DOJ Criminal Division Issues Updated Corporate Enforcement and Voluntary Self-Disclosure Policy

International Alert

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On January 17, 2023, following remarks by Assistant Attorney General (AAG) Kenneth A. Polite, Jr., at Georgetown University Law Center, the Department of Justice's (DOJ) Criminal Division issued its revised Corporate Enforcement and Voluntary Self-Disclosure Policy (the Policy or CEP). The revised Policy follows Deputy Attorney General (DAG) Lisa Monaco's memorandum sharing "initial revisions" to the DOJ's corporate criminal policies in October 2021 and her memorandum detailing " further revisions" on September 15, 2022 (the Monaco Memorandum). Publication of the revised Policy was prompted in part by a request from the DAG for all DOJ components to issue formal policies that "clarify the benefits of promptly coming forward to self-report" and "make the case in the boardroom that voluntary self-disclosure is a good business decision."

The revisions to the CEP implement and further elaborate on policy changes announced in the Monaco Memorandum and likely reflect further consideration of public and private feedback on those policies after September 2022. To the likely disappointment of some compliance personnel, the revised Policy does not contain promised guidance on important issues such as how the DOJ will assess compensation clawbacks and specific DOJ expectations related to corporate policies on the management of use of personal devices and third-party messaging platforms. This alert highlights key changes and areas of interest for compliance personnel.

A Single Policy Across the Criminal Division

The revised Policy supersedes what was previously known as the FCPA Corporate Enforcement Policy (the FCPA CEP) and will apply on a prospective basis "to all FCPA cases nationwide and all other corporate criminal matters handled by the Criminal Division." The policy formalizes the DOJ's practice of applying the FCPA CEP on a division-wide basis, which AAG Polite noted had been happening "[s]ince at least 2018."

The DOJ's Three Fundamental Standards for Companies Remain the Same, But the Revised Policy Enhances Potential Benefits in Certain Circumstances

The primary revisions center on incentives that prosecutors may offer to companies with less-than-pristine criminal and compliance records or certain aggravating circumstances. Consistent with longstanding DOJ practice, the actions that companies need to take to be eligible for these incentives remain tied to three broad categories: (1) voluntary self-disclosure "at the earliest possible time"; (2) full cooperation with the DOJ's investigation; and (3) "timely and appropriate remediation" of the issues raised by the potential misconduct.

Presumption of Declination

Like the former FCPA CEP, the revised Policy establishes "a presumption that [a] company will receive a declination" if the company "has voluntarily self-disclosed misconduct to the Criminal Division, fully cooperated, and timely and appropriately remediated" under the Policy's standards, "absent aggravating circumstances involving the seriousness of the offense or the nature of the offender." In addition, a company must "pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue."

Also in line with the prior policy, the revised Policy defines "aggravating circumstances" as including "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." Some DOJ public statements since the issuance of the Monaco Memorandum have suggested that recidivism may not be an aggravating factor, but the revised Policy makes clear

that, as before, past violations can be considered as aggravating circumstances. As will be discussed below, the revised Policy gives DOJ prosecutors more discretion when dealing with recidivist companies.

Some Relief for Corporate Recidivists and Other Cases with "Aggravating Circumstances"

The revised Policy contains a new section on how companies in cases that present "aggravating circumstances" will be treated. Much of the focus of AAG Polite's speech on this aspect focused on recidivism as such a factor, though neither the revised Policy nor the speech added further context beyond the Monaco Memorandum as to how the DOJ will analyze which company is considered a recidivist. However, the revised Policy makes clear that similar considerations will inform other aggravating factors.

While in such cases the presumption of a declination would not apply (as was the case under the prior FCPA CEP), under the revised Policy prosecutors can still offer a declination (with disgorgement) if the following factors are present (emphasis added):

- 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"
- "The company provided *extraordinary cooperation* with the Department's investigation and undertook *extraordinary remediation* that exceeds" the normal standards under the revised Policy

Enhanced Benefits for Companies Subject to Criminal Resolutions

The revised Policy offers added incentives to companies that self-disclose, fully cooperate, and effectively remediate, including corporate recidivists and companies facing other aggravating circumstances, in circumstances where the DOJ determines that a company is ineligible for a declination.

First, the Policy states that the DOJ "will accord, or recommend to a sentencing court, at least 50% and *up to a 75% reduction off of the low end* of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist" (emphasis added). This marks an increase in the potential penalty calculation benefit, which the prior FCPA CEP set at a maximum of 50 percent reduction. Recidivists can still obtain "a reduction of at least 50% and up to 75%" but such a reduction "will generally not be from the low end of the U.S.S.G. fine range, and prosecutors will have discretion to determine the starting point for the reduction based on the particular facts and circumstances of the case."

Second, in such cases the DOJ "will generally not require a corporate guilty plea…absent the presence of particularly egregious or multiple aggravating circumstances…." Both the revised Policy and AAG Polite's related speech noted that this will also be the case for recidivist companies. The eligibility of recidivists for such a benefit softens earlier statements by DAG Monaco criticizing past patterns of successive deferred prosecution agreements (DPAs)/non-prosecution agreements (NPAs) for recidivist companies but is meant to emphasize the importance that the DOJ places on voluntary self-disclosure, especially.

Third, "generally" no Monitor will be required "if a company has, at the time of resolution, demonstrated that it has implemented and tested an effective compliance program and remediated the root cause of the misconduct." This aspect of the Policy aligns with both the prior FCPA CEP and the Monaco Memorandum and continues the DOJ's focus on companies ensuring that their compliance program is sufficiently tested before making a final determination on a monitorship.

Enhanced Incentives Even Where Self-Disclosure is Not Credited

The revised Policy updates the incentives offered by the DOJ in cases in which the company does not self-disclose, "but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth" in the Policy. In such cases, "the company will receive, or the Criminal Division will recommend to a sentencing court, up to a 50% reduction off of the low end of the U.S.S.G. fine range." If recidivism is present, the company is still eligible to receive up to a 50 percent reduction, but the

starting point to apply the reduction will "generally not be from the low end… of the fine range." As AAG Polite pointed out, this reduction is "twice the maximum amount of a reduction available under the prior version of the [FCPA] CEP."

Under the revised Policy, DOJ prosecutors "will have discretion to determine the specific percentage reduction and starting point in the range based on the particular facts and circumstances of the case." AAG Polite noted in his speech that "[a] reduction of 50% *will not be the new norm* ; it will be reserved for companies that truly distinguish themselves and demonstrate extraordinary cooperation and remediation" (emphasis added). We comment on what may be meant by such "extraordinary" cooperation below. Generally, AAG Polite asserted that "having a greater range of cooperation and remediation credit available…and using the full spectrum of the Guidelines from which to apply those reductions — will allow our prosecutors to draw greater distinctions among the quality of companies' cooperation and remediation."

Additional DOJ Definitions, Commentary, and Open Questions

The revised Policy contains some additional or updated commentary from the DOJ on several aspects of its core requirements but does not provide additional insight into some key open questions originating from the September 2022 Monaco Memorandum.

Timing and Effectiveness of Self-Disclosures

The revised Policy is the latest in a long line of DOJ pronouncements citing voluntary self-disclosure as a critical element for companies looking for favorable treatment in investigations. The Policy, while retaining the generally broad discretion available to prosecutors to address case-specific facts and circumstances, discusses significant and concrete benefits available to companies that disclose issues. The DOJ also continues to push companies toward disclosure at a very early stage.

In new language, the revised Policy states that the DOJ "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*" (emphasis added). Existing prior language requiring disclosure "within a reasonably prompt time after becoming aware of the misconduct, with the burden being on the company to demonstrate timeliness" remains. The pressure on companies facing "aggravating circumstances" is potentially even greater since, as noted, to gain benefits such companies must disclose "*immediately* upon the company becoming aware of the allegation of misconduct." New language notes, as well, that the DOJ will make a "careful assessment of the circumstances of the disclosure, including the extent to which the disclosure permitted the [DOJ] to preserve and obtain evidence as part of its investigation." Finally, the revised language makes clear that, to be credited, a disclosure "must be to the Criminal Division," implying that disclosures to other agencies will not be credited. The Policy does allow disclosure credit for a "good faith disclosure to another office or component of the" DOJ that is referred to the Criminal Division.

In his speech, AAG Polite stated that a company's "clearest path to avoiding a guilty plea or an indictment is voluntary self-disclosure" which is "also the clearest path to the greatest incentives that [the DOJ] offer[s], such as a declination with disgorgement of profits." He also noted that "a functioning compliance program with effective detection mechanisms best positions companies to not only identify misconduct…but to make the important decision of whether to disclose it." The speech asserts that the DOJ "fully understand[s] the significance of a company's decision to voluntarily self-disclose and fully cooperate, and the consequences that such a decision brings," but also admonishes that "a corporation that falls short of our [significant] expectations does so at its own risk."

As we have noted previously, given that FCPA investigations increasingly involve authorities in other countries, companies also will be forced to consider the costs and benefits of ever-earlier disclosure to non-U.S. enforcement agencies, such as the investigation costs of potential earlier involvement of local counsel or potential fallout if the company's disclosures to the various agencies are not aligned.

"Full"/"Extraordinary" Cooperation and Updated Foreign Data Privacy Law Requirements

The revised Policy's standards for credit for full cooperation mostly carry over the key considerations from the former FCPA CEP,

though some revised language emphasizes DAG Monaco's consistent focus on prioritizing the sharing of evidence related to culpability of all involved individuals. The Policy states that a company must disclose "all relevant, non-privileged facts known to it, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue, including individuals inside and outside of the company regardless of their position, status, or seniority." Language requiring, for example, "attribution of facts to specific sources where such attribution does not violate the attorney-client privilege" and "rolling disclosures of information" as internal investigations proceed remains in place.

New commentary makes clear that "[a] cooperating company must earn credit for cooperation. In other words, *a company starts at zero cooperation credit and then earns credit for specific cooperative actions* (as opposed to starting with the maximum available credit and receiving reduced credit for deficiencies in cooperation)" (emphasis added). An additional new and lengthy paragraph discusses how prosecutors should weigh aspects of cooperation in line with the broad discretion indicated in the various sections on enhanced benefits discussed above.

The revised Policy continues to bolster the DOJ's insistence that, to receive credit for cooperation, companies must be "proactive," "voluntary," and "genuine" cooperators. The Policy notes that "the most substantial reductions [should be] reserved for only the most extraordinary levels of cooperation and remediation." In his speech, AAG Polite shared guidance that DOJ prosecutors will consider four concepts when assessing whether cooperation could be considered "extraordinary": "immediacy, consistency, degree, and impact." For example, prosecutors can consider whether a corporate defendant cooperated immediately from the start of an investigation; "consistently told the truth"; provided evidence that might be otherwise unobtainable – "like quickly obtaining and imaging electronic devices or [providing] recorded conversations"; and whether the assistance provided by the corporate defendant led to "results [such as] testifying at trial or providing information that leads to additional convictions."

Consistent with the Monaco Memorandum's statements of concern about the effect of foreign data privacy and similar laws on access to evidence, the Policy contains revised language as to companies' obligations in this area to receive cooperation credit. Companies continue to "bear the burden of establishing the existence of such a prohibition or restriction" on accessing or providing information and now must "identify[] reasonable and legal alternatives to help the Criminal Division preserve and obtain the necessary facts, documents, and evidence for its investigations and prosecutions." This language replaces the former FCPA CEP's requirement that companies "should work diligently to identify all available legal bases to provide such documents" – and could be read to allow for greater flexibility for companies to work out potential practical solutions or alternatives, though that will depend on future DOJ positions in each case.

Effective Remediation and No Additional Guidance on Executive Compensation or Management of "Personal Devices" and "Third Party Applications"

The language in the revised Policy largely duplicates the prior iteration's standards for companies to obtain credit for effective remediation, though there are several modifications to the eight criteria set out for an effective compliance program. For example, the Policy changes "culture of compliance" to a "commitment to instilling corporate values that promote compliance." The fourth element specifically adds consideration of "the access the compliance function has to senior leadership and governance bodies," recognizing this important aspect for ensuring effective program support. And new language calls for "testing" rather than "auditing" of compliance program effectiveness, a change likely intended to encourage the use of more varied tools to assess program performance.

Overall, a clear goal of the revised Policy is to encourage further the proactive development and maintenance of effective compliance programs, for companies at risk of being considered recidivists in particular. Recidivists or others facing aggravating circumstances can receive substantial benefits, but only if they have effective compliance programs in place "at the time of misconduct" that "enabled the identification of the misconduct and led to the company's voluntary self-disclosure." Given past public pronouncements by AAG Polite, the likely intention is to provide more concrete benefits that corporate compliance officers can cite to obtain appropriate resources for compliance programs and related controls.

The revised Policy does not include promised additional DOJ guidance on expectations related to compensation clawbacks and related remediation, which was a focus of the Monaco Memorandum. The language continues to state that discipline is expected for "those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred."

One potential challenge related to clawbacks is the revised Policy's continued requirement that, to obtain remediation credit, a "company must have effectively remediated at the time of the resolution." Given that clawbacks can result in sometimes protracted litigation, it is unclear how the DOJ will weigh the efforts of companies that engage in attempts to retrieve compensation related to potential wrongdoing but are unable to finalize the process before the time of a disposition with the DOJ.

The revised Policy does not include new DOJ expectations for corporate practices regarding use of personal devices and third-party messaging platforms; per the Monaco Memorandum, additional information on this topic is expected for the next reiteration of the DOJ's guidance on the Evaluation of Corporate Compliance Programs. The Policy includes the same language from the prior FCPA CEP that requires companies to "implement[] appropriate guidance and controls on the use of personal communications and messaging applications, including ephemeral messaging platforms, that may undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations." One possibility that could play out under the revised Policy is that, to qualify for extraordinary cooperation that may lead to a declination, the DOJ may expect all types of companies to implement the stringent document retention requirements that are presently required of financial institutions, including ephemeral messaging and personal device prohibitions, testing and discipline for violators.

Merger & Acquisition Due Diligence and Remediation

Finally, the revised Policy's section on "M&A Due Diligence and Remediation" – which is largely the same as the prior FCPA CEP's section, including as to requirements for a presumption of declination – adds a new sentence at the end regarding "aggravating circumstances." The sentence notes that "[i]n appropriate cases, an acquiring company that voluntarily self-discloses misconduct as set forth in this paragraph may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity."

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The revised Policy represents the latest DOJ attempt to encourage early self-disclosure, full cooperation, and substantial remediation efforts by companies facing FCPA and other criminal issues and sets out some concrete examples of benefits that will inure in such circumstances. AAG Polite in his speech discussed several recent cases (including non-FCPA matters) as examples of how the DOJ will apply the Policy in practice. We will address the FCPA matters in our upcoming FCPA Review. However, companies likely will continue to want to see further examples of coherent application of such benefits in future cases, especially as regards the always complicated decision regarding self-disclosure.

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