

# U.S. Department of Justice Announces Revisions to Corporate Criminal Enforcement Policy

January 23, 2023

On January 17, 2023, Assistant Attorney General (“AAG”) Kenneth A. Polite announced important revisions to the Department of Justice’s (“DOJ” or “Department”) Corporate Enforcement Policy during a speech at the Georgetown Law Center in Washington, D.C. (the “Speech”).<sup>1</sup> The announcement, which continues the trend of incentivizing voluntary self-disclosure and corporate cooperation, was accompanied by the release of a revised and renamed “Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy” (the “Policy”), which applies to all corporate criminal matters handled by the DOJ’s Criminal Division.<sup>2</sup> The Policy increases, and makes more explicit and concrete, the potential benefits for companies to self-disclose misconduct, cooperate, and remediate, as well as the potential costs for those that fail to do so.

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<sup>1</sup> See Speech, “Assistant Attorney General Kenneth A. Polite, Jr. Delivers 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> (“AAG Polite Speech”).

<sup>2</sup> See Dep’t of Just., Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, <https://www.justice.gov/opa/speech/file/1562851/download>. The Corporate Enforcement Policy had been applied to all corporate criminal cases since 2018. The Policy does not apply to all components of the DOJ; for example, it does not apply to matters handled exclusively by U.S. Attorneys’ Offices. However, many DOJ corporate investigations are handled jointly between a U.S. Attorney’s Office and the DOJ Criminal Division, and U.S. Attorneys’ Offices are expected to develop their own corporate enforcement policies that will likely look to the Policy for guidance and consistency.

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In sum, the Policy gives prosecutors greater latitude to reward voluntary self-disclosure,<sup>3</sup> swift remediation and “extraordinary cooperation” in an effort to incentivize early reporting and remediation by corporations that have identified potential wrongdoing. Of note, the Policy “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.”<sup>4</sup> Under the provisions of the Policy:

- A company is eligible for a declination even when the misconduct involves aggravating circumstances if it voluntarily self-reports as soon as it uncovers misconduct and engages in “extraordinary” cooperation and remediation. Declinations are still subject to disgorgement of ill-gotten gains.<sup>5</sup>
- A company that timely and appropriately self-reports, cooperates and remediates is now eligible for a 50% to 75% reduction from the low end of the U.S. Sentencing Guidelines (“U.S.S.G.”) fine range (or a higher point of the range in the case of recidivism), up from a maximum of 50%.
- A company that does not appropriately self-report, but engages in extraordinary cooperation and remediation, is eligible for up to 50% from the low end of the U.S.S.G. fine range (or a higher point of the range in the case of recidivism), up from a maximum of 25%.
- Even where a criminal resolution is warranted, the DOJ Criminal Division will generally not seek a guilty plea unless there are “egregious or multiple aggravating circumstances” involving the seriousness of the offense or the nature of the offender.<sup>6</sup> By the same token, corporations that

the DOJ Criminal Division identifies as “recidivists” (even those having entered into a prior Deferred Prosecution Agreement with the Department) should not automatically expect a guilty plea.<sup>7</sup>

## Revisions to the Policy

The revised Policy makes three significant changes to the existing version of the Corporate Enforcement Policy: (I) greater opportunity for declinations in the case of voluntary self-disclosures of misconduct; (II) increased potential credit (and overall lower fines) where corporations have voluntarily self-disclosed; and (III) even where companies have not voluntarily self-disclosed misconduct, increased potential credit for cooperation.

### I. Greater Eligibility for a Declination in Case of Voluntary Self-Disclosure

In his Speech, AAG Polite emphasized that the Policy provides important additional incentives for companies to voluntarily self-disclose misconduct so that corporate officers, general counsels and other stakeholders can “make the case in the boardroom that voluntary self-disclosure is a good business decision.”<sup>8</sup>

Under the Policy, a company that voluntarily self-discloses, fully cooperates and appropriately remediates is entitled to a “presumption of declination” with disgorgement of ill-gotten gains, absent aggravating circumstances. Such circumstances include, but are not limited to, involvement by executive management of the company, a significant profit to the company (which is measured relative to the company’s overall profits), egregiousness or pervasiveness of the misconduct, or criminal recidivism.<sup>9</sup> In the presence of aggravating circumstances, a company is not generally entitled to a

<sup>3</sup> This is notable, as credit will be given for voluntary self-reporting to the DOJ Criminal Division or to the Department more generally. *See id.* at 7. For foreign companies that are accountable to multiple authorities, timing will be especially crucial, as reporting to a foreign regulator with a perceived delay in reporting to the Department may not satisfy the Department’s “imminence” requirement under the Policy.

<sup>4</sup> *See id.* at 3.

<sup>5</sup> In line with prior announcements regarding transparency, all declinations under the Policy will be made public. *See id.* at 7.

<sup>6</sup> *See id.* at 2.

<sup>7</sup> *See* AAG Polite Speech.

<sup>8</sup> *See id.*

<sup>9</sup> *See* Corporate Enforcement Policy at 1.

presumption of declination unless the misconduct was uncovered in the context of due diligence for a merger or acquisition.<sup>10</sup>

Nonetheless, in contrast to the prior policy, prosecutors still have the discretion to seek a declination even where such aggravating circumstances are present. The Policy now provides that under the following circumstances, which must all be present, a company may still receive a declination notwithstanding the existence of aggravating factors:

- The company’s voluntary self-disclosure is made “immediately” following awareness of an allegation of misconduct;
- The company’s compliance program and internal controls system was effective at the time of disclosure and identified the misconduct that prompted the self-disclosure; and
- The company provided “extraordinary cooperation” and demonstrated “extraordinary remediation” to the DOJ Criminal Division.

Although the Policy includes a “Definitions” section, the terms “extraordinary cooperation” and “extraordinary remediation” are not defined. However, in his Speech, AAG Polite distinguished extraordinary cooperation from full cooperation: Extraordinary cooperation goes “above and beyond” full cooperation or even “gold-standard cooperation,” and the difference is more likely in degree than in kind. Extraordinary cooperation, according to AAG Polite, is characterized by immediacy, consistency, degree, and impact. Companies may receive extraordinary cooperation credit if, for example, they cooperate immediately, consistently tell the truth, share evidence with the DOJ Criminal Division that might not otherwise be obtainable, and provide information

that leads to additional convictions.<sup>11</sup> Moreover, AAG Polite’s Speech suggests that prosecutors will have wide discretion in determining what constitutes extraordinary cooperation and when a company will get such credit: “[W]e know ‘extraordinary cooperation’ when we see it.”<sup>12</sup>

AAG Polite reiterated in his Speech the DOJ’s repeatedly stated priority to hold accountable the individuals who are criminally culpable—regardless of their position, status, or seniority.<sup>13</sup> He also took the opportunity to flag that the DOJ Criminal Division would closely scrutinize how companies disciplined bad actors and rewarded good ones.<sup>14</sup>

## II. Additional Credit for Voluntary Self-Disclosure (When Ineligible for Declination)

The revisions to the Policy also provide for additional and concrete credit for a company that appropriately self-discloses, cooperates and remediates even where the DOJ has determined that a criminal resolution is warranted (i.e., the company is ineligible for a declination). Where a company was previously eligible for a maximum reduction of 50% from the low end of the U.S.S.G.,<sup>15</sup> the revised Policy adjusts that range to a 50% to 75% reduction from the low end of the U.S.S.G. The Policy provides that companies with a history of misconduct (recidivists) may also be eligible for a 50% to 75% reduction, although not from the low end of the U.S.S.G. fine range.<sup>16</sup> Prosecutors retain significant discretion in determining specific percentage reductions and starting points in the fine range.<sup>17</sup>

<sup>10</sup> *Id.* at 3.

<sup>11</sup> See AAG Polite Speech.

<sup>12</sup> See *id.*

<sup>13</sup> See AAG Polite Speech; see also our Alert Memorandum on this topic, “U.S. Department of Justice Announces Changes to Corporate Criminal Enforcement Policies,” dated Sep. 19, 2022, available at <https://www.clearyenforcementwatch.com/2022/09/u-s->

[department-of-justice-announces-changes-to-corporate-criminal-enforcement-policies/#more-2734](https://www.justice.gov/criminal-fraud/file/838416/download).

<sup>14</sup> See AAG Polite Speech.

<sup>15</sup> See Dep’t of Just., FCPA Corporate Enforcement Policy (updated Mar. 2019), <https://www.justice.gov/criminal-fraud/file/838416/download>.

<sup>16</sup> See Corporate Enforcement Policy, at 2.

<sup>17</sup> See *id.*; AAG Polite Speech.

### III. Increased Potential Credit Absent Voluntary Self-Disclosure

The Policy also increases the potential credit even if a company did not voluntarily self-disclose, but did fully cooperate and remediate. It doubles the possible reduction from the low end of the U.S.S.G. under such circumstances, from a prior maximum cap of 25% to 50%. Corporate recidivists are also eligible for up to a 50% reduction from a higher point in the applicable U.S.S.G. fine range.<sup>18</sup>

While this revision lowers the potential fine a company has to pay in a criminal resolution, AAG Polite warned that a 50% reduction would “not be the new norm.”<sup>19</sup> Rather, he explained that it would be reserved for companies that truly distinguished themselves by demonstrating “extraordinary cooperation and remediation.”<sup>20</sup>

#### M&A Guidance

Consistent with prior guidance, the DOJ Criminal Division recognizes the potential benefits of corporate mergers and acquisitions in developing more robust compliance structures through the acquisition process. Acquirers that identify misconduct pre- or post-close, voluntarily self-disclose the misconduct and appropriately remediate or otherwise implement an effective compliance program will be entitled to a presumption of declination. Eligibility for a declination remains even where aggravating circumstances existed for the acquired entity.

#### Conclusion

The DOJ Criminal Division’s revised Policy seeks to offer companies “new, significant, and concrete incentives to self-disclose misconduct.” Specifically, the Policy sets forth added benefits to (1) the immediate and voluntarily self-reporting of misconduct, (2) the development and maintenance of effective corporate compliance programs, (3) extraordinary cooperation, and (4) full remediation.

The flip side of these incentives is that companies that fail to self-report, cooperate and remediate risk harsher punishment.<sup>21</sup> Key takeaways for companies from these revisions include:

- First, even where aggravating circumstances exist (and thus, declination was not previously an option), the DOJ Criminal Division now retains discretion to decline in the case of voluntary self-disclosure, extraordinary cooperation and remediation.
- Second, the Policy enhances, in a tangible way, the range of potential benefits for voluntary self-reporting, cooperation and remediation through increased opportunities to receive a declination, and a 50% to 75% reduction from the lower end of the U.S.S.G. where a declination is not available.
- Third, the Policy further incentivizes “extraordinary cooperation” and “extraordinary remediation” —even when voluntary self-disclosure was not made—by giving prosecutors wider latitude to vary the starting point and percentage range for calculating a fine based on their assessment of cooperation.
- Fourth, the Policy reinforces the importance of robust and effective compliance programs that can detect wrongdoing early such that companies can self-report swiftly and obtain the benefits of a potential declination, even in the presence of aggravating circumstances.

While the Policy plainly seeks to create greater incentives for companies to voluntarily self-report potential misconduct, a company must weigh these increased and more tangible benefits against the need to understand the extent of potential wrongdoing and liability.

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<sup>18</sup> See Corporate Enforcement Policy, at 2.

<sup>19</sup> See AAG Polite Speech.

<sup>20</sup> Id.

<sup>21</sup> In his Speech, AAG Polite spoke of “very different outcomes” or outright “dire consequences” for companies that did not appropriately self-disclose, cooperate and remediate. See id.