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# Client Alert: Assistant Attorney General Announces Changes to DOJ's Corporate Enforcement Policy

**Publications**

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On January 17, 2023, Assistant Attorney General (AAG) Kenneth Polite, Jr., delivered a speech announcing several important revisions to the Department of Justice (DOJ) Criminal Division's Corporate Enforcement Policy (CEP). These changes, which will apply to current and future corporate defendants in cases involving the Criminal Division—including all cases brought under the Foreign Corrupt Practices Act (FCPA)—include:

1. Preserving the possibility of securing a declination of prosecution for companies even when aggravating circumstances may exist;

2. Increasing the maximum potential fine reduction to 75% off of the bottom of the applicable sentencing guidelines range in cases that warrant a criminal resolution but where the company voluntarily self-discloses the misconduct, fully cooperates, and effectively remediates; and

3. Increasing the maximum potential fine reduction to 50% off of the bottom of the applicable sentencing guidelines range for companies that do not voluntarily self-disclose, but still fully cooperate and effectively remediate.

These policy modifications follow a September 2022 memorandum from Deputy Attorney General (DAG) Lisa Monaco announcing revisions to DOJ's corporate criminal enforcement policies. As we wrote at the time, that memorandum reflected the Department's stated goal of bringing more prosecutions of individuals responsible for corporate wrongdoing—and thus building an incentive structure that encourages companies to self-report more misconduct and cooperate more comprehensively and expeditiously with the government's investigation.

The policy changes announced earlier this week, which appear aimed at crystallizing these corporate incentives, build on that Departmental guidance.

Key aspects of the revisions are highlighted below:

**1. The Existence of Aggravating Circumstances Does Not Preclude the Possibility of Declination.**

Prior Criminal Division policy offered a presumption of declination if a company voluntarily self-disclosed, fully cooperated, and "timely and appropriately" remediated—but only if there were no "aggravating circumstances," such as involvement by executive management in the misconduct, significant profit to the company from wrongdoing, or criminal recidivism. In other words, the existing policy suggested to companies that, so long as aggravating circumstances were present, the Department would pursue a criminal resolution even if the company did everything DOJ could ask for from the moment the misconduct was discovered. That implication stood as a potential deterrent to companies that might otherwise have considered voluntary self-disclosure, but that did not want to select a path that effectively guaranteed some type of criminal resolution.

The new policy leaves the door open for a declination, even where such "aggravating circumstances" are present. That is, if a company immediately self-discloses the misconduct, shows that it had an effective compliance program at the time of the misconduct and disclosure, and provides "extraordinary" cooperation, then prosecutors will be empowered to decline to prosecute the company (even if there would still not be a *presumption* of such a declination).

AAG Polite did not define what "extraordinary" cooperation means in this context, but said that such factors as "immediacy, consistency, degree, and impact" of cooperation would be relevant, noting that, in practice, "extraordinary" cooperation is the type of cooperation that leads to evidence that the Department would not otherwise have access to (e.g., electronic devices and recorded conversations) or helps the Department produce concrete results (e.g., providing information that leads to additional convictions or trial testimony). That emphasis follows earlier Department guidance that companies that are cooperating should prioritize the production of information that will aid in investigating individual wrongdoing, and other Department guidance that companies disclose *all* individuals involved in wrongdoing in order to receive full cooperation credit.

Of note, the Department has historically resolved cases in declination only sparingly. Since the initial unveiling of the  —the precursor to the CEP—in April 2016, DOJ has only publicly extended declinations under the Policy in 16 cases—and it has publicly issued only a single declination in a non-FCPA case even though the Criminal Division explicitly applied the Policy to such cases in March 2018. It therefore remains to be seen whether this revised policy will meaningfully open the door for additional self-disclosures, or merely leave it slightly ajar.

**2. Companies May Receive Enhanced Cooperation Credit Even When DOJ Seeks a Criminal Resolution.**

The revised policy also provides for the possibility of an increased reduction in penalties for companies that self-disclose, cooperate, and remediate, but are not offered the possibility of a declination. It does this in two key ways:

First, DOJ will recommend that non-recidivist companies receive a fine of 50 to 75% off of the low end of the sentencing guidelines range. Previously, companies were only eligible to receive up to a 50% discount in such circumstances. Second, in those circumstances—i.e., where the company self-discloses, cooperates, and remediates but nevertheless faces criminal prosecution—the Department will "generally" not require the company to plead guilty—even if the company is considered a criminal recidivist—absent multiple or "particularly egregious" aggravating circumstances.

Finally, the revised policy provides additional—albeit more limited—potential savings for companies that *do not* voluntarily self-disclose, but nevertheless fully cooperate and effectively remediate. In those cases, DOJ will recommend that the company receive a penalty reduction of 25 to 50% off of the low end of the sentencing guidelines range. Previously, companies in these circumstances were only eligible to receive up to a 25% discount. AAG Polite advised, however, that the reduction "will likely" not be off the low end of the range in cases involving criminal recidivists.

Moreover, notwithstanding these greater discounts, AAG Polite stressed that a 50% reduction will not be "the new norm." Instead, each company will start at "zero cooperation credit," with the greatest reductions reserved for those companies that earn maximum cooperation credit by demonstrating "extraordinary" cooperation and remediation. "To receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set in our policies," AAG Polite said.

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In sum, these changes signal DOJ's continued interest in incentivizing voluntary self-disclosure of corporate misconduct, cooperation that produces measurable results, and remediation. At the same time, of course, DOJ's repeated fine-tuning of its corporate enforcement policies demonstrates that companies have not yet responded to the existing incentives at the level DOJ hopes for. In particular, companies can be hesitant to voluntarily self-report misconduct to the government when such reports entail substantial uncertainty regarding the outcome beyond the likelihood of significant investigative expense and potential penalties. The new policy revisions announced by AAG Polite help ensure that the better outcomes remain a possibility for more companies. Yet, the government's continued reliance on ambiguous standards like "extraordinary" cooperation will not likely assuage apprehension on the part of companies about whether to voluntarily self-disclose misconduct. Time will tell whether self-reporting increases under the Policy, and whether such self-reporting translates into more favorable resolutions for companies. Similarly, DOJ's increased cooperation incentives may push companies to work harder to preserve and obtain potential evidence against individual employees in some cases, but that evidence does not always readily translate into criminal convictions. Companies may not wish for their cooperation to be judged by a standard that emphasizes results rather than efforts.

For companies facing the decision whether to self-report misconduct, and how best to cooperate with the government's investigation, DOJ's ongoing corporate enforcement approach makes clear the importance of making those decisions swiftly and carefully, and after full consideration of the available incentives in consultation with experienced counsel.

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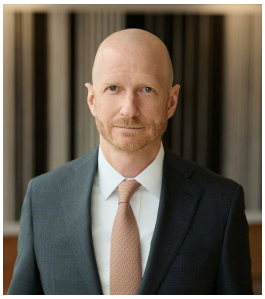

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