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DOJ Criminal Division Revises Corporate Enforcement Policy to Further Incentivize Voluntary Self-Disclosure and “Extraordinary” Cooperation

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January 19, 2023 - On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. of the U.S. Department of Justice’s (the “Department”) Criminal Division announced revisions to the Criminal Division’s Corporate Enforcement Policy (“CEP”), which provides benefits to companies for voluntarily self-reporting misconduct, cooperating with the Government, and remediating. The revisions are the first noteworthy changes to the CEP since it was established in 2017. The changes seek to further encourage corporations to voluntarily self-disclose misconduct, fully and exceptionally cooperate with Department investigations, and timely remediate violations. The three main changes are: (1) providing transparency on when a company can receive a declination even when there are “aggravating factors”; (2) increasing the maximum potential fine reduction where a company voluntarily self-discloses misconduct; and (3) increasing the maximum potential fine reduction where a company does not voluntarily self-disclose misconduct but provides “extraordinary cooperation” in the Department’s investigation.

1. Transparency on When a Declination is Appropriate in Cases Involving Aggravating Factors

The first change to the policy applies in matters involving aggravating factors, the presence of which constitutes an exception to the presumption created by the policy that a company that voluntarily self-reports misconduct will receive a declination (i.e., a decision to decline to prosecute). Aggravating factors can include, among others, involvement by senior executives in the misconduct, significant corporate profit from the misconduct, egregiousness of the conduct, and criminal recidivism. The revised policy provides guidance on when a company can receive a declination, even if aggravating factors are present, namely where:

- Voluntary self-disclosure was made immediately after the company was made aware of the allegation of misconduct,
- At the time of the misconduct and the disclosure, the company had an effective compliance program and system of internal accounting controls in place that identified the misconduct and led to the self-disclosure, *and*
- The company provided extraordinary cooperation with the Department’s investigation and undertook extraordinary remediation.

2. Lower Sentencing Recommendations for Voluntary Self-Disclosure

The revised CEP also provides new incentives for companies to voluntarily self-disclose, cooperate, and remediate even where aggravating factors call for a criminal resolution. These incentives include offering reduced fines of at least 50% and up to 75% off the low end of the U.S. Sentencing Guidelines (the “Guidelines”) range of fines, except in the case of criminal recidivism where the reduction will generally not be off the low end of the range. This is an increase from the previous potential maximum reduction of 50%. Moreover, the Department now will generally not require a corporate guilty plea absent multiple or particularly egregious aggravating circumstances.

3. Lower Sentencing Recommendations for “Extraordinary Cooperation” Where a Company Has Not Made Voluntary Self-Disclosure

Finally, companies that do not voluntarily self-disclose but still undertake extraordinary cooperation with the Government and timely and appropriately remediate the alleged misconduct will receive a recommendation of a reduced fine — up to a 50% reduction off the low end of the Guidelines fine range, except for criminal recidivists whose reductions will likely not be calculated off the low end of the Guidelines range. On this point, AAG Polite distinguished between extraordinary and full cooperation and made clear that extraordinary cooperation is cooperation that goes above and beyond the criteria for full cooperation set forth in Department policies. Extraordinary cooperation includes immediate cooperation, consistency in telling the truth, cooperation that leads to evidence the Government could not otherwise obtain, and cooperation that produces results such as additional convictions and trial testimony, and it will be reserved for companies that exceed even the gold standard in cooperation.

Considerations Going Forward

The changes to the CEP will likely impact how corporate criminal cases are resolved by the Department and highlight the continued importance of robust compliance programs that allow companies to identify, timely report, and remediate potential misconduct. Indeed, under the revised CEP, a robust compliance program that identifies misconduct can now help a company obtain a declination decision even where aggravating factors are present. This update is a reminder and incentive to companies to ensure that they implement and maintain *effective* compliance programs and controls that can identify potential misconduct in the organization.

With this announcement, the Department continued to emphasize its intent to target the individual perpetrators of corporate misconduct and its preference for working alongside “corporate citizens” to deter criminality instead of pursuing criminal actions against companies, but it also underscored its willingness to pursue companies that do not heed its call to work hard to deter misconduct. Companies should be alert to this call and be proactive in designing and implementing compliance procedures, as adopting a vigilant and vigorous compliance posture can reap important benefits for the company.

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