Regulatory and Enforcement Alert

More Carrots—More Sticks? Changes to the DOJ Criminal Division's Corporate Enforcement Policy

January 18, 2023

Yesterday, Assistant Attorney General Kenneth A. Polite announced newly-effective changes to the Department of Justice's ("DOJ") FCPA Corporate Enforcement Policy, now called the Corporate Enforcement and Voluntary Self-Disclosure Policy (the "CEP"), which will apply to all corporate investigations by the DOJ Criminal Division. The revised CEP, among other things, purports to give Criminal Division prosecutors more discretion to offer corporations additional incentives to self-disclose allegations of wrongdoing, even where certain "aggravating circumstances" (such as involvement by senior management in the misconduct and/or recidivism) would have previously limited cooperation credit. Notably, the CEP still does not expressly apply to other components of the DOJ, including U.S. Attorney's Offices (though coordination among components is typical and encouraged under DOJ policy).

While the proposed changes represent a positive step toward further expanding the incentives to self-report, it remains to be seen whether, on balance, they will ultimately tip the scales in favor of more disclosure. Companies considering a self-report must still weigh the value of these incentives against the various collateral consequences that may accompany such a disclosure.

Original Corporate Enforcement Policy

The CEP originated in April 2016 as a pilot program designed to encourage companies to self-report potential FCPA violations and to cooperate with the DOJ. The policy was later expanded beyond the FCPA and added to the U.S. Attorney's Manual as a guide to federal prosecutors on when and how to exercise discretion in reaching charging decisions. According to the DOJ, since 2018 it has been applied to all corporate cases prosecuted by the DOJ Criminal Division.

The original CEP presumed that a company that (i) voluntarily self-disclosed misconduct, (ii) fully cooperated, and (iii) timely and appropriately remediated would receive a declination[1] from criminal prosecution by the DOJ, absent "certain aggravating circumstances." These "aggravating circumstances" included involvement by the company's executive management in the misconduct, significant profit resulting from the misconduct, pervasive misconduct within the company, and recidivism.

[1] Companies were still required to pay all disgorgement, forfeiture, and/or restitution resulting from any misconduct at issue.

Companies that were not eligible for a full declination because of one or more aggravating circumstances could still receive cooperation credit—up to 50% off the low end of the U.S. Sentencing Guidelines (the "Guidelines") fine range, except for repeat offenders. And companies that did not voluntarily disclose misconduct but later cooperated and remediated could receive up to a 25% fine reduction off the low end of the Guidelines range.

Newly-Effective Revisions to the Corporate Enforcement Policy

The updated CEP purports to include what it describes as additional, "concrete incentives" to self-disclose misconduct, particularly for companies that would not have been otherwise eligible for a *declination* under the old CEP—*e.g.*, companies that are repeat offenders and/or engaged in misconduct that was pervasive, involved the C-suite, or resulted in significant profit.

First, the updated policy permits prosecutors to issue declinations even where so-called "aggravating circumstances" are present, if the company can demonstrate that it has met each of the following three factors:

1. Voluntary self-disclosure made "immediately" upon the company becoming aware of allegations of misconduct;
2. An effective compliance program and a system of internal accounting controls which enabled the identification of the misconduct and led to the voluntary disclosure; and
3. "Extraordinary" cooperation with the DOJ's investigation and extraordinary remediation.[2]

Second, in cases where the DOJ decides that a self-reporting company that satisfies these three factors nevertheless does not deserve a declination, DOJ prosecutors will now recommend to a sentencing court a minimum of 50% and *up to 75%* off the low end of the Guidelines range fine (the previous version provided for a 50% maximum reduction).[3] The DOJ also will generally not require a corporate guilty plea, including for repeat offenders, or the appointment of a monitor if the company has an effective compliance program.

Third, in cases where there is *no self-disclosure* but full cooperation and remediation, the updated CEP provides that the company will receive up to a 50% reduction off the low end of the Guidelines range fine (the previous version provided for a 25% maximum reduction). Notably, there is no indication in the new CEP that companies in this scenario will avoid a guilty plea or a corporate monitor.

With respect to what differentiates "extraordinary" cooperation (eligible for a full declination, even where aggravating factors are present) from "full" cooperation (perhaps only justifying a reduction in fine, not a declination), Assistant Attorney General Polite advised that companies consider concepts traditionally valued by prosecutors regarding individual cooperating defendants: cooperate immediately, consistently tell the truth, facilitate evidence that prosecutors would not otherwise get (like wearing a wire or having recorded

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[2] There is no *presumption* of a declination under this scenario, but rather a decision of prosecutorial discretion.

[3] Recidivists generally may not receive this discount from the *low end* of the Guidelines.

conversations), testify at trial, or provide information that leads to additional convictions. And on the other end of the spectrum, the revised CEP references that a lack of "genuine cooperation" will result in a company receiving minimal to no credit.

With respect to what qualifies as "immediate" self-disclosure, the updated CEP encourages disclosure "at the earliest possible time, even when a company has not yet completed an internal investigation, if it chooses to conduct one," and sets forth specific disclosure requirements for companies to be eligible for credit under the CEP.

Finally, the updated CEP includes the original guidance on self-reporting misconduct uncovered during or after corporate mergers and acquisitions. It provides that a company that uncovers misconduct through "thorough and timely" M&A due diligence or post-acquisition audits or compliance efforts, will be entitled to a presumption of a declination if the company voluntarily self-discloses the misconduct and takes action consistent with the policy overall (including the timely implementation of an effective compliance program at the merged entity). The CEP also explains that an acquiring company that voluntarily self-discloses wrongful conduct (consistent with the policy) may be eligible for a declination even where aggravating circumstances exist as to the acquired entity.

Implications of the Updated Policy and Takeaways

Reading between the lines as to what triggered these recent changes, it may be that the original CEP's incentives to self-report and cooperate did not result in a significant increase in self-reports, and senior DOJ leadership realized that DOJ needed to add more tangible benefits ("carrots") to self-reporting and impose greater disincentives for firms that do not ("sticks"). To be sure, the new CEP does arm Criminal Division prosecutors with additional, concrete incentives to offer companies seeking cooperation credit: even repeat corporate offenders can now, at the discretion of the prosecutor, receive a declination (if they have an effective compliance program at the time of the misconduct and, after learning of the misconduct, immediately self-disclose, remediate and provide extraordinary cooperation to the DOJ). And even companies that may not qualify for this "extraordinary" remedy will be eligible for a minimum of 50% and *up to 75%* off the low end of the Guidelines range fine. These are significant changes from the original CEP.

Of course, it remains to be seen to what extent these new "carrots" will encourage additional companies to come forward and cooperate. As we have written previously, while the possibility of a lenient resolution with DOJ is undoubtedly a powerful incentive to self-report, a self-reporting company that receives a DOJ declination may still be responsible for substantial monetary payments to the DOJ (in the form of disgorgement), regulatory actions by the SEC (for U.S. listed companies) and other domestic federal or state enforcement agencies, follow-on civil litigation, potential regulatory collateral consequences such as debarment, and significant reputational harm. Further, cross-border misconduct that is self-reported to the DOJ under the revised policy will often become public, possibly leading to interest from foreign enforcement authorities with uncertainty as to outcome. Indeed, the policy (like the original version) specifically says that declinations issued will be made public. The potential

for a “piling on” effect may, in certain cases, outweigh the benefits of receiving a declination from a single U.S. regulatory agency.

Finally, in his speech, Assistant Attorney General Polite made clear that DOJ intends to apply the new incentives carefully. In what he described as a “nuanced, but tough approach,” Polite noted that the DOJ’s default in prosecution “is not a declination; it’s not a [non-prosecution agreement]; and it’s not a [deferred prosecution agreement].” Companies will not be presumed to qualify for a declination, they will need to earn it by following the CEP. After highlighting two corporate guilty pleas in 2022 by the DOJ Fraud Section, he previewed that “there will be more in 2023.” In this way, according to Polite, the updated CEP reflects DOJ’s continued commitment to hold corporate actors accountable and an increased expectation that corporations do more to act as “allies in the fight against crime.” Time will tell whether the new CEP includes the right balance of carrots and sticks to achieve this goal. Given that these additional “carrots” in the CEP do not appear to apply to component U.S. Attorney’s Offices, it also remains to be seen (1) whether companies and their counsel will be incentivized to engage in forum shopping, *e.g.*, self-report corporate misconduct to the Criminal Division’s Fraud Section instead of a U.S. Attorney’s Office, and (2) for matters that are reported to U.S. Attorney’s Offices around the country, whether those offices will be receptive to arguments that, in fairness, similar policy considerations as set forth in the CEP should be applied to their resolutions.

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