

DOJ Announces Additional Incentives for Corporate Cooperation in Criminal Enforcement

by RJ Zayed and Elena Modl

On January 17, 2023, Assistant Attorney General for the United States Department of Justice Kenneth A. Polite Jr. announced significant revisions to the Criminal Division's Corporate Enforcement Policy ("CEP"). Four months after Deputy Attorney General Lisa Monaco unveiled the Biden Administration's first substantive changes to white-collar criminal investigations and enforcement, AAG Polite announced "the first significant changes to the Criminal Division's Corporate Enforcement Policy since 2017." The revised CEP applies to all corporate criminal matters prosecuted by the Criminal Division, including misconduct cases governed by the Foreign Corrupt Practices Act. In announcing the revisions, AAG Polite highlighted new incentives for companies who develop internal compliance functionalities, voluntarily self-disclose criminal misconduct, cooperate with criminal investigations, and take steps toward timely and appropriate remediation. The policy reflects three different tiers of incentives based on the particular company's role in disclosure, cooperation, and remediation.

1. Companies with aggravating circumstances may still receive a declination.

Even if aggravating factors are present that would typically bar a company from benefitting from the *presumption* of a declination, **prosecutors may now decline prosecution** if the company can demonstrate:

1. Voluntary self-disclosure immediately followed the company's discovery of misconduct;
2. At the time of the misconduct and subsequent disclosure, the company maintained robust compliance mechanisms and an internal accounting system that identified misconduct and resulted in voluntary self-disclosure;
3. The company provided **extraordinary cooperation and remediation**.

There is no concrete definition of extraordinary cooperation. AAG Polite noted examples of valuable cooperator assistance, including immediate cooperation, rapid organization of

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electronic device imaging, or providing information to secure additional convictions. Ultimately, a company looking to receive credit for extraordinary cooperation 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.”

Practice Point: Companies uncovering misconduct involving executive management, significant profit-gain, egregious or pervasive misconduct, or criminal recidivism should still consider voluntary self-disclosure. AAG Polite noted that companies seeking a declination, even if aggravating factors are present, should strive to take these extraordinary measures before, during, and after the investigation to earn the incentive.

2. Companies that voluntarily self-disclose, cooperate, and remediate are eligible to receive increased fine reductions, even if a criminal outcome is warranted.

1. The criminal division will recommend a reduction of **at least 50% and up to 75%** off the low end of the U.S. Sentencing Guidelines fine range. This significantly increases the maximum potential reduction available and incentivizes voluntary self-disclosure.
2. Generally, companies **will not be required to enter a corporate guilty plea** absent particularly egregious or numerous aggravating factors present.

Notably, criminal recidivists will not receive a reduction from the low end of the fine range and prosecutors will always have discretion to determine where to start within range. However, the criminal division will not require recidivists to enter a corporate guilty plea in most circumstances.

Practice Point: In addition to the advantages of voluntary self-disclosure and cooperation noted above, a reduced fine can have a meaningful impact on a company's bottom-line – both from a financial perspective and regarding outward relations with investors and the public. The brand of a “corporate criminal” can have a negative lasting impact, both financially and publicly, for years to come.

3. Companies that do not self-disclose but later demonstrate full cooperation and timely and appropriate remediation are still eligible for increased fine reductions.

1. The criminal division will recommend up to a **50% reduction** off the low end of the applicable fine range. This is **double the maximum** reduction available under the previous CEP. Criminal recidivists will likely not receive a reduction from the low end of the fine range. Prosecutors will again have the discretion to tailor the reduction percentage and starting point within the range to the particular circumstances.

Practice Point: The revised CEP incentivizes companies who did not voluntarily self-disclose to still fully cooperate and remediate in a timely and appropriate manner. The availability of a wider range of cooperation and remediation credit allows greater discretion for prosecutors to distinguish companies demonstrating high levels of

cooperation and remedial efforts. However, voluntary self-disclosure of criminal misconduct still marks “the clearest path to avoiding a guilty plea or an indictment.” A 50% reduction off the low end of the guideline fine range is the maximum allowed for companies that failed to self-disclose. Compliance programs equipped with effective detection mechanisms allow companies to uncover criminal misconduct in its first instance, determine whether disclosure is necessary, and subsequently benefit from the best incentive offered by the revised CEP.

Takeaway: The standards for corporate cooperation are still high. While up to a 50% reduction off the low end of the Guidelines range is available to companies who did not voluntarily self-disclose, AAG Polite emphasized that “each and every company starts at zero cooperation credit and must earn credit based on the parameters and factors outlined in the CEP.” A reduction of 50% will not become the new normal. Only companies that “truly distinguish themselves and demonstrate extraordinary cooperation and remediation” will receive the reduction. AAG Polite emphasized that they must earn it.

AAG Polite reiterated the DOJ's ultimate goal of promoting individual accountability by examining how companies discipline bad actors and reward good behavior. The DOJ is committed to incentivizing corporate allies to detect and prevent criminal misconduct. The ultimate message for corporations is to come forward immediately, cooperate, remediate if they discover criminal misconduct, and invest the resources required to develop strong compliance functionalities.

The DOJ emphasized the benefits of coming forward and disclosing by providing transparency to potential incentives. However, companies may still consider withholding and risking harsher penalties in some circumstances. We must emphasize that a company that fails to take the outlined steps and falls short of DOJ guidance risks increasing criminal exposure, monetary penalties, and negative perception with investors and the public. There is great significance in making the decision to voluntarily self-disclose and fully cooperate, especially when such decisions are a culmination of complex boardroom discussions. Ultimately, each company should work with its outside counsel to choose what is in the best interest of the company and its constituents.