

Government Enforcement and White Collar Crime Alert



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DOJ Doubles Down on Efforts To Incentivize Early Self-Reporting and Cooperation

On January 17, 2023, the U.S. Department of Justice (DOJ) announced revisions to the Criminal Division's Corporate Enforcement Policy. The revisions follow Deputy Attorney General (DAG) Lisa Monaco's [September 2022 memorandum](#) directing all DOJ components to adopt clear policies on certain issues, including a written policy to incentivize voluntary self-disclosure by companies. (See our [November 21, 2022](#), [October 6, 2022](#), and [September 16, 2022](#), client alerts on the topic.)

The revisions largely focus on DOJ expectations and policies designed to further incentivize early and voluntary self-disclosures. For example, even a company involved in serious misconduct with aggravating circumstances (such as executive management involvement, recidivism or pervasiveness of misconduct within the company) may be able to avoid prosecution. This would occur if 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 the company engaged in extraordinary cooperation and remediation.

Importantly, the revised policy emphasizes that companies are encouraged to self-disclose **immediately** upon identifying allegations of potential misconduct, even if an internal investigation has not been completed.

The revised policy also gives prosecutors more discretion in:

- granting declinations;
- dealing with recidivist companies; and
- seeking reduced penalties for companies that meet certain criteria.

The policy further clarifies that it applies to all corporate matters prosecuted by the Criminal Division, not just Foreign Corrupt Practices Act (FCPA) cases.

Below, we summarize the key takeaways from the revised policy.

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New Incentives for Companies To Self-Disclose Early, Fully Cooperate and Remediate

- Prosecutors will have discretion to determine that a declination is appropriate, even where there are aggravating circumstances, if a company meets the following criteria:
 - The voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct (even if the company has not completed an internal investigation);
 - At the time of the misconduct and 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;
 - The company provided "extraordinary" cooperation with the DOJ's investigation; and
 - The company undertook "extraordinary" remediation.
- Under the prior policy, a company would not qualify for a presumption of a declination if aggravating circumstances were present, such as involvement by the company's executive management in the misconduct, a significant profit to the company from the misconduct, egregiousness or pervasiveness of the misconduct within the company, or criminal recidivism.
- Where the DOJ believes that a criminal resolution, as opposed to a declination, is nonetheless warranted for a company that has voluntarily self-disclosed, fully cooperated and timely and appropriately remediated:
 - Prosecutors will generally not require a corporate guilty plea — including for criminal recidivists — absent the presence of particularly egregious or multiple aggravating circumstances, and may seek another type of resolution such as a deferred prosecution agreement instead.
 - The DOJ can now accord, or recommend to a sentencing court, a higher reduction in the fine range than in prior versions of the policy. Where the policy previously allowed for a reduction of up to 50% off the low end of the U.S. Sentencing Guidelines, the revised policy provides for a reduction of **at least 50%** and allows for a reduction of up to 75%. A 50% cap will still apply where a company did not voluntarily self-disclose.
 - Consistent with the DOJ's focus on treating recidivist conduct more harshly, for repeat offenders fine reductions will not start from the low end of the guidelines fine range but rather from some higher point within the range, as determined by the DOJ based on the particular facts and circumstances.
 - The DOJ generally will not require the appointment of a monitor if a company has, at the time of the resolution, demonstrated that it has implemented and tested an effective compliance program, and remediated the root cause of the misconduct.

Clarity on Voluntary Self-Disclosures

- The revised policy states that the Criminal Division will consider the extent to which the timeliness of the disclosure permitted it to preserve and obtain evidence as part of its investigation in evaluating the circumstances of the disclosure.
- The revisions also discuss the expected timing of self-disclosures, noting that the Criminal Division "encourages self-disclosure of potential wrongdoing at the earliest possible time, even when a company has not yet completed an internal investigation." The company bears the burden of demonstrating that the disclosure was timely.
- Companies will receive credit for a voluntary self-disclosure if:
 - The disclosure is made to the Criminal Division;
 - The company had no preexisting obligation to disclose the misconduct;
 - The disclosure occurred prior to an imminent threat of disclosure or government investigation; and
 - The company disclosed all relevant, nonprivileged facts known to it, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue. This includes individuals inside and outside the company regardless of their position, status or seniority.
- Where a company does not self-disclose but fully cooperates and timely and appropriately remediates, the DOJ will recommend up to a 50% reduction off the low end of the Sentencing Guidelines fine range. (The previous version of the policy contemplated only a 25% reduction.) In his speech announcing the revisions, Assistant Attorney General (AAG) Kenneth Polite explained that the specific percentage reduction is left up to the prosecutors' discretion and will vary depending on a company's level of cooperation and remediation.

Full Cooperation at the Earliest Opportunity

The policy emphasizes that prosecutors have discretion to analyze a company's cooperation when calculating penalties, but that companies that fail to demonstrate full cooperation at the earliest opportunity might not receive full cooperation credit.

The policy revisions explain that companies will start at zero cooperation credit and earn credit for specific cooperative actions (as opposed to starting with the maximum available credit and receiving reduced credit for deficiencies in cooperation).

Although the revised policy describes requirements for full cooperation, it does not define "extraordinary" cooperation. AAG Polite described extraordinary cooperation as going "above and beyond the criteria for full cooperation," which is seen to include, among other things:

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- immediate cooperation and consistent candor in communications with prosecutors;
- allowing prosecutors to obtain timely evidence they could not otherwise get, such as securing and imaging electronic devices, and having recorded conversations; and
- providing a level of cooperation that produces results for prosecutors, such as testifying at trial or providing information that leads to additional convictions or furthers the investigation.

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It is clear from recent DOJ pronouncements, including DAG Monaco's September 2022 memorandum and the updated Corporate Enforcement Policy, that the Criminal Division is serious about incentivizing self-disclosure, cooperation and remediation. The DOJ

is offering significant benefits to companies that engage early and proactively with prosecutors, even in cases of serious misconduct. At the same time, it will take a tougher stance on evaluating corporate efforts in order to distinguish, and reward, those that are truly meaningful and helpful to prosecutors.

The DOJ is expected to issue further guidance this year on topics including:

- compensation structures that allow for clawback provisions or other compensation-related consequences for individuals involved in misconduct; and
- how prosecutors should evaluate companies' policies and practices on the use of ephemeral or encrypted messaging platforms.

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