

ALERTS

DOJ Highlights Self-Disclosure and Cooperation by Corporate Entities

January 24, 2023

On Jan. 17, 2023, the head of the Criminal Division of the Department of Justice, Assistant Attorney General Kenneth Polite, announced^[1] revisions to the Foreign Corrupt Practices Act (“FCPA”) Corporate Enforcement Policy^[2] (“CEP”) designed to further encourage self-reporting and cooperation by corporate entities. The Criminal Division created a voluntary self-disclosure program for FCPA cases in 2016, which became DOJ policy for all of their corporate prosecutions in 2018. The revised policy that Polite announced last week applies to *all* corporate criminal matters the Criminal Division of DOJ handles,^[3] and seeks to directly incentivize voluntary self-disclosure for all corporate entities in all federal criminal prosecutions.

This comes four months after Deputy Attorney General Lisa Monaco released a memorandum^[4] (“Monaco Memo”), directing each DOJ Division involved in prosecuting corporate crime to adopt policies to be “sufficiently transparent such that the benefits of voluntary self-disclosure are clear and predictable.” Like Monaco, Polite emphasized the strong focus on prosecuting corporate crime and the key role voluntary self-disclosure plays in that effort. These changes strongly encourage self-disclosure and cooperation when, for example, an investment fund learns of potential criminal violations at a company during due diligence or after acquisition of an equity interest in that company.

The DOJ’s Voluntary Self-Disclosure Program

The prior CEP created a presumption that DOJ would decline to prosecute corporate entities that voluntarily self-disclosed, fully cooperated, and appropriately remediated the problem. There was an exception to this presumption when aggravating circumstances existed, including egregious misconduct, involvement of executive management, significant unlawful profits and criminal recidivism. The prior policy did not specify whether a declination was possible if aggravating circumstances were present. According to Polite, this “may have led companies and their outside counsel to conclude, under the prior version of the CEP, that it is more prudent not to disclose the misconduct.”

DOJ’s Revised Corporate Enforcement Policy

Unlike the former version of the Criminal Division’s CEP, the revised policy creates a clear path to declination even where aggravating circumstances are present. Under the new policy, prosecutors may still determine that a declination of prosecution for the corporate entity would be appropriate if:

- 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 the Department’s investigation and undertook extraordinary remediation efforts.

Polite commented that not all corporations will be able to overcome aggravating circumstances, but the revised CEP provides incentives for entities to cooperate even where one or more aggravating circumstances are present. Previously, the Monaco Memo stated that the DOJ ordinarily “will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct.” The revised CEP reaffirms this principle.

The revisions to the CEP strongly encourage self-reporting and cooperation by significantly increasing the fine reductions that corporations can receive by doing so. Under the prior CEP, when a

corporation self-disclosed the unlawful conduct but aggravating circumstances dictated a criminal resolution and not a declination of charges, the Criminal Division “offer[ed] 50% off of the low end of the applicable Sentencing Guidelines penalty range.” The revised CEP increases the incentive to cooperate by providing that, in this circumstance, the Criminal Division will offer at least 50% and up to 75% off of the low end of the applicable penalty range. If a corporation is a recidivist, the revised CEP provides that the reduction generally will not be from the low-end of the fine range, although prosecutors have the discretion to determine the starting point within the penalty range.

The revised CEP incentivizes cooperation by corporations that do not voluntarily self-disclose but do fully cooperate. Entities that do not self-disclose but fully cooperate with DOJ in a timely manner with appropriate remediation will be offered up to 50% off of the low end of the applicable fine range. This doubles the maximum amount of a reduction available under the prior CEP.

Polite explained that the Criminal Division will evaluate “extraordinary cooperation” by entities in the same way it evaluates individuals: “[W]hen 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.” Polite’s message to corporations is that they must go above and beyond the standard criteria to receive full credit for cooperation, stating: “[W]e know ‘extraordinary cooperation’ when we see it.”[5]

Discovery of Potential Criminal Conduct

One common way corporate misconduct is uncovered is when a firm uncovers evidence of criminal conduct during the course of due diligence of an acquisition target. Discovery can also occur post-acquisition, after the acquiring entity takes some level of control over the target. If the misconduct is promptly and voluntarily self-disclosed, the new DOJ policy creates a presumption of declination of prosecution. The misconduct must be uncovered “through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts.” Even where aggravating circumstances exist, acting in accord with the CEP and performing appropriate remediation can now

lead to a declination of prosecution. This directly echoes guidance from high ranking officials at the Securities and Exchange Commission regarding increased transparency in awarding cooperation credit to entities that voluntarily self-disclose, and may materially change the risk/reward analysis when firms become aware of potential criminal conduct at potential or current portfolio companies.

Authored by Peter H. White and Craig S. Warkol.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] Kenneth A. Polite, Jr., Assistant Attorney General, Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law> ("Polite Remarks").

[2] Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, JM 9-47.120, available at <https://www.justice.gov/opa/speech/file/1562851/download>.

[3] DOJ's Antitrust Division has its own Leniency Program which differs in some respects as to the criteria required for a corporate declination of prosecution. See Antitrust Division Leniency Policy and Procedures, JM 7-3.300, available at <https://www.justice.gov/atr/page/file/1490246/download>.

[4] Memorandum from Deputy Attorney General Lisa Monaco, Further Revisions to Corporate Criminal Enforcement Policies (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

[5] Polite emphasized that individual accountability is "[o]ur number one goal in this area." Polite Remarks. In order to receive credit for extraordinary cooperation, DOJ expects cooperating entities to identify all culpable individuals and to take timely disciplinary measures against them regardless of seniority; otherwise "a company runs the risk of increasing its criminal exposure and monetary penalties." *Id.*

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