

## DOJ Updates Corporate Criminal Enforcement Policy to Incentivize “Extraordinary Cooperation” with Prosecutors



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The Department of Justice (DOJ) recently introduced the first significant revisions since 2017 to policies affecting all corporate matters handled by the DOJ’s Criminal Division. These policies aim to incentivize companies to self-report misconduct and cooperate with DOJ in exchange for (1) a presumption of declination to bringing

criminal charges against wrongdoers and/or (2) significant discounts on fines.

These revisions stem from policy proposals developed by the DOJ’s Corporate Crime Advisory Group under the leadership of Deputy Attorney General (DAG) Lisa Monaco, which [Beveridge & Diamond analyzed in September 2022](#).

### Key Takeaways

- ◆ The revised policy provides for a presumption of declination if a company satisfies three factors after discovering misconduct: (1) immediate self-reporting upon discovery of misconduct; (2) “extraordinary cooperation” with DOJ’s investigation; and (3) demonstrating effective compliance monitoring and accounting controls at the time the misconduct was discovered.
- ◆ Non-recidivist companies that satisfy the above-listed requirements may qualify for a declination despite aggravating factors (e.g., egregious crime, corporate executive involvement) that previously would give rise to criminal prosecution.
- ◆ For non-recidivist companies, when DOJ determines that prosecution is necessary, companies that avail themselves of the policies may receive fine reductions of at least 50% and as much as 75%. Such steep reductions in fines will require “exceptional cooperation” and “extraordinary remediation.”
- ◆ For recidivist companies, prosecutors may still decline to bring criminal charges or require a guilty plea if there is timely self-reporting, full cooperation with DOJ, and prompt remediation.
- ◆ DOJ signaled this is not the last corporate criminal enforcement guidance to be issued. The Corporate Crime Advisory Group is also considering policy revisions or new guidance regarding compensation structures, using personal devices for corporate affairs, and encrypted messaging.

## Background

- ◆ **April 2016:** DOJ's Criminal Division [created a pilot program targeting violations of the Foreign Corrupt Practices Act \(FCPA\)](#) that provided potential benefits for self-reporting misconduct, cooperating with DOJ, and timely remediating any wrongdoing.
- ◆ **November 2017:** DOJ expanded the FCPA Pilot Program to become the FCPA Corporate Enforcement Policy (CEP) and incorporated the CEP into the DOJ's Justice Manual.
- ◆ **October 2021:** DAG Monaco announced the formation of the [Corporate Crime Advisory Group](#) and charged the Advisory Group to develop revisions to corporate criminal enforcement policies.
- ◆ **December 2022:** DOJ consulted with several groups, including the Securities and Exchange Commission (SEC) and other federal agencies, executive compensation experts, and defense attorneys, to design revisions to the Corporate Enforcement Policy.
- ◆ **January 17, 2023:** Assistant Attorney General Kenneth Polite Jr. previewed significant revisions to the Corporate Enforcement Policy during a [speech at Georgetown University](#). "We are going to be closely examining how companies discipline bad actors and reward the good ones," said AAG Polite.

## Updated policy increases incentives to companies that "Come forward, cooperate, and remediate."

The revised CEP seeks to dovetail the interests of companies concerned with compliance, including with respect to environmental laws. This development comes as companies face increasing scrutiny from government agencies, private stakeholders, and the public marketplace. DOJ expects its revised policy will benefit companies that seriously undertake good corporate citizenship efforts. The policy favors "extraordinary measures before, during, and after a Criminal Division investigation," in AAG Polite's words, though he never defined "extraordinary."

Notably, the policy seeks to achieve cooperation with companies despite the presence of aggravating factors that would otherwise render self-reporting untenable. "The revised CEP presents another path for companies facing such a choice," said AAG Polite. He summarized the policy: "Come forward, cooperate, and remediate."

Finally, AAG Polite signaled that DOJ is willing to negotiate fine reductions for companies that do not timely self-report misconduct but cooperate and remediate. DOJ will recommend a reduction of up to 50% in a fine if a company satisfies the aforementioned "extraordinary" measures.

## Prosecutors can use discretion to reward companies for policies and compliance measures that discourage misconduct.

On December 16, 2022, Attorney General (AG) Merrick Garland issued [a memorandum for all federal prosecutors](#) setting forth his updated general policies for charging, pleas, and sentencing. Although not directly connected to the Corporate Crime Advisory Group's policies regarding self-reporting, cooperation, and remediation, the memo shows concurrent developments in the DOJ's "reasoned exercise of prosecutorial discretion." The memo underscores that DOJ follows principles on whether to pursue criminal prosecution "if the prosecution would not serve a substantial federal interest or the person is subject to adequate alternatives to federal prosecution." In AG Garland's memo and AAG Polite's speech, DOJ demonstrates a desire to limit its use of prosecutorial resources and power in circumstances where voluntary self-reporting and remediation are appropriate.

## Conclusion

Amid rising enforcement and increased public attention against corporate misconduct, companies should evaluate their self-governance mechanisms, including independent monitoring and accounting controls. Companies should also familiarize themselves with the emerging corporate criminal enforcement policies that favor self-reporting, cooperation with investigators, and timely remediation.

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