

Clients & Friends Memo

DOJ Announces Formal Expansion of Corporate Enforcement Policy to Incentivize More Self-Reporting

January 20, 2023

On January 17, 2023, Assistant Attorney General Kenneth Polite announced revisions to the Department of Justice (DOJ) Criminal Division's Corporate Enforcement Policy (CEP),¹ expanding the availability of a potential full declination with self-reporting, even in some cases involving aggravating circumstances, and applying the CEP to a broader range of issues, including those involving fraud and money laundering. The announcement comes after a number of public statements by Deputy Attorney General Lisa Monaco promising more action to tackle corporate crime.

Background

Historically, the DOJ has incentivized self-reporting of bribery and anticompetitive business practices; DOJ's effort in this regard began in 2016 with the Foreign Corrupt Practices Act (FCPA) Pilot Program, which was expanded into its FCPA Corporate enforcement policy, now incorporated in the DOJ Manual.

The DOJ's existing CEP provides that companies that voluntarily self-disclose, cooperate, remediate are entitled to a presumption of declination so long as there are no aggravating circumstances present. Aggravating circumstances include, for example, involvement by executive management in the misconduct, egregious misconduct, or criminal recidivism. If the circumstances of a particular case overwhelm the declination presumption and DOJ decides to pursue a criminal resolution, the existing policy provides for a 50 percent sentencing reduction from the low end of the federal sentencing guidelines range.

Mr. Polite's remarks signal the formal expansion of self-reporting for all corporate criminal matters handled by the Criminal Division. This expansion, Mr. Polite stressed, reflects the importance DOJ

¹ Press Release, Dep't of Justice, Assistant Attorney General Kenneth A. Polite, Jr. Delivers 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>.

places on self-reporting in all corporate criminal cases and the availability of a potential declination in some situations in which such a result was previously foreclosed.

Revisions to CEP

The DOJ's newly announced policy permits (but does not presume) prosecutorial declination, *even in the presence of aggravating factors*, where a company's conduct meets three conditions: first, that the company self-reported immediately upon becoming aware of the misconduct; second, that the company had an effective compliance program and controls at the time of the misconduct and disclosure which enabled its identification; and third, that the company provided "extraordinary" cooperation and remediation. Where the presence of a single one of these aggravating factor may have previously disincentivized any self-reporting, the new policy changes instead permit declination even with such aggravating factors present, provided that the company's cooperation is deemed "extraordinary."

Mr. Polite took care to describe how "extraordinary" cooperation would be assessed under the revised CEP. Although acknowledging that the difference between "full" and "extraordinary" cooperation was one of degree, Mr. Polite remarked that DOJ would look to concepts including immediacy, consistency of controls, degree, and impact of a company's cooperative conduct in deciding whether a company's cooperation was indeed extraordinary. Mr. Polite emphasized that "[t]o receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set in our policies," including beyond "even gold-standard cooperation."

As emphasized by Mr. Polite, having a robust compliance program in place, with appropriate, effective, and consistent policies, procedures, and controls, will be key to the DOJ's evaluation in this regard. An effective compliance program should be able to immediately identify any misconduct and companies should use this opportunity to tighten controls to ensure that is the case.

Further, the DOJ specifically expanded the CEP to all corporate criminal matters handled by the Criminal Division, including all FCPA cases nationwide, all fraud cases, and all money laundering cases.

Short of efforts taken to warrant declination, if the DOJ decides a criminal resolution is still warranted where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates the misconduct, the DOJ will recommend additional leniency: *at least* a 50 percent, and up to a 75 percent, reduction from the low end of penalties assessed under the federal sentencing guidelines. Further, the DOJ will not pursue a corporate guilty plea, absent multiple or particularly egregious aggravating circumstances.

For those companies who do not self-disclose misconduct but still fully cooperate and appropriately remediate, the DOJ will recommend up to a 50% reduction from the low end of

penalties assessed under the federal sentencing guidelines, twice the reduction permitted under the prior CEP.

Practice Points

- The continued significant encouragement of self-reporting comes as corporate prosecutions declined significantly in 2022. There is, of course, a widely held belief that the CEP incentives that are newly memorialized were previously offered without a formal policy.
- Companies should fully evaluate the additional self-reporting incentives under the revised CEP—including potential declination even in the presence of aggravating factors—if certain conditions precedent are met. One of the conditions precedent requires companies to implement effective compliance and controls *before* the misconduct occurs; to that end, companies should maximize their eligibility by immediately evaluating compliance policies, procedures, and controls so that they are better situated to identify misconduct in the first instance.
- Before self-reporting even under the revised CEP, companies should assess how the DOJ will assess their cooperation, namely whether it will be deemed “extraordinary” and considering factors such as the immediacy of the self-reporting and remediation.
- While the involvement of senior management in the conduct is no longer prohibitive for a declination, companies should still consider that their self-reporting and cooperation will likely lead to the charging of individuals.
- With the CEP revisions in mind, companies should weigh the benefits of self-reporting potential misconduct—which may result in reduced legal exposure by way of a declination or a highly reduced penalty—against its drawbacks, including:
 - Public disclosure of the misconduct if DOJ announces its decision to decline prosecution;
 - The implementation of “extraordinary” remedial measures, which often include the institution of onerous corporate monitors to oversee day-to-day operations; and
 - Historical trends in which declinations have been infrequent.
- Especially where companies may be at risk of recidivism, companies should weigh carefully the risk that the DOJ will find aggravating factors present or so egregious as to warrant criminal resolution even in instances involving a self-reported disclosure.
- Finally, companies should keep in mind that, even if they decide not to self-report potential misconduct, they may still be eligible under the revised CEP for a substantial penalty reduction recommendation so long as they fully cooperate and remediate the misconduct. These factors should be weighed carefully with outside counsel.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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