

DOJ Offers New Incentives in Revised Corporate Enforcement Policy

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On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. [announced](#) what he called “the first significant changes” to DOJ’s Corporate Enforcement Policy since its inception in 2017. The updated policy—now titled the [Corporate Enforcement and Voluntary Self-Disclosure Policy](#) (the “Policy”)—significantly increases the potential benefits for both companies that self-disclose and those that do not, as long as they engage in exemplary cooperation and remediation. The Policy also now applies explicitly to **all** corporate criminal matters handled by the Criminal Division, not only to FCPA cases.

The updated Policy offers new carrots to complement recent sticks and provides welcome guidance on how prosecutors should view corporate recidivism. In particular, the Policy increases various incentives available to companies undergoing criminal investigations and enforcement actions:

- Prosecutors now may offer declinations even in cases where aggravating factors (such as recidivism) are present, as long as the company timely self-discloses, provides extraordinary cooperation and has an effective compliance program that identified the misconduct.
- Even if a declination is inappropriate, voluntary disclosure, full cooperation and effective remediation will yield a discount of **at least 50%** and **up to 75%** off the low end of the fine range under the U.S. Sentencing Guidelines, a material increase from the prior maximum discount of 50%.
- Perhaps most notably, even if a company does not voluntarily disclose, full cooperation and effective remediation still can yield a discount of **up to 50%** off the low end of the Guidelines range, thus doubling the prior discount of up to 25%.
- The Policy also clarifies the impact of corporate recidivism, noting that the 50%–75% discount will be taken from a higher point in the range, at the prosecutor’s discretion, for recidivists, depending on the particular facts and circumstances of the case.

The updated Policy and AAG Polite's related remarks highlight DOJ's continued focus on individual accountability. DOJ clearly views full cooperation from companies undergoing criminal investigations as essential to bringing individual wrongdoers to justice. This includes making employees available for interviews by the Criminal Division, subject to such individuals' exercise of their constitutional right against self-incrimination. Pointing to the strategy behind these incentives, AAG Polite noted that DOJ needs companies to be its "allies" in the fight against criminal activity.

ADDITIONAL INCENTIVES FOR SELF-DISCLOSURE AND COOPERATION

The Policy's new incentives clearly seek to make the decision to self-disclose easier, by increasing the benefits companies may realize by choosing quickly to disclose wrongdoing, fully cooperate with investigators and remediate any issues. Moreover, these incentives apply to companies in different circumstances, including those that already may have missed the opportunity to voluntarily self-disclose.

Declinations with Disgorgement

AAG Polite recognized that, under the prior version of the Policy, companies that identified potential wrongdoing might have chosen not to disclose where concerned that an aggravating factor might preclude a declination. The revised Policy now permits prosecutors to offer declinations, even in the presence of aggravating factors such as the involvement of executives in the misconduct, significant profit from the wrongdoing, the pervasiveness/egregiousness of the conduct and (even) where the company is a recidivist. The revision seems squarely aimed at addressing the prior criticism that there were insufficient incentives for a "recidivist" company to self-disclose, given that it may not qualify for a declination. In addition, the revised Policy clarifies that "significant profits" under the Policy requires profits that are significant "proportionally relative to the company's overall profits," which is potentially helpful in FCPA and other matters where there may be sizeable profits.

Notwithstanding aggravating factors, companies may now qualify for a declination if they: (1) voluntarily self-disclose *immediately* upon discovering the misconduct (including when uncovered during the merger process); (2) maintain an effective compliance program at the time of the misconduct that identified the misconduct and led to the self-disclosure; and (3) engage in extraordinary cooperation and remediation efforts. Of these criteria, the key addition to the prior Policy is DOJ's emphasis on having an effective compliance program that can identify misconduct and drive a voluntary self-disclosure. The clear implication is that, in addition to other benefits of a robust compliance program, proactively investing in and empowering a company's

compliance function may help qualify for a declination, albeit with disgorgement of the illicit profits.

Increased Discounts for Self-Disclosure of Up to 75%

Acknowledging that a declination will not always be appropriate, DOJ also increased the discount that can be offered to companies that do not quite make the cut for a declination. Companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate still can expect a discount of 50% and possibly as much as 75% off the low end of the applicable Guidelines range, except for criminal recidivists. Recidivists still may benefit from a 75% discount, but likely from higher in the Guidelines range, which prosecutors may determine based on each case's particular facts and circumstances.

Further, companies that meet these requirements—even if recidivists—generally will not be required to enter a parent-level guilty plea unless there are multiple or egregious aggravating circumstances. As with ABB Ltd.'s recent FCPA settlement, recidivism does not necessarily translate into a parent-level guilty plea.

Increased Discounts for Cooperation and Remediation without Self-Disclosure from 25% to Up to 50%

For companies that have not voluntarily self-disclosed, DOJ has doubled the available maximum discount from 25% to 50% off the applicable Guidelines range. This increase reflects the premium that DOJ places on cooperation to meet its enforcement goals. By increasing the range of credits it can offer, DOJ is empowering prosecutors to differentiate better among companies based on their posture towards DOJ, adjusting the rewards (in the form of discounts) accordingly.

This increase also provides companies that did not self-disclose with powerful incentives to provide the “extraordinary” cooperation and remediation that DOJ is seeking, in the hopes that they still can cut their fine in half.¹

“FULL” VERSUS “EXTRAORDINARY” COOPERATION

The apparent key to these enhanced incentives is meeting DOJ's expectations for “extraordinary” cooperation. In his remarks, AAG Polite addressed how DOJ distinguishes between “full” and “extraordinary” cooperation of the type that could yield the newly increased credits. He described the core concepts of cooperation as

¹ Notably, the revised Policy added language explaining that full remediation also will include instituting systems that ensure appropriate retention of business communications through messaging applications.

“immediacy, consistency, degree, and impact,” noting that these factors apply to both individual and corporate cases. The difference between “full” and “extraordinary” is largely one of degree, not kind, though AAG Polite stated without a complete explanation that even “gold-standard cooperation” would qualify only as “full.”

AAG Polite added that, for individuals at least, DOJ values immediate cooperation, consistent truthfulness, access to electronic devices, testifying at trial and providing information that leads to additional convictions. Many of these echo what we would expect to be “extraordinary” corporate efforts at cooperation, including full disclosure of non-privileged information, fast access to documents and witnesses,² facilitation of DOJ’s investigations through translations and effective factual presentations (among other means), and a willingness to penalize promptly individual misconduct and terminate relationships with individuals and third parties that engaged in misconduct.

IMPLICATIONS FOR FUTURE ENFORCEMENT

These recent revisions reflect DOJ’s ongoing theme of placing increased emphasis not only on companies’ conduct and cooperation during investigations, but also on taking prophylactic compliance measures both before misconduct occurs and then after issues are identified. This emphasis does not come at the cost of other incentives and instead reflects DOJ’s intention to reward more kinds of good behavior.

Indeed, DOJ ended 2022 with a declination for Safran S.A. and, as noted above, a DPA for the three-time recidivist ABB Ltd. Both matters underscore DOJ’s stated intention of truly rewarding cooperation and disclosure (even with an intent-to-disclose, as was the case with ABB).

These latest revisions potentially foretell more generous resolution terms for companies that meet DOJ’s increasingly high expectations, as well as tougher penalties for companies that choose not to cooperate and that insufficiently remediate. AAG Polite listed a few such companies in his speech, where DOJ concluded that meager cooperation did not warrant more favorable corporate resolutions. DOJ’s position is clear that incentives to self-disclose, cooperate and remediate are there more so than ever, but companies have to earn these benefits or continue to face the unpleasant consequences of an aggressive U.S. enforcement environment. Only time will tell how the Policy is actually applied and what forms of cooperation are viewed by DOJ as “extraordinary.”

² The Policy also modified language around deconfliction of witnesses, reiterating that DOJ expects a company will keep its internal investigation from interfering or conflicting with DOJ’s.

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