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More Carrot, Less Stick: DOJ Announces Corporate Enforcement Policy Revisions

by BJ Stieglitz, Joey Burby, and James Hwang

In remarks delivered on January 17, 2023, Assistant Attorney General Kenneth Polite, who leads the Department of Justice's Criminal Division, announced revisions to the division's Corporate Enforcement Policy (CEP), characterizing them as "new, significant, and concrete incentives" for companies to self-disclose misconduct, meaningfully cooperate with DOJ investigations, and remediate. Polite's revisions to the CEP follow Deputy Attorney General Lisa Monaco's revisions announced in October 2021 and September 2022, which had sounded an unmistakably aggressive tone toward companies facing DOJ scrutiny, especially those that previously had been subject to a DOJ criminal enforcement action (our prior advisories on these announcements can be found here and here). In addition to stating that successive non-prosecution or deferred prosecution agreements would be "disfavored," those earlier revisions demanded more and faster corporate cooperation (including disclosure of more information about individuals) and set forth expectations of additional preventive and remedial measures, such as efforts to claw back compensation from those involved in misconduct.

Highlights of the revisions announced by Polite on January 17 include:

- **More opportunities to avoid prosecution.** Previously, the DOJ would have been largely unwilling to decline prosecution of companies with "aggravating circumstances," such as a record of prior misconduct, even when such companies voluntarily self-disclosed misconduct, fully cooperated with the DOJ's investigation, and timely and appropriately remediated. Polite suggested a greater willingness to provide such declinations (with disgorgement of profits) going forward, but only if companies meet certain additional criteria, including disclosing the misconduct "immediately" after it is discovered, having a demonstrably effective compliance program at the time of the misconduct and at the time of the disclosure, and providing "extraordinary"—not just "full"—cooperation with the DOJ's investigation.
- **Greater discounts on penalties.** In situations where prosecutors elect to bring an enforcement action against a company that has (1) voluntarily self-disclosed misconduct; (2) fully cooperated with the DOJ's investigation; and (3) timely and appropriately remediated, the DOJ now will offer to discount the company's monetary penalty by up to 75% (and no less than 50%) from the low end

of the applicable U.S. Sentencing Guidelines fine range, a significant increase from the previous ceiling of 50%. Similarly, in situations where a company does not voluntarily selfdisclose misconduct, but still fully cooperates with the DOJ's investigation and timely and appropriately remediates, the DOJ now will offer to discount the company's monetary penalty by up to 50% from the low end of the applicable fine range, compared to the prior ceiling of 25%. However, the discounts offered to "recidivist" companies generally will not be from the low end of the applicable fine range.

- **Guilty pleas not automatic for "recidivist" companies.** In a notable departure from prior DOJ claims that successive non-plea resolutions would be "disfavored" by the DOJ, Polite stated that even companies with a record of prior misconduct that voluntarily self-disclose misconduct, fully cooperate with the government's investigation, and timely and appropriately remediate generally will not be required to enter a guilty plea.

Key Takeaways

Polite stated, "We need corporations to be our allies in the fight against crime." His remarks, which focused far more on incentives than threats to the business community, may indicate a recognition by the DOJ that sticks alone are unlikely to yield hoped-for enforcement results.

However, it is not clear that these additional carrots will meaningfully alter the complex set of considerations companies face when evaluating whether to report misconduct to the DOJ. For example, while Polite's articulation of specific criteria for overcoming "aggravating circumstances" to obtain a declination is helpful, the meaning of concepts like "extraordinary cooperation"—something prosecutors will be called upon to distinguish from "full cooperation"—is far from clear, and for the time being, companies are left with little more to guide them than Polite's less-than-comforting statement that "we know 'extraordinary cooperation' when we see it." Similarly, the DOJ's willingness to "generally" not require guilty pleas from recidivist companies is a promising walk-back of the punitive tone the DOJ previously sounded toward such companies, but here again it remains to be seen how frequently the DOJ will refrain from insisting upon guilty pleas from them.

Only time will tell how readily, and to what degree, the DOJ will confer these promised benefits upon companies electing to self-disclose, cooperate, and remediate; and we can expect the DOJ to attempt to showcase their implementation of these policies by making examples—both good and bad—of companies facing DOJ scrutiny. Alston & Bird's White Collar, Government & Internal Investigations Team will continue to monitor and report on further developments. With corporate criminal enforcement continuing to be a significant DOJ priority, and at a time when the DOJ's approach to such enforcement continues to shift and evolve, sound strategic and substantive advice from counsel steeped in the DOJ's approach to corporate criminal enforcement is more important than ever.

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