NOW & NEXT

Government Investigations & White Collar Alert

JANUARY 18, 2023

DOJ Corporate Enforcement Policy sees "first significant" revisions since 2017

By Christopher D. Grigg

The revisions offer companies new incentives to self-disclose misconduct and cooperate with DOJ investigations.

What's the Impact?

- Companies should view the revisions as a renewed call to action to prioritize compliance and good corporate citizenship
- Some of the incentives offered to cooperating companies include prosecutorial flexibility regarding declinations and potentially substantial sentencing reductions
- Mr. Polite's remarks reiterate that companies that embrace compliance will achieve better results

Speaking at Georgetown University yesterday, Assistant Attorney General Kenneth A. Polite, Jr., announced "the first significant changes" to the Justice Department's Corporate Enforcement Policy (CEP) since 2017. The revisions "offer companies new, significant, and concrete incentives to self-disclose misconduct" as well as incentives for companies that do not self-disclose but "go far above and beyond the bare minimum when they cooperate with [DOJ] investigations."

Originally implemented in the Foreign Corrupt Practices Act space and later adopted for all corporate cases prosecuted by the DOJ's Criminal Division, the CEP offers potential benefits for

companies that self-disclose misconduct, meaningfully assist government investigations, and take robust steps to correct errors that contributed to the misconduct. Potential benefits include a presumption that the DOJ will decline to prosecute criminally absent certain aggravating circumstances and, in cases where the DOJ deems a criminal is prosecution warranted, possible reductions in the sentences the DOJ will seek. Mr. Polite discussed two examples of companies that availed themselves of CEP benefits but he recognized the decision to self-disclose and cooperate requires "complex discussions in boardrooms, and each company and each outside counsel should, of course, choose to do what is in the best interest of the company."

New self-disclosure incentives

The decision to self-disclose can be the most difficult and consequential choice a company may face. That is especially true when potential aggravating factors could foreclose a declination. But today's announcement may be cause for optimism.

Obtaining declinations despite aggravating factors

Even if a company does not qualify for a *presumption* of declination, the revisions now permit prosecutors to determine that a declination is nonetheless appropriate. Empowering prosecutors who know their cases best to exercise their own professional judgment can benefit companies able to demonstrate earnest commitments to disclose and remedy misconduct despite potential "bad" facts. Still, qualifying for a declination in these circumstances won't be easy. A company must:

- voluntarily self-disclose "immediately" upon becoming aware of alleged misconduct;
- at the time of the misconduct and the disclosure, have "an effective compliance program and system of internal accounting controls that enabled the identification of the misconduct and led to the company's voluntary self-disclosure"; and
- provide "extraordinary" cooperation and undertake extraordinary remediation.

The CEP previously emphasized "full cooperation" and companies are right to wonder how the DOJ will distinguish between "extraordinary" and "full" cooperation. Mr. Polite acknowledged the differences "are perhaps more in degree than kind." His remark that "we know 'extraordinary cooperation' when we see it" may be unsatisfying but he offered the following on how prosecutors might distinguish between the two:

- familiar concepts of immediacy, consistency, degree, and impact will inform how prosecutors assess what is extraordinary;
- prosecutors traditionally value witnesses who cooperate immediately, consistently tell the truth, allow investigators to obtain otherwise unavailable evidence like images of devices or conversation recordings, and testify at trial; and
- "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."

Mr. Polite acknowledged that the facts and circumstances of each case will be unique and that "companies are often well positioned to know the steps they can take to best cooperate in a

particular given case." Additional clarity regarding "extraordinary cooperation" will likely emerge as the DOJ applies the revised CEP going forward. In the meantime, companies seeking to maximize the potential benefits of cooperation should consult closely with experienced counsel.

Favorable outcomes in prosecutions

Additional incentives mean companies can still achieve favorable outcomes even when the facts foreclose a declination. In such cases, if a company voluntarily self-discloses, fully cooperates, and timely remediates, the Criminal Division:

- will extend, or recommend to a sentencing court, "at least 50%, and up to 75% off of the low end of the U.S. Sentencing Guidelines fine range, except in the case of a criminal recidivist"; and
- "will generally not require a corporate guilty plea—including for criminal recidivists—absent multiple or particularly egregious aggravating circumstances."

These changes are significant because they hold open the possibility that corporations facing prosecution can still resolve matters and obtain potentially substantial sentencing reductions. Formerly, the CEP capped the maximum possible Guidelines reduction at 50%. With the revisions, the former ceiling is now the floor.

The revisions also raise the reduction ceiling for companies that do not self-disclose. Provided those companies "fully cooperate and timely and appropriately remediate . . . the Criminal Division will recommend up to a 50% reduction off of the low end of the Guidelines fine range." Previously, the reduction was capped at 25%.

Mr. Polite made clear that the changes apply in all Criminal Division corporate resolutions and recognized that many cases won't involve self-disclosures. Even then, "the revised CEP provides Criminal Division prosecutors with a greater range of options to distinguish among companies that commit crime."

A call to action

Ultimately, the revisions are a call to action "directed squarely at companies that take compliance and good corporate citizenship seriously." Mr. Polite noted that the DOJ's "default is not a declination," a non-prosecution agreement, or a deferred prosecution agreement. "Companies are not presumed to qualify for a declination—they must earn it by following our policies."

He also warned of "dire consequences" for companies that failed to heed that call and highlighted the guilty plea in the recently announced Balfour Beatty Communities LLC military housing matter as an example. In that case, the company pleaded guilty to committing major fraud against the United States. A federal judge sentenced Balfour to three years' probation and ordered it to pay a fine of more than $33.6 million and over $31.8 million in restitution. The court also ordered Balfour to engage an independent monitor for a period of three years.

Mr. Polite emphasized that "[t]here was no voluntary self-disclosure. The company's cooperation was lackluster, merely the bare minimum for credit under the [federal sentencing] Guidelines and a reduction for acceptance of responsibility. It also failed to conduct appropriate remediation in a timely manner." As a result, "the company did not get *any* additional reduction of the fine amount under" the CEP. (Emphasis original.)

Compliance: The once and future king

A monitorship is an especially serious consequence in a corporate prosecution and generally reflects concerns over a company's ability and commitment to preventing future misconduct. In his remarks on the Balfour matter, Mr. Polite noted "the company's compliance program was inadequate not only at the time of the offense, but also at the time of the resolution, so we imposed an independent compliance monitor." Ultimately, a monitorship requirement may reflect a lack of confidence in a company's culture. Mr. Polite spoke directly to companies on this point: "Your resources—particularly your investment in your compliance function—can help increase your corporate civic engagement and lead to lasting solutions to corporate criminality." The key take-away is clear: companies that embrace and practice compliance—in earnest, not just on paper—will achieve better results.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Christopher D. Grigg
213.629.6134
cgrigg@nixonpeabody.com