

DOJ Offering Increased Reductions in Fines up to 75% to Incentivize Companies to Voluntarily Report Misconduct

On January 17, 2023, the Department of Justice (DOJ) rolled out a significant change to its existing Corporate Enforcement Policy (CEP) that will grant as much as a 75% reduction in fines for companies that voluntarily self-report wrongdoing to the government and fully cooperate with federal investigations into the conduct.¹ Even companies that fail to disclose wrongdoing before it is known to the government from other sources will remain eligible to receive up to a 50% reduction off the low end of fines calculated for corporate wrongdoers under the U.S. Federal Sentencing Guidelines if they fully cooperate with government investigators — despite the presence of aggravating factors.²

In light of these policy changes, companies should implement stronger compliance policies and internal misconduct reporting requirements, alert legal counsel to any potential misconduct as soon as possible, and take heed: the new policy may dangle a carrot, but it threatens with a stick.

Assistant Attorney General Kenneth Polite, head of the Criminal Division, announced the new policy during a speech given at his alma mater, Georgetown University Law Center, stating that the changes aim to boost incentives for companies to disclose to authorities any misconduct they uncover.³ Polite recognized that under the prior version of the CEP, companies that have potentially identified wrongdoing might decide against self-disclosure if there are aggravating factors present that would prevent the company from receiving a complete declination by the DOJ to prosecute the conduct.⁴

In reaction to that reality, under the new policy, prosecutors may decline to bring charges against companies, even if aggravating factors are present. To be considered for declination, companies must (1) immediately self-disclose the misconduct; (2) have a robust compliance policy currently in place on the front end; and (3) provide extraordinary cooperation and remediation efforts on the back end.⁵

Polite made it clear that cooperators seeking declination will be held to a higher standard than your average or even gold-standard cooperator — the cooperation must be “truly extraordinary.”⁶ The Justice Department will distinguish extraordinary cooperation by assessing the immediacy, consistency, degree, and impact of the cooperation. Prosecutors will expect companies to cooperate immediately, consistently tell the truth, and hand over evidence that the DOJ otherwise would not be likely to obtain, such as quick access to electronic device images, audio/video recordings, trial testimony, and other kinds of cooperation that “produces results.”⁷

The policy also covers corporations conducting business internationally, as the changes will apply to all corporate matters handled by the Criminal Division, including all Foreign Corrupt Practices Act (FCPA) cases nationwide.⁸

Notably, the new policy is the third in a trilogy of Department of Justice memoranda addressing the prosecution of corporate misconduct and setting forth revised policies concerning the effect of cooperation by companies that have engaged in wrongdoing. The new policy was announced to further Deputy Attorney General Lisa Monaco’s October 2021 memorandum directing the creation of a Corporate Crime Advisory Group within the Department to recommend guidance concerning, in part, the nature of a company’s dealings with the government required to receive cooperation credit in resolving company misconduct, and to consider revisions and reforms to the Department’s approach to corporate crime prosecution.⁹ The new policy also follows less than five months after the issuance of a memorandum further clarifying the Department of Justice’s policy



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against seeking a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and properly remediated the conduct at issue in the absence of aggravating factors and directing all department components, including the 93 U.S. Attorney’s Offices across the country, to review its policies on corporate voluntary self-disclosure and ensure it has a publicly available written policy.¹⁰ At the same time, the September 2022 memorandum emphasized DOJ’s commitment to “strong corporate criminal enforcement.”¹¹

Polite likely had these pronouncements in mind as he concluded his speech. He entreated corporations to “come forward, cooperate, and remediate,” and to join the Department of Justice as allies in the fight against crime.¹² But he also warned: “Failing to take these steps, a company runs the risk of increasing its criminal exposure and monetary penalties.”¹³

¹ See 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Jan. 2023),

<https://www.justice.gov/opa/speech/file/1562851/download> [hereinafter, CEP].

² *Id.*

³ See DOJ, “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> [hereinafter, Polite Remarks].

⁴ *Id.*

⁵ See CEP § 2, p. 2, <https://www.justice.gov/opa/speech/file/1562851/download>.

⁶ Polite Remarks.

⁷ *Id.*

⁸ See CEP § 1, p. 1.

⁹ Memorandum from the Deputy Attorney General re: “Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies” (Oct. 28, 2021), https://www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf.

¹⁰ Memorandum from Deputy Attorney General re: “Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group” (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

¹¹ *Id.*

¹² Polite Remarks.

¹³ *Id.*