Davis Polk

DOJ Criminal Division head announces changes to corporate enforcement policy

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On January 17, 2023, Assistant Attorney General Kenneth Polite announced changes to DOJ's corporate enforcement policies, including applying the FCPA Corporate Enforcement Policy to all criminal corporate cases in the Criminal Division and increasing incentives for voluntary disclosures, cooperation, and remediation. Nonetheless, corporations considering voluntary self-disclosures should wait to see how the Department defines key terms and how the revised policy plays out in practice.

During a speech at Georgetown University Law Center on January 17, 2023, Kenneth Polite, Assistant Attorney General for the Criminal Division—which oversees the Fraud Section and the Money Laundering and Asset Recovery Section—announced changes to the Criminal Division's Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (CEP). The FCPA-specific policy, which has informally applied to all corporate enforcement matters in the Criminal Division since 2018, offers companies a presumption of a declination if they voluntarily and timely self-disclose misconduct, cooperate with DOJ's investigation, remediate, and disgorge ill-gotten profits.

The new CEP revisions: (1) formalize the application of the CEP to all Criminal Division cases (not just FCPA cases); (2) require companies to overcome three new criteria to get the benefits of the voluntary self-disclosure program when aggravating circumstances are present; and (3) increase the available financial discounts from fines and penalties. AAG Polite reiterated that individual accountability remains DOJ's top priority and an essential part of the CEP and warned that companies should expect harsher treatment if they fail to voluntarily self-disclose and remediate.

Notably, this new CEP is the latest in a long line of corporate enforcement policies released by the Criminal Division, which handles a significant portion of DOJ's corporate cases, including the Evaluation of Corporate Compliance Programs guidance, the Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty memorandum, the Selection of Monitors in Criminal Division Matters memorandum, and the FCPA Resource Guide.

While the previous version of the CEP has led to a number of self-disclosures by corporations and associated declinations, the choice to voluntarily self-disclose and cooperate under the new policy (as with the FCPA version) is not foolproof—and even if a company is able to achieve a more favorable outcome from DOJ, that company still will likely face the cost and disruption of a multi-year investigation, scrutiny by and a potential resolution with other regulators, and potential civil actions.

A crucial aspect of the revisions for practitioners and corporations weighing whether to self-disclose will be how the DOJ applies this new guidance in practice, including how DOJ defines several key terms in the guidance such as "voluntary self-disclosure made immediately," "effective compliance program," and "extraordinary cooperation."

This new guidance is also likely to be followed by additional guidance in the coming months. Deputy Attorney General Lisa Monaco forecasted in her September 2022 speech and memorandum that the Criminal Division would be drafting guidance on clawbacks and financial incentives for compliance, as well as on the use of messaging apps and personal devices.

1. Background

The CEP was first introduced in April 2016 as a one-year pilot program seeking to encourage companies to voluntarily self-disclose relevant facts regarding FCPA-related misconduct, cooperate with DOJ's investigation, and remediate. Companies that satisfied the requirements of the pilot program were eligible from up to a 50% reduction off the bottom end of the applicable U.S. Sentencing Guideline fine range calculation, as well as an increased likelihood of a declination.

Following this trial period, in November 2017, DOJ formally adopted the pilot program as the FCPA Corporate Enforcement Policy and added the CEP to the Justice Manual, which provides policies and guidance for federal prosecutors. The CEP established a presumption that a company would receive a declination from DOJ if, "absent aggravating circumstances involving the seriousness of the offense or the nature of the offender," the company voluntary self-disclosed, fully cooperated, and timely and appropriately remediated. In March 2018, DOJ announced through a series of speeches that the CEP would serve as nonbinding guidance for all corporate cases in the Criminal Division, rather than just FCPA cases.

The new revisions announced by AAG Polite this week come just four months after DAG Monaco's September 2022 announcement of new guidance related to DOJ corporate enforcement. That guidance requires all DOJ components—including U.S. Attorney's Offices—to issue written voluntary self-disclosure policies and outlines the benefits of self-reporting. Our client alert about that guidance can be found here. At the time of DAG Monaco's speech, the only DOJ components with such policies on the books were the Criminal Division, Antitrust Division, and National Security Division. No other component has yet to promulgate a written policy.

2. Revisions to the CEP

AAG Polite announced several key changes to the CEP, though the impact of these changes will depend on how they are applied.

A. Application of the policy

The revised CEP now formally applies to all corporate cases in the DOJ Criminal Division. Although this had been the practice since 2018, the introduction of the revised CEP now states: "This policy—previously known as the FCPA Corporate Enforcement Policy—applies to all FCPA cases nationwide and all other corporate criminal matters handled by the Criminal Division." The Criminal Division houses the Fraud Section and Money Laundering and Asset Recovery Section, two of the components of DOJ that bring a significant number of corporate cases, including those involving anti-money laundering and Bank Secrecy Act violations (AML/BSA), FCPA violations, and healthcare, financial, and securities fraud.

Importantly, the revised CEP does not directly apply to other parts of DOJ outside the Criminal Division, such as U.S. Attorney's Offices and the Civil Divisions. Nonetheless, the policies are likely to have some force in other parts of DOJ jointly investigating corporations with the Criminal Division, and as a result of DAG Monaco's September 2022 announcement requiring all Department components to issue written self-reporting guidance.

B. Overcoming aggravating circumstances

Until now, when a company voluntarily self-disclosed, fully cooperated, and fully remediated, there was a presumption of a declination absent aggravating circumstances. The policy previously defined and still does define "aggravating circumstances" to include, but not be limited to, "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism." The CEP, however, did not previously specify if a declination was still possible when aggravating circumstances were present. The new version of the CEP explicitly provides that a company may obtain a declination even in the presence of aggravating circumstances, but the company must have met all of the following criteria:

- the voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct;
- at the time of the misconduct and disclosure, the company had an effective compliance program and system of internal accounting controls, which enabled the identification of the misconduct and led to the company's voluntary

self-disclosure; and

– the company provided extraordinary cooperation with DOJ's investigation and undertook extraordinary remediation that exceeds the respective factors listed herein.

Although this revision appears to increase the possibility of securing a declination in the face of aggravating circumstances, these new factors, at least on their face, may pose significant hurdles and uncertainties, and in fact may make it more difficult to obtain a declination. For example, the CEP does not define what counts as an "immediate" voluntary self-disclosure or how that can be accomplished given the significance of the decision to walk a case into DOJ. Understandably, companies may be wary of making an immediate self-disclosure without first having an opportunity to undertake at least some meaningful investigation to determine if, in fact, there is merit to the allegation. Although the definition of an "effective compliance program" at the time of misconduct likely comports with the Evaluation of Corporate Compliance Programs guidance, this is a very high bar to satisfy for many companies. Finally, AAG Polite did not provide a clear definition of "extraordinary" cooperation, but did say:

> "In assessing the quality of a cooperator's assistance, we value: when an individual begins to cooperate immediately, and consistently tells the truth; individuals who allow us to obtain evidence we otherwise couldn't get, like quickly obtaining and imaging their electronic devices, or having recorded conversations; cooperation that produces results, like testifying at a trial or providing information that leads to additional convictions … [W]e know "extraordinary cooperation" when we see it, and the differences between "full" and "extraordinary" cooperation are perhaps more in degree than kind."

Until DOJ defines these terms, it is unclear whether the new revisions will meaningfully increase a company's incentive to make voluntary self-disclosures and cooperate with DOJ investigations.

Notably, under the prior version of the CEP, DOJ awarded declinations despite the presence of aggravating circumstances (e.g., the involvement of senior executives of the company) and even when those three criteria (relating to immediate self-disclosure, an effective compliance program that enabled the identification and self-disclosure of the alleged misconduct, and extraordinary cooperation/remediation) were not met. It is unlikely that at least some companies that were previously awarded declinations would have qualified for a declination under the new, tougher criteria.

Thus, it may be that these revisions have the (perhaps unintended) consequence of deterring companies from voluntarily self-disclosing misconduct where aggravating circumstances are present, which ironically is likely the category of cases that DOJ would be most interested in investigating, and what follows may be a tougher decision with respect to self-disclosure.

C. Discounts off the Sentencing Guidelines fine range

Another aspect of the policy—the so-called "carrot"—is the revised and increased discounts off the U.S. Sentencing Guidelines fine range in an effort to further incentivize voluntary self-disclosure, cooperation, and remediation.

Previously, when a company voluntarily self-disclosed, fully cooperated, and remediated, but a criminal resolution was nevertheless warranted (for example when aggravating circumstances were present), the company could achieve at most a 50% reduction off the low end of the U.S. sentencing guidelines range. Now, such a company can obtain between a 50%-75% discount off the low end of the guideline range. However, if the company is a recidivist, the 50%-75% discount could be taken from another point in the guideline range (e.g., as a discount off the midpoint of the guideline fine range, instead of the low end).

Likewise, under the prior guidance, when a company did not voluntarily self-disclose, but fully cooperated and remediated, the company could obtain up to a 25% discount off the low end of the guidelines fine range. The revised CEP now prescribes a discount of up to 50%, with the same caveat for recidivists. Importantly, AAG Polite noted that the 50% discount will not be the new normal. Rather, it "will be reserved for companies that truly distinguish themselves and demonstrate extraordinary cooperation and remediation." As described above, "extraordinary" cooperation and remediation is a high bar to satisfy.

In addition to these "carrots," the revised CEP also includes a "stick." AAG Polite made a point to "underscor[e] that a corporation that falls short of our expectation does so at its own risk. Make no mistake—failing to self-report, failing to fully cooperate, failing to remediate, can lead to dire consequences." He added that the Department will "be closely examining how companies discipline bad actors and reward good ones" and noted that failure to do so "risk[s] increasing its criminal exposure and monetary penalty."

3. Key takeaways

Overall, the CEP revisions are another indication that DOJ is acutely focused on corporate enforcement and incentivizing voluntary self-disclosures, cooperation, and remediation.

And consistent with the practice of the DOJ Criminal Division for a number of years now, the revisions provide additional transparency as to how the Criminal Division will treat cases where the company voluntarily self-discloses, fully cooperates, and remediates. It is certainly helpful for companies to now know for certain that the CEP applies to all corporate cases in front of the Criminal Division, and where the Division's thinking rests.

Nonetheless, some uncertainty around the CEP will remain until DOJ applies the new policies and defines key terms. Additionally, the CEP's new criteria for a corporation to overcome aggravating circumstances may have the unintended consequence of deterring self-disclosures given the higher bar for obtaining declinations, and it is unclear whether the new increased financial incentives will motivate additional cooperation. In other words, if a company was disinclined to voluntarily self-disclose, fully cooperate, or appropriately remediate previously, it is likely that this incremental increase in discounts will not persuade them to do so.

Finally, looking forward, and as noted above, we expect that DOJ will continue to provide additional guidance related to clawbacks and financial incentives for compliance, as well as on the use of messaging apps and personal devices as a way to measure the effectiveness of a company's compliance program.

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