

DOJ Revamps Incentives for Companies to 'Come Forward, Cooperate, and Remediate'

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On January 17, 2023, the Department of Justice (DOJ), Criminal Division, announced it has reassessed and strengthened its Corporate Enforcement Policy, which applies to all corporate criminal matters (including Foreign Corrupt Practices Act cases) handled by the division. The remarks by Assistant Attorney General Kenneth A. Polite Jr. continue a conversation started by a DOJ announcement in September 2022, in which Deputy Attorney General Lisa O. Monaco called for every DOJ component that prosecutes corporate crime to have a formal, documented program and policy that incentivizes voluntary self-disclosure. Our coverage of that announcement can be found [here](#).

In this first significant revamping of the Criminal Division's voluntary self-disclosure policy since its launch in 2017, the division has made the following changes:

- Creating a presumption of declination when a company has voluntarily self-disclosed misconduct to the Criminal Division, fully cooperated, and timely and appropriately remediated, so long as no aggravating circumstances are present.
- Where aggravating circumstances are present, permitting prosecutors to determine that a declination is appropriate if all of the following three criteria are met: (i) the voluntary self-disclosure immediately followed the company discovery of the misconduct; (ii) the company had an effective compliance program and internal accounting controls at the time of the misconduct, that enabled the identification of the misconduct; and (iii) the company provided extraordinary cooperation and undertook extraordinary remediation.
- In cases where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates but the Criminal Division nevertheless determines that a criminal resolution is still warranted, the division will accord, or recommend to a sentencing court, at least 50 percent and up to 75 percent from the low end of the U.S. sentencing guidelines (the Guidelines) fine range. Previously, the maximum reduction was 50 percent. Additionally, the Criminal Division generally will not require (a) a corporate guilty plea unless multiple or egregious aggravating circumstances exist or (b) the appointment of a monitor, provided that the company demonstrates it has implemented and tested an effective compliance program and remediated the misconduct.
- If a company is a criminal recidivist, however, the above-referenced reduction generally will not be from the low end of the fine range. Even criminal recidivism now will not always mean a guilty plea.
- Even in cases where companies do not voluntarily self-disclose, if they fully cooperate and timely remediate, the Criminal Division will recommend up to a 50 percent reduction from the low end of the Guidelines range. Previously, the reduction was up to 25 percent.
 - Again, for criminal recidivists, the reduction generally will not be from the low end of the Guidelines range.
- Finally, where a company undertakes a merger or acquisition and uncovers misconduct through due diligence (or, in

some cases, post-acquisition audits or compliance efforts) and voluntarily self-discloses the misconduct and remediates, there will be a presumption of declination.

- Furthermore, an acquiring company may be eligible for declination even if aggravating circumstances existed as to the acquired entity.

According to the DOJ, these changes are “sending an undeniable message: come forward, cooperate, and remediate.” These

changes reflect the reality that while the DOJ “continue[s] to utilize [its] investigative resources and partners to uncover wrongdoing, [it] could never completely identify and address this area of criminality without corporations – our corporate citizens – coming forward and reporting the conduct of these wrongdoers.”

Polite’s full speech can be read [here](#). The updated Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy can be read [here](#).

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