

ARE YOU EXTRAORDINARY? DOJ'S NEW CORPORATE ENFORCEMENT GUIDANCE PUTS COMPANIES TO THE TEST BUT OFFERS NEW REWARDS TO ENCOURAGE DISCLOSURES, COOPERATION, AND REMEDIATION

On January 17, 2023 the U.S. Department of Justice ("DOJ") [Criminal Division announced the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy \("Revised Policy"\)](#) as part of DOJ's ongoing efforts to incentivize self-reporting of corporate misconduct. The Revised Policy updates the DOJ's [2017 Foreign Corrupt Practices Act \("FCPA"\) Corporate Enforcement Policy \("CEP"\)](#), which first introduced the presumption that a company could receive a declination in FCPA matters. The Revised Policy applies to all corporate criminal matters handled by the Criminal Division, and reflects the DOJ's ongoing public efforts to incentivize companies expeditiously to voluntarily disclose and remediate misconduct, and cooperate fully with Criminal Division investigations. This announcement builds on prior [September 2022 DOJ Guidance](#) that set forth a more aggressive approach to corporate criminal enforcement.

Specifically, the Revised Policy, in cases when a criminal resolution is still appropriate: (1) increases from the maximum possible penalty reduction from the low end of the U.S. Sentencing Guidelines ("USSG") from 50% to 75%, setting 50% as the minimum reduction if, except in the case of a recidivist corporate offender, "a company voluntarily self discloses misconduct, fully cooperates, and timely and appropriately remediates"; (2) increases the available reduction in USSG fines to 50% from 25% for full cooperation without a voluntary disclosure; and (3) amends the M&A due diligence and remediation guidance to allow for declinations even in cases with aggravating circumstances.

Notably, under the Revised Policy, even companies involved in misconduct with "aggravating circumstances" that would not have been eligible for a declination

under the CEP may be offered a declination if the company has voluntarily self-disclosed, had an effective compliance program and accounting controls in place, and provides "extraordinary" cooperation to the investigation.

CRITERIA FOR PRESUMPTION OF A DECLINATION

The Revised Policy reiterates that there is a presumption that a company will receive a declination when it voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remedies that conduct, absent any aggravating factors.

CONSIDERATION OF AGGRAVATING CIRCUMSTANCES AND CREDIT FOR COMPLIANCE

While there is no presumption of a declination for a company involved in serious misconduct with "aggravating circumstances," the Revised Policy allows prosecutors to give a declination when certain factors are met. Previously, the CEP allowed for a 50% reduction off the low end of the USSG fine range and did not require the appointment of a monitor if the company had implemented an effective compliance program. Under the Revised Policy, which expands on those allowances, a company will not presumptively qualify for a declination if aggravating circumstances are present, but a prosecutor may now offer a declination if three conditions are met:

- The company must voluntarily self-disclose immediately upon becoming aware of the misconduct;
- At the time of the misconduct there must have been an effective compliance program and accounting controls in place and those controls must have enabled the identification of the misconduct and led to the self-disclosure; and
- The company must provide "extraordinary" cooperation with the DOJ investigation and must undertake "extraordinary" remediation measures.

Where these conditions are met, the Criminal Division will recommend a reduction of at least 50% but up to 75% off of the low end of the USSG fine range, except in the case of a criminal recidivist in which case the prosecutor will have more discretion. The Criminal Division generally will not require a guilty plea absent aggravating circumstances, and recidivism alone may not require a guilty plea. The Criminal Division will also not generally require the appointment of a monitor so long as the company has demonstrated its effective compliance program and remediated the cause(s) of the misconduct.

LIMITED CREDIT FOR FULL COOPERATION AND TIMELY AND APPROPRIATE REMEDIATION WITHOUT VOLUNTARY SELF-DISCLOSURE

While most of the Revised Policy focuses on self-disclosure, even companies that do not voluntarily self-report may receive reduced fines as an award for cooperation and remedial actions. The Revised Policy increases the available reduction in USSG fines to 50% from 25% in cases in which a company does not voluntarily disclose misconduct to the Criminal Division, but later satisfies the other requirements by cooperating fully, and timely and appropriately remediating.

M&A DUE DILIGENCE AND REMEDIATION

The CEP provided that if a company discovered, during the M&A due diligence process, that an entity it was planning to acquire had committed misconduct and timely reported, there would be a presumption of a declination. The Revised Policy expands on this by adding that a declination may be available even if aggravating circumstances are present.

NEW DEFINITIONS

Like the CEP, the Revised Policy defines what constitutes "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation."

Voluntary Self-Disclosure

The Revised Policy adds two requirements for a company to receive credit for voluntary self-disclosure: (1) the company must disclose to the Criminal Division and (2) the company must not have been under a preexisting obligation to disclose the misconduct. This expands on the three requirements from the CEP: (1) the company must disclose "prior to an imminent threat of disclosure or government investigation," (2) the company must disclose "within a reasonably prompt time after becoming aware of the misconduct," and (3) the company must disclose all relevant, non-privileged facts known to it, including facts relating to individuals, both inside and outside the company, that were involved in or responsible for the misconduct.

Notably, the Revised Policy encourages self-disclosure of potential misconduct as early as possible, even if the company's internal investigation, if it chooses to conduct one, is not yet complete.

Full Cooperation

The Revised Policy describes full cooperation as involving five requirements:

- The company must make timely disclosure of all relevant and non-privileged facts relating to the misconduct, including: facts gathered during a company's internal investigation and timely updates of the investigation, providing specific sources of information, identifying specific individuals, and providing all non-privileged information relating to the individuals' involvement in the misconduct;
- The company must proactively cooperate by disclosing relevant facts, even if not specifically asked to do so, as well as by identifying to the Criminal Division additional opportunities to obtain relevant information that it may not be aware of;
- The company must timely and voluntarily preserve, collect, and disclose relevant documents including the location of any overseas documents and must assist the Criminal Division to obtain any overseas documents;
- The company should not conflict or interfere with the Criminal Division's investigation; and

- The company should make company officers and employees with relevant information regarding the misconduct available for interviews by the Criminal Division.

Timely and Appropriate Remediation

The Revised Policy also defines five requirements for achieving timely and appropriate remediation credit, as follows:

- The company must show a thorough "root cause analysis" of the underlying conduct and possible remediations;
- The company must appropriately discipline the employees it identifies as involved in the misconduct;
- The company must appropriately retain its business records, including implementing guidance on the use of personal communications and messaging applications; and
- The company should take any additional steps to demonstrate its recognition and acceptance of the misconduct and its efforts to reduce the risk of repeating the misconduct.

KEY TAKEAWAYS

By creating an alternative path to obtaining a declination and providing prosecutors with broader discretion to reduce fines, even if an aggravating factor is present, the DOJ is seeking once again to reinforce its message in favor of self-disclosure. In his [remarks](#), Assistant Attorney General Kenneth A. Polite, Jr. recognized that "in many situations, companies that have identified wrongdoing and are weighing whether to self-disclose that conduct to the Department will be concerned that an aggravating factor may prevent a company from obtaining a declination." While the Revised Policy's incentives are intended to address that concern, they require companies "to take extraordinary measures before, during, and after a Criminal Division investigation to earn such an outcome." What the DOJ will consider "extraordinary" remains to be seen (as it is not a defined term), and the need to disclose quickly may concern companies in unclear cases. Whether this mix of incentives and conditions will make a real difference, the Revised Policy certainly will impact the analysis on whether a company should voluntarily disclose.

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