

DOJ Criminal Division Announces New Round of Revisions to Corporate Enforcement Policy

January 23, 2023

Key Points

- On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. announced revisions to the DOJ Criminal Division's corporate enforcement policy that offer new incentives to self-disclose corporate misconduct, even when there may be aggravating circumstances.
- Under the revised policy, the Criminal Division may decline to prosecute companies that self-disclose, maintain an effective compliance program, provide "extraordinary cooperation" and fully remediate, even if there are aggravating circumstances such as criminal recidivism, senior management culpability or pervasive misconduct.
- If companies do not self-disclose, the Criminal Division will nevertheless recommend up to a 50 percent reduction from the Sentencing Guidelines fine range upon a showing of full cooperation and timely remediation.

Background

On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. **announced** revisions to the Department of Justice (DOJ or the "Department") Criminal Division's corporate enforcement policy. The **revisions** are aimed at further encouraging companies to self-report misconduct and cooperate with the government.

These changes build upon the DOJ's voluntary self-disclosure incentive program, which was first announced in 2016 and later incorporated into the Justice Manual as the FCPA Corporate Enforcement Policy. They also follow Deputy Attorney General Lisa O. Monaco's September 2022 **announcement** calling for all Department components "to clarify the benefits of promptly coming forward to self-report, so that chief compliance officers, general counsels, and others can make the case in the boardroom that voluntary self-disclosure is a good business decision."

While Polite acknowledged that making the decision to cooperate involves "complex discussions" and that every company should do what is in its best interest, he emphasized that "failing to self-report, failing to fully cooperate, [and] failing to remediate, can lead to dire consequences."

Contact Information

If you have any questions concerning this alert, please contact:

Peter I. Altman

Partner

paltman@akingump.com

Los Angeles

+1 310.728.3085

Michael A. Asaro

Partner

masaro@akingump.com

New York

+1 212.872.8100

James Joseph Benjamin Jr.

Partner

jbenjamin@akingump.com

New York

+1 212.872.8091

Paul W. Butler

Partner

pbutler@akingump.com

Washington, D.C.

+1 202.887.4069

Karen Elizabeth Christian

Partner

kchristian@akingump.com

Washington, D.C.

+1 202.887.4265

Charles F. Connolly

Partner

cconnolly@akingump.com

Washington, D.C.

+1 202.887.4070

Estela Díaz

Partner

ediaz@akingump.com

New York

+1 212.872.8035

Three Primary Changes in the Revised Policy

According to Polite, the revised policy is designed to “make clear that there will be very different outcomes for companies that do not self-disclose, meaningfully cooperate with our investigations, or remediate.” The changes apply to all corporate criminal matters handled by the Criminal Division, including all Foreign Corrupt Practices Act (FCPA) cases, and are effective on a prospective basis as of January 2023.

A. The DOJ may decline to prosecute companies that provide “extraordinary cooperation” despite the presence of aggravating circumstances.

The former policy created a presumption that the DOJ would decline to prosecute companies that voluntarily self-disclosed misconduct, fully cooperated and timely remediated the misconduct. Importantly, however, this presumption did *not* apply if “aggravating circumstances” were present. “Aggravating circumstances” included involvement by executive management in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism by the company.

The revised policy clarifies that aggravating circumstances are not a disqualifier for a corporate declination. Under the revised policy, although a company won’t qualify for a *presumption* of a declination if aggravating circumstances are present, the DOJ may nonetheless determine that a declination is the appropriate outcome if the company can demonstrate three factors:

- Immediate voluntary self-disclosure;
- A preexisting compliance program that was sufficiently effective to identify the misconduct and trigger the self-disclosure in the first place; and
- “Extraordinary” cooperation with the government’s investigation, including “extraordinary” remediation.

Although the potential for a declination is extremely attractive, these conditions will not be easy to satisfy in some cases. For example, the emphasis on “immediate” self-disclosure may be challenging for companies that are struggling to understand the nature and scope of an apparent violation. With respect to the third factor, the definition of “extraordinary” cooperation and “extraordinary” remediation remains subjective. Polite described the former as “not just run of the mill, or even gold-standard cooperation, but truly extraordinary” cooperation. Going forward, it remains to be seen how the Department distinguishes between “gold standard” and “extraordinary” cooperation, which some observers might have thought would be synonymous.

B. Even when a criminal resolution is warranted, the DOJ will provide increased incentives for companies that self-disclose misconduct, fully cooperate and timely remediate.

Under the revised policy, even if the DOJ determines that a criminal resolution is appropriate, there are significant incentives for companies to self-report, fully cooperate and remediate. In these circumstances, the Criminal Division will now recommend at least 50 percent and up to a 75 percent reduction from the low end of the Sentencing Guidelines fine range—an increase from the previous *maximum*

Katherine R. Goldstein
Partner
kgoldstein@akingump.com
New York
+1 212.872.8057

Mark J. MacDougall
Partner
mmacdougall@akingump.com
Washington, D.C.
+1 202.887.4510

Ian P. McGinley
Partner
imcginley@akingump.com
New York
+1 212.872.1047

Stacey H. Mitchell
Partner
shmitchell@akingump.com
Washington, D.C.
+1 202.887.4338

Claudius B. Modesti
Partner
cmodesti@akingump.com
Washington, D.C.
+1 202.887.4040

Thomas C. Moyer
Partner
tmoyer@akingump.com
Washington, D.C.
+1 202.887.4528

Parvin Daphne Moyne
Partner
pmoyne@akingump.com
New York
+1 212.872.1076

Jonathan C. Poling
Partner
jpoling@akingump.com
Washington, D.C.
+1 202.887.4029

Raphael Adam Prober
Partner
rprober@akingump.com
Washington, D.C.
+1 202.887.4319

Thomas Napoli
Associate
napoli@akingump.com
New York
+1 212.872.8022

reduction of 50 percent—unless the corporation is a recidivist, in which case the reduction generally will not be from the low end of the fine range.

Perhaps more importantly, if a corporation self-reports, cooperates and remediates, the DOJ generally *will not* require a corporate guilty plea, including for criminal recidivists, absent “particularly egregious or multiple aggravating circumstances.” Likewise, the Department generally *will not* require appointment of a monitor for such companies, provided that they have implemented and tested an effective compliance program.

C. Companies that failed to self-disclose misconduct will have increased incentives to later cooperate with the government.

Companies that do not voluntarily self-disclose, but later fully cooperate and timely remediate, can expect up to a 50 percent reduction from the low end of the Guidelines fine range—twice the amount available under the prior version of the policy—unless the company is a recidivist, in which case the reduction will likely not be off of the low end of the range. However, under the revised policy, a full 50 percent reduction will be “reserved for only the most extraordinary levels of cooperation and remediation.” In describing what is required to qualify for these benefits, Polite stated that “each and every company starts at zero cooperation credit and must earn credit based on the parameters and factors outlined” in the policy.

Individual Accountability

In his speech, Polite pointedly re-emphasized the Criminal Division’s “number one goal” of seeking “individual accountability” for corporate criminal conduct. This sentiment echoes Monaco’s September 2022 remarks, in which she also noted that the DOJ’s “number one priority is individual accountability,” and can be traced back to years of prior statements by senior leaders of the Department.

Consistent with DOJ policy going back to the Yates Memo that was issued during the Obama administration, the revised policy requires, as a key element of voluntary self-disclosure, that companies disclose all relevant facts and evidence about all individuals involved in the misconduct “inside and outside of the company regardless of their position, status, or seniority.” Additionally, “full cooperation” requires the “identification of all individuals involved” in the misconduct at issue, “regardless of their position, status, or seniority,” including the company’s customers, competitors and third parties.

Takeaways

The policy revisions announced by the Criminal Division continue the Department’s longstanding “carrot and stick” approach to corporate criminal misconduct. Polite, who previously served as Chief Compliance Officer of a Fortune 500 company, has tried to encourage companies to prioritize compliance and to engage proactively with the government upon the discovery of violations.

The new policies create incentives for companies to consider self-reporting, even in the presence of “aggravating circumstances.” In particular, the potential for avoiding a corporate guilty plea and the imposition of a monitor will be very attractive. However, the threshold requirements for a declination are not easy to satisfy, and it is difficult to

predict in advance how prosecutors will interpret requirements such as “immediate” self-reporting, “extraordinary cooperation” and “extraordinary remediation.”

As always, it is of paramount importance for board members and senior management of a corporation to create and maintain an effective system of controls, including compliance, and to foster a culture of responsible behavior. These revisions to the DOJ policy may provide a good opportunity to assess the effectiveness of corporate compliance programs to ensure they are equipped to deter, identify and remediate problematic behavior.

akingump.com