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Client Alert Commentary

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DOJ's Updated Corporate Enforcement Policy Aims to Incentivize Compliance

Companies that self-disclose, cooperate, and remediate could benefit from significantly reduced fines and possible declinations even in cases with aggravating factors.

In a speech at Georgetown University Law Center on January 17, 2023, Assistant Attorney General Kenneth Polite (AAG Polite) announced revisions to the US Department of Justice (DOJ) Criminal Division's Corporate Enforcement Policy (CEP).[1] The revisions, the most significant since 2017, are primarily designed to incentivize companies to invest significantly in compliance, come forward at the earliest point when they discover corporate misconduct, and fully cooperate with DOJ investigations.

Key takeaways include:

- Companies that voluntarily self-disclose misconduct to the Criminal Division, fully cooperate, and timely and appropriately remediate continue to be entitled to a presumption of a declination absent aggravating circumstances. This framework did not change under the new policy.

- Even with aggravating circumstances, companies may now qualify for a declination if they voluntarily self-disclose "immediately upon the company becoming aware of the allegation of misconduct"; have an effective compliance program in place which helped identify the misconduct; and provide "extraordinary cooperation" in the DOJ investigation and undertake "extraordinary remediation."

- If a criminal resolution is warranted — i.e., a declination is not appropriate — companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate can receive larger reductions in the criminal fine range than under the previous policy. Companies that meet these expectations can now receive at least 50% and up to a 75% reduction off the low end of the US Sentencing Guidelines (Guidelines) fine range. Recidivists can also qualify for the same sizeable reduction, but not from the low end of the fine range.

- Even companies that do not self-disclose can obtain up to a 50% reduction off the low end of the fine range if they later fully cooperate and timely and appropriately remediate. This is double the reduction that was available under the prior CEP, and it is also available to recidivists, except that the reduction will not be from the low end of the fine range.[2]

This Client Alert summarizes these latest developments in DOJ's approach to corporate criminal enforcement and focuses on new questions introduced by the latest policy revisions, most notably what qualifies as "immediate" self-disclosure and "extraordinary" cooperation.

Updated Criminal Division Policies

The revised CEP provides new opportunities for companies to receive a declination despite aggravating circumstances and provides greater incentives for companies that self-disclose, fully cooperate, and timely and appropriately remediate. Key revisions are described below, and Appendix A to this alert contains a chart summarizing these changes.

Companies can receive a declination despite aggravating factors

Under the prior CEP, even if a company voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, it would not benefit from the presumption of a declination if aggravating factors were present (e.g., executive management involvement or criminal recidivism).[3] The CEP revisions now make it expressly clear that aggravating factors are not a bar to a declination. Although a company will still not qualify for a *presumption* of a declination if aggravating circumstances are present, the new policy outlines how prosecutors may determine that a declination is still appropriate if the company meets three requirements that to go beyond the standards expected for companies without aggravating factors: (1) immediate voluntary self-disclosure; (2) an effective compliance program; and (3) extraordinary cooperation.

This policy update combined with statements from DOJ officials makes clear that the Department wants to drive more voluntary reporting by increasing the odds of (and clarity around) securing a declination. To illustrate, AAG Polite announced during his January 17 remarks that if a company has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, DOJ generally will not require a corporate guilty plea, absent multiple or particularly egregious aggravating factors.[4]

Companies can receive fine reductions of up to 75%, even when a declination is not appropriate

Even if a company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, DOJ may still determine that a declination is not appropriate due to aggravating circumstances. Under the revised CEP, such companies may now be eligible for significantly greater fine reductions.

Companies can receive up to a 50% reduction in the guidelines fine range even without voluntary self-disclosure

The CEP's enhanced incentives are not limited to companies that self-report. DOJ has now doubled the maximum fine reduction for companies that fail to voluntarily self-disclose but still fully cooperate and timely and appropriately remediate.

Analysis

Open questions

The revised CEP provides enhanced transparency about what companies must do to obtain a more favorable resolution, but important and practical questions remain.

What is "immediate" self-disclosure?

Most significantly, the revised CEP outlines how companies can still obtain a declination even in the face of aggravating factors. One of the requirements is that the "[t]he voluntary self-disclosure was made ***immediately*** upon the company becoming aware of the allegations of misconduct."[5] This language differs from the prior CEP, as well as the remainder of the revised CEP when describing the requirements to obtain Guidelines fine reductions even when a criminal resolution is appropriate.

Although the revised CEP does not define "immediately," differences between the prior and current guidance documents provide insight into DOJ's perspective. Most significantly, the revised CEP states that a company should report "immediately upon the company becoming aware of the *allegations of misconduct*," whereas the prior CEP described "a reasonably prompt time after becoming *aware of the offense*."[6] Companies are "aware of the allegations" as soon as they receive them — whether reported to a manager, through a company hotline, or otherwise. This is different from becoming aware of an "offense," which often requires an evaluation of the credibility of the allegations and at least some investigation into the facts.

This potentially significant difference appears to move DOJ's position closer to other countries' regulators, like the United Kingdom's Serious Fraud Office, which has historically been reluctant to allow company counsel to undertake first account interviews of key witnesses let alone complete an investigation before deciding whether to self-disclose.[7]

The revised CEP also adds language in the "Definitions" section regarding "voluntary self-disclosure," though it does not further define "immediately." The prior CEP defined "voluntary self-disclosure" consistent with U.S.S.G. § 8C2.5(g)(1) as a disclosure "occurring 'prior to an imminent threat of disclosure or government investigation'" and "within a reasonably prompt time after becoming aware of the offense."[8] The revised CEP reiterates that same language, but adds that "[t]he Criminal Division *encourages* self-disclosure of potential wrongdoing at the earliest possible time, even when a company has not yet completed an internal investigation, if it chooses to conduct one." It further adds that a self-disclosure is only voluntary if "[t]he company had no preexisting obligation to disclose the misconduct."[9]

Although the revised CEP "encourages" disclosure at the earliest possible time, it is not clear how different that is from a "reasonably prompt time after becoming aware of the misconduct." Moreover, it is not clear whether (when aggravating factors are present) a company that discloses within a "reasonably prompt time after becoming aware of the misconduct" but not "immediately upon becoming aware of the allegation" completely loses out on the possibility of a declination and is only eligible for a reduction in the Guidelines fine range.

In addition, DOJ did not provide guidance regarding what constitutes a "preexisting obligation" to disclose the misconduct, and whether that includes obligations in the United States only, or worldwide. Some companies have obligations to disclose certain matters—for example, through Suspicious Activity Reports in the United States and other countries. Issuers that identify material misstatements in financial statements have an obligation to issue a Form 8-K disclaiming reliance. It would be surprising if DOJ intends to disqualify large numbers of companies from receiving credit for voluntary self-disclosure due to these kinds of preexisting obligations.

Regardless of these details, it is important for companies to begin thinking about and consult with counsel regarding the pros and cons of self-disclosure immediately upon receiving any allegations. Whether that is the right time to disclose or not is a complex and multifaceted decision, but companies should start

balancing the considerations "immediately," particularly if they have a history of misconduct or have reason to believe other aggravating factors may be triggered.

What is "extraordinary" cooperation and remediation?

As with "immediate" self-disclosure, the revised CEP also introduces but fails to define the concepts of "extraordinary cooperation" and "extraordinary remediation."

The prior CEP required "full cooperation" as a requirement for a presumption of a declination and for reductions in the Guidelines fine range. The revised CEP reiterates "full cooperation" as a requirement for a presumption of a declination and for reductions in the Guidelines fine range. However, it uses the term "extraordinary" when describing what is necessary for companies to receive a declination when aggravating factors are present.

The "Definitions" section of the revised CEP covers only "Full Cooperation" and "Timely and Appropriate Remediation"—*not* "extraordinary" cooperation or remediation. AAG Polite explained in his speech introducing the revised CEP that "to receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary." AAG Polite stated that prosecutors "know 'extraordinary cooperation' when we see it," and he provided examples such as immediate cooperation, consistently telling the truth, allowing DOJ to obtain otherwise unobtainable evidence (like obtaining and imaging electronic devices), and cooperation that produces results.[10] However, the types of cooperation he identified as potentially "extraordinary" are already included in the revised CEP's definition of "full cooperation." Thus, the difference between "full" and "extraordinary" is not obvious, and this standard creates a less-than-clear path for companies (where aggravating factors are present) trying to obtain a declination as compared to a criminal resolution with a reduction in the Guidelines fine range. Companies seeking to achieve "extraordinary" cooperation credit will likely need to show proactive, creative, and labor-intensive efforts to meet this higher, undefined standard.

Recent FCPA enforcement sheds some light on DOJ's perspective regarding what constitutes "extraordinary cooperation." In one recent case, DOJ credited a recidivist with "extraordinary cooperation" that included, among other things, making regular and detailed factual presentations to the Department; voluntarily making foreign-based employees available for interviews in the United States; producing documents located outside the United States in ways that did not implicate foreign data privacy laws; and translating certain foreign language documents. In another, DOJ described a company's "extraordinary" cooperation as including, but not limited to, conducting an extensive internal investigation, voluntarily making US and foreign employees available for interviews and collecting, analyzing, and organizing voluminous evidence and information for the Department.

Conclusion

Although questions remain regarding the contours of immediate self-disclosure and extraordinary cooperation and remediation, the revised CEP reiterates DOJ's call for companies to invest in compliance and promises rewards to those that do. To reap the benefits of this policy, companies should prioritize establishing and maintaining robust and empowered compliance programs and internal controls, which should be designed with the goals of: (a) promoting compliance and preventing misconduct, (b) detecting and investigating misconduct when it occurs—including through reporting mechanisms, auditing, monitoring, and data analytics, and (c) remediating misconduct effectively. Given the Criminal Division's continued focus on individual accountability, a company's compliance program and internal controls should also be designed to quickly and appropriately hold individual wrongdoers accountable. Further, the revised CEP demonstrates it is particularly critical for recidivist companies to invest in and empower their

compliance functions so that they can continue to have an opportunity for a declination. Latham's Client Alert, Empowering Corporate Compliance Functions in a Post-Pandemic Environment, provides practical guidance for companies seeking to build and enhance their compliance functions.

The revised CEP provides new paths and incentives for companies to obtain declinations or reductions in the Guidelines fine range. At the very least, if companies receive allegations of misconduct, they will want to immediately begin weighing the pros and cons of self-disclosure and take steps to position themselves for credit for remediation and cooperation.

Appendix

Summary of Key CEP Provisions

Scenario	Prior CEP	Revised CEP
Company voluntarily self-discloses, full cooperates, and timely and appropriately remediates, and no aggravating factors are present	Company will receive a presumption of a declination	Company will receive a presumption of a declination
Aggravating factors are present but the company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates	Company could potentially qualify for a declination, but aggravating factors might disqualify it	Company may qualify for a declination if it meets three factors: 1. Immediate voluntary self-disclosure, 2. Effective compliance program and internal controls, and 3. Extraordinary cooperation
Criminal resolution is warranted but the company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates	Up to a 50% reduction off of the low end of the applicable Guidelines fine range (except for recidivists that did not qualify for a reduction from the low end of the range)	At least 50% and up to 75% off of the low end of the applicable Guidelines fine range (recidivists are eligible for the same reduction, but generally not from the low end of the range)
Company failed to voluntarily self-disclose but later demonstrated that it fully cooperated and timely and appropriately remediated	Up to a 25% reduction off of the low end of the applicable Guidelines fine range (except for recidivists that did not qualify for a reduction from the low end of the range)	Up to a 50% reduction off of the low end of the applicable Guidelines fine range (recidivists are eligible for the same reduction, but generally not from the low end of the range)

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Endnotes

[1] Kenneth A. Polite, Jr., Assistant Attorney General of the US Department of Justice, Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law [hereinafter, Polite Remarks].

[2] 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, *available at* https://www.justice.gov/opa/speech/file/1562851/download [hereinafter, Revised CEP].

[3] 9-47.120 – FCPA Corporate Enforcement Policy, *available at* https://www.justice.gov/criminal-fraud/file/838416/download [hereinafter, Prior CEP].

[4] Polite Remarks; *see also* Revised CEP.

[5] Revised CEP.

[6] Revised CEP.

[7] UK SFO Releases Guidance on Corporate Cooperation Credit (Aug. 9, 2019), *available at* https://www.latham.london/2019/08/uk-sfo-releases-guidance-on-corporate-cooperation-credit/.

[8] Prior CEP.

[9] Revised CEP.

[10] Polite Remarks.