of self-disclosure.