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Bigger Carrots, More Sticks? DOJ Revises Its Corporate Criminal Enforcement Policy

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On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. (“AAG Polite”) announced several key revisions to the Department of Justice (“DOJ”) Criminal Division’s Corporate Enforcement Policy (the “CEP”) governing what credit a corporation can receive with respect to voluntary self-disclosures, cooperation, and remediation.¹ AAG Polite made clear that the Criminal Division’s efforts to investigate and prosecute corporate crime rely on corporations “coming forward and reporting the conduct of the[] wrongdoers” and being DOJ’s “allies in the fight against crime.”

Seeking to tilt the scale in favor of incentivizing more voluntary self-disclosures, the Criminal Division’s newly-titled Corporate Enforcement and Voluntary Self-Disclosure Policy (the “revised CEP”) adapts existing guidelines to allow prosecutors more discretion to decline to prosecute a case and award a larger reduction off of the penalty. The revised CEP also provides helpful clarity for what companies must do to meet the standards outlined in the recent changes to DOJ’s corporate enforcement policies announced by Deputy Attorney General Lisa O. Monaco (“DAG Monaco”), including enhanced investment in tailored and effective compliance programs. But the revised CEP is not all about benefits—AAG Polite made clear that “in providing transparency to the potential incentives,” the Criminal Division is underscoring that “a corporation that falls short of [DOJ’s] expectations does so at its own risk.”

Under the revised CEP, the Criminal Division appears to have increased transparency and created a structure that provides prosecutors with greater ability to differentiate between the behavior of companies by a combination of carrots and sticks. While the revised CEP provides incremental and potentially important changes that may encourage more voluntary disclosures, the continued uncertainty regarding their application and the enhanced obligations for cooperation and compliance—all subject to prosecutorial discretion—are unlikely to move the needle dramatically in making this decision. However, companies can, and should, heed DOJ’s advice to continue to invest in their compliance programs by understanding the specific risks that their company faces.

This article outlines the changes to the revised CEP and provides key takeaways on what these changes may mean for corporations with respect to voluntary self-disclosures (“VSDs”), cooperation, and remediation.

Recent Efforts by DOJ to Toughen its Stance on Corporate Misconduct

Since October 2021, DOJ has issued a series of guidance documents revising its corporate enforcement policies. Most recently, on September 15, 2022, DAG Monaco issued a memorandum outlining changes to DOJ policy governing a wide range of areas, including VSDs, requirements for corporate cooperation

credit, evaluation of prior history of misconduct, independent compliance monitorships, and expectations for corporate compliance programs (the “Monaco Memo”).² The Monaco Memo was the subject of an earlier article published by Paul Hastings.³

Consistent with the original CEP, the Monaco Memo made clear that where a corporation has voluntarily self-disclosed, fully cooperated, and remediated its misconduct: (1) DOJ will not seek a guilty plea, absent aggravating factors; and (2) DOJ will not require the appointment of a monitor if, at the time of resolution, the corporation has implemented and tested an effective compliance program. The Monaco Memo also provided for harsher treatment for corporations who failed to cooperate or had a prior history of misconduct, particularly where the corporation had previously received a non-prosecution agreement (“NPA”) or deferred prosecution agreement (“DPA”).

The Monaco Memo left unanswered, however, how DOJ would treat a corporation that had self-disclosed, cooperated and remediated, but also had aggravating factors, such as involvement by executive management, significant ill-gotten profits, egregious and pervasive misconduct, and/or a prior history of misconduct. In issuing the revised CEP, the Criminal Division provided some helpful guidance on this issue.

Increased Benefits for Companies that Voluntarily Self-Disclose

The revised CEP seeks to encourage more companies to voluntarily self-disclose by: (1) offering larger potential rewards; and (2) providing companies with aggravating circumstances a path to a possible declination. In issuing the revised CEP, AAG Polite recognized that uncertainty over whether a company would receive these rewards could deter certain companies from making a VSD. The revised CEP thus also seeks to provide more transparency and, in turn, more predictability, for companies deciding whether to self-disclose.

First, under the revised CEP, where a criminal resolution (i.e., where there is no declination) is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Criminal Division will now provide a minimum of 50% off of the bottom of the U.S. Sentencing Guidelines (“Guidelines”) range, and up to a maximum of a 75% discount. In cases where the corporation is a recidivist, prosecutors will have discretion over the appropriate starting point for the discount off of the Guidelines range. Previously, there was no minimum discount, and the maximum discount was 50%.

Second, the revised CEP offers the potential for increased benefits for companies whose criminal conduct includes the aggravating factors identified in the Monaco Memo. Under the revised CEP, prosecutors may conclude that a declination is an appropriate outcome for such companies where the following requirements are met:

- The company voluntarily self-disclosed the misconduct immediately upon becoming aware of the allegation of misconduct;
- At the time of the misconduct as well as the disclosure, the company had an effective compliance program and internal accounting controls that enabled the identification of the misconduct and led to the VSD; and
- The company provided extraordinary cooperation with DOJ’s investigation and undertook extraordinary remediation.

Under the revised CEP, even if a resolution is warranted, the Criminal Division will generally not require a corporate plea, including for criminal recidivists, absent particularly egregious or multiple aggravating circumstances excluding recidivism.

In short, the revised CEP encourages more voluntary self-disclosures by guaranteeing at least a 50% discount and providing avenues for benefits for companies with aggravating factors.

Smaller but Significant Benefits for Companies that Do Not Voluntarily Self-Disclose

Even for companies that do not self-disclose, the revised CEP also outlines additional potential benefits for companies that nonetheless fully cooperate and remediate. Under the revised CEP, a company that fully cooperates and remediates is eligible for up to a 50% discount off of the low end of the Guidelines range, except in the case of a recidivist corporation, in which case prosecutors will have discretion to determine the starting point for the reduction. Under the original CEP, the maximum discount for cooperation and remediation alone was 25%. As AAG Polite explained, the increase in the range of benefits would allow prosecutors to draw finer distinctions among the quality of a corporation's cooperation and remediation.

The revised CEP, however, continues the enhanced cooperation obligations from previous policy guidance, such as "timely" disclosure of all facts regarding all wrongdoers, proactive cooperation, and preservation and collection of all documents, including overseas documents and ephemeral messages. Failure to meet these and other cooperation expectations can lead a prosecutor to determine that the company has not provided full cooperation, which can ensure that the company loses out on the enhanced benefits. As AAG Polite noted, "failing to self-report, failing to fully cooperate, failing to remediate, can lead to dire consequences."

More Requirements for Companies to Receive the Higher Benefits, with Harsher Outcomes for Failure to Do So

While outlining the new potential benefits that corporations can receive under the revised CEP, AAG Polite made clear that corporations will have to earn their cooperation credit, with the highest discounts "reserved for companies that truly distinguish themselves and demonstrate extraordinary cooperation and remediation." In explaining what constitutes "extraordinary cooperation," AAG Polite stated that companies must "go above and beyond the criteria for full cooperation set in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary." AAG Polite offered some relevant factors—immediacy, consistency, degree, and impact—that prosecutors will consider in evaluating the "quality" of cooperation.

The greater range of potential benefits may allow prosecutors to differentiate between companies and differing levels and types of cooperation, but companies likely will be examining carefully the factors identified publicly in future cases to understand how DOJ makes its decisions. Given that AAG Polite noted that "failing to take these steps, a company runs the risk of increasing its criminal exposure and monetary penalties," companies must carefully consider when to voluntarily engage with DOJ and what is the likelihood, absent a voluntary self-disclosure, that DOJ will identify the misconduct on its own.

Key Takeaways for Companies

The revised CEP explicitly seeks to increase the number of VSDs made to the Criminal Division by both providing greater transparency on how the Division will treat corporations and offering greater benefits for corporations that meet the CEP requirements. It also makes clear that companies that fail to promptly voluntarily disclose, fully cooperate, and appropriately remediate are at risk of more significant types of

resolution and greater penalties. While it remains to be seen how effective the revised CEP will be in encouraging more VSDs, companies should consider the following in light of the new policy:

- 1. The Benefits of Making a VSD Remain Unclear:** The Monaco Memo left open certain questions about how much credit a corporation, and particularly those with a history of misconduct or aggravating factors, would receive for making a VSD. The revised CEP tries to answer those questions by providing a path for recidivist companies or companies with aggravating factors to receive a declination if they meet the revised CEP's enhanced and stringent requirements. Because the decision still depends heavily on the discretion of the prosecutor, however, companies may still not be able to adequately predict how much weight a VSD may have for the final resolution, especially given the enhanced obligations of cooperation that recent DOJ policies have required.
- 2. Corporations Should Take Steps to Maximize Cooperation Credit:** If a company ends up before DOJ, it should ensure that it takes full advantage of the benefits offered by the revised CEP. The revised CEP provides for substantial discounts off of the Guidelines range for corporations that provide full cooperation, and even higher rewards for corporations that provide "extraordinary" cooperation. Thus, corporations must have clear communication with DOJ not only to ensure that the corporation understands DOJ's expectations for cooperation, but also to ensure that DOJ recognizes—and the corporation receives maximum credit for—all of its cooperation.
- 3. An Effective Compliance Program Remains a Key Factor under the Revised CEP:** The Monaco Memo made clear that having an effective compliance program is an important factor for DOJ in assessing the appropriate resolution, and the revised CEP reinforces that view. Notably, the CEP now also encourages corporations to have effective compliance programs *at the time of the misconduct*, requiring that for any company with an aggravating factor to be eligible for a declination, it must have "an effective compliance program and internal accounting controls that enabled the identification of the misconduct" at the time of the misconduct as well as the disclosure. Companies should take to heart this addition by developing a compliance program based on the "risks related to the businesses in which the organization is engaged." Companies will need to show that their program is tailored based on a comprehensive risk assessment that takes into account the realities of that company's operations, and that the program has been tested to demonstrate effectiveness and continuous improvement.

The Criminal Division is the first of many components of DOJ to revise its enforcement policy as required by the Deputy Attorney General. In the coming months, we expect that other Divisions of "Main Justice" (National Security, Environmental and Natural Resources, and Civil Divisions) along with many U.S. Attorney's Offices will be announcing similar types of policies with slight nuances based on the scope of their cases. The similarities and differences of their policies with the Criminal Division's revised CEP may be enlightening. There is more guidance to come, and companies should carefully consider these policies when evaluating important decisions in interacting with DOJ.

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- ¹ Kenneth A. Polite, Jr., Assistant Attorney General of the U.S. Department of Justice, Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), Washington, D.C. See *also* U.S. Department of Justice, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, JUSTICE MANUAL § 9-47.120 (2023). The Criminal Division investigates and prosecutes organized and transnational crime, securities fraud, health care fraud, Foreign Corrupt Practices Act ("FCPA") violations, money laundering, international narcotics trafficking, and human rights violations, among other federal crimes.
 - ² Lisa O. Monaco, Deputy Attorney General of the U.S. Department of Justice, Memorandum on Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022).
 - ³ Paul Hastings, "New Enforcement Policies Signal an Important Shift in DOJ's Approach to Corporate Prosecutions" (Sept. 20, 2022). This article may be found [here](#).

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