# The Criminal Division's Enforcement Policy: What's New for Companies Deciding Whether to Voluntarily Disclose?

*Since the DOJ announced a new policy under which companies that voluntarily disclosed violations of the Foreign Corrupt Practices Act has attempted to encourage companies to voluntarily disclose all manner of criminal misconduct beyond violations of just the FCPA, while general counsels worldwide have been wrestling with the question of whether and when it is in the company's best interest to so disclose.*

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In 1979, the Department of Justice (DOJ) announced a new policy under which companies that voluntarily disclosed violations of the then newly enacted Foreign Corrupt Practices Act of 1977 (FCPA) would be treated more leniently than those that did not come forward. Since then, the DOJ has attempted to encourage companies to voluntarily disclose all manner of criminal misconduct beyond violations of just the FCPA, while general counsels worldwide have been wrestling with the question of whether and when it is in the company's best interest to so disclose.

Is it better to conduct an investigation, remediate the problem, discipline the wrongdoer, beef up the company's compliance program and stay silent, keeping the company out of the DOJ's crosshairs and the spotlight of the media? Or is it better to take the high road of the good corporate citizen and self-report, knowing that it could result in a sharp drop in the stock price, the filing of shareholder suits, bad publicity and — if the disclosure was not to the DOJ's satisfaction — criminal charges? Even publicly traded companies that have regulatory disclosure obligations find themselves having to wrestle with these issues when the misconduct does not necessarily rise to the level of a material event. Prior guidances by the DOJ — usually announced by the Deputy Attorney General (DAG) — provided some assistance, but not enough.

**2022 DAG Directive to Publish Written Corporate Enforcement Policies**

On Sept. 15, 2022, DAG Lisa Monaco, in her memo announcing revisions to the DOJ's Corporate Enforcement Policies (CEPs), directed each DOJ component that prosecutes corporate crime to review its policies on voluntary self-disclosure. If a formal, written policy did not exist—as it does for the FCPA Unit of the Frauds Section — that unit or division had to craft and publicly share its new written policy. See, J. Wolff & E. Jogerst, "DOJ's Revised Corporate Prosecutions Policy: Deputy Attorney General Lisa Monaco's September 2022 Memorandum Ups the Ante," https://bit.ly/3RV3HGJ

**2023 Criminal Division Response to the DAG Directive: When Can a Disclosing Company Expect a Declination?**

On Jan. 17, 2023, Assistant Attorney General Kenneth Polite Jr. announced that, rather than each section or unit having its own policy, the entire DOJ Criminal Division would now be formally using the FCPA Unit's CEP. AAG Polite also announced the first "significant" revisions to the CEP since 2017. Whereas many of these revisions clarify under what circumstances a company that is voluntarily disclosing can expect to avoid a criminal resolution and instead qualify for a clean declination — as opposed to a non-prosecution agreement (NPA) or deferred prosecution agreement (DPA) or, worse, a guilty plea — some of the factors that need to be met may be too onerous for some companies and even potentially in conflict with counsel's obligation to conduct a thorough internal investigation.

The revisions — as expected — adhere to the DAG's directive that any CEP has to have at its core two principles: "(1) absent aggravating factors, to not seek a guilty plea where there has been voluntary self-disclosure, full cooperation, and timely and appropriate remediation, and (2) to not require an independent compliance monitor for a corporation that is voluntarily self-disclosing relevant conduct, cooperates, and demonstrates it has implemented an effective compliance program."

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The CEP, as has the FCPA policy since 2017, takes this one step further. It specifically states that — setting aside any “aggravating circumstances” — there is a “presumption” that a company will receive a declination and only be required to pay restitution, disgorgement and forfeiture (i.e., no criminal penalty), provided it “voluntarily discloses,” engages in “full” cooperation and can show that it “timely and appropriately” remediated by the time of the resolution.

**Declinations for Companies With Aggravating Circumstances**

Even if there are aggravating circumstances, including the involvement of executive management in the misconduct, a significant profit to the company resulting from the misconduct, or conduct that was “egregious” or “pervasive,” the Criminal Division provides, for the first time, another path to getting a declination. Although not presumed, a declination would likely be granted despite the presence of aggravating circumstances if the disclosing company makes an “immediate” disclosure, has an effective compliance program in place that discovered the misconduct, provides “extraordinary” cooperation and engages in “extraordinary” remediation.

That all sounds good — until you review the DOJ’s definitions of “voluntary” and “full.” And realize that “immediate” means before the company has had an opportunity to properly investigate and that the subjective term “extraordinary” is undefined, with only one or two examples provided: recording conversations or providing images of employees’ cell phones. Setting aside the legal arguments an employee may use to refuse to provide their cell phone to an employer for imaging, these few examples arguably make the disclosing company an agent of the DOJ, potentially sowing distrust with employees and employees’ counsel, and making conducting any internal investigation difficult.

**The Public Company Dilemma: What Is Voluntary?**

Most of the Criminal Division’s definition of what constitutes voluntary disclosure is what a company would expect: The disclosure is made before a whistleblower tells the DOJ or the DOJ discovers the conduct on its own. But the Criminal Division also specifically defines a voluntary disclosure as one made when “the company has no preexisting obligation to disclose the misconduct.” This is a significant revision to the FCPA CEP; the 2017 revision having removed similar language that was in the FCPA CEP Pilot Program.

In terms of a public company, does that mean it can never get a declination for misconduct that rises to the level of material misconduct? Or does it mean the disclosure by a public company needs to be made before the company determines whether the misconduct is material — that is, very early on, before it has engaged in any significant investigation to determine how high and how wide the misconduct went? The DOJ has hinted at the answer by suggesting disclosure should certainly be made before completion of the investigation. Either way, to avoid this potential barrier to getting a declination, a public company looking for a declination as a result of voluntarily disclosing may need to consider disclosing to the DOJ before the obligation to disclose in its financials is triggered.

**Full Cooperation, Standing Down and Balancing Privilege**

Full cooperation includes the usual suspects — the sharing of non-privileged information from an internal investigation; identification of all individuals involved in the misconduct; and proactive, rather than passive, disclosures — as well as some newer DOJ requirements noted in the DAG’s September 2022 memo. They include disclosure of overseas documents, and if a blocking statute or another issue is raised by the company as grounds not to produce, the burden shifts to the company to find an alternative way to get the DOJ the information — a potentially expensive proposition.

Also included in the definition of full cooperation are “deconfliction” or, said another way, agreeing to stand down in conducting an internal investigation to allow the DOJ to step in and interview particular employees or officers before in-house or outside counsel get the opportunity, and providing evidentiary source information — that is, telling the DOJ who within the company provided the information being disclosed, while at the same time not breaching attorney-client privilege or work product immunity.

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Both of these requirements are potentially problematic. In terms of standing down mid-investigation, that will likely have a greater impact on larger companies than on smaller ones that can capture most relevant employees early on, rather than months into an investigation. The new CEP suggests that requests to stand down will be rare and will only last for a brief period — but query whether a general counsel can, in good conscience, defer interviewing a key witness until after the witness has been interviewed by the DOJ. And will a voluntarily disclosing company be penalized by a witness's counsel's decision to not let their client be interviewed by the DOJ? In the end, with the DOJ's focus on prosecuting individuals, deconfliction may not be in anyone's best interest, including the DOJ's.

As to providing source information, one possible way to address the privilege issue may be to provide the DOJ with a list of sources and, separately, a detailed factual recitation without specifically tying an individual source to a particular fact. Time will tell whether this will satisfy the DOJ.

**Remediation**

Remediation is required for any declination. Essentially, that includes a root cause analysis, a compliant "tone at the top," implementing an effective compliance program and engaging in appropriate discipline. For companies with aggravating circumstances, the company must already have had an effective compliance program in place at the time of the misconduct; that is, the misconduct must have been identified by the program. An effective compliance program requires sufficient resources, high-quality personnel, periodic testing of its effectiveness and appropriate compensation of personnel. Note that the DAG directed the Criminal Division to survey companies' for their best practices when using compensation metrics as part of their compliance programs and to develop further guidance on how to treat cooperating companies that have developed and implemented compensation clawback policies. Neither of these topics was addressed in the revised CEP. Developing such metrics and policies while there is no guidance may provide a company just what it needs to prove extraordinary remediation sufficient for a declination.

**What If a Self-Disclosing Company With Aggravating Circumstances Cannot Meet the Requirements?**

What about the company that knows it cannot meet all the requirements for a declination even if it does disclose? For example, it has aggravating circumstances — its CEO was involved in the misconduct — and although it is willing to immediately disclose and engage in extraordinary cooperation and remediation, the fact is that its compliance program did not pick up on the misconduct. In other words, the compliance program was ineffective. The CEP makes clear that the disclosing company will likely still avoid a guilty plea — even if the company is a criminal recidivist — making an NPA or DPA with criminal penalties the most likely resolution unless the DOJ determines that there were multiple aggravating factors. In other words, a company with pervasive misconduct, management involvement and significant profits resulting from the misconduct, along with an ineffective compliance program, may expect to be required to plead guilty even if it voluntarily disclosed, cooperated fully and remediated after the fact.

**The Company That Does Not Disclose but Fully Cooperates and Remediates: No Declination Even With No Aggravating Circumstances**

What about the good company that has a hiccup? Several midlevel people are engaged in criminal conduct that does not net the company a big profit, the compliance program discovers the issue, an investigation and root cause analysis take place, the offenders are fired, and internal controls are strengthened. The company is in sensitive talks with another company, and the board decides not to disclose the misconduct to the DOJ. As luck would have it, the DOJ finds out about the undisclosed criminal conduct. The company fully cooperates with the DOJ and has fully remediated. What happens to that company under the CEP?

The CEP suggests that because the company did not voluntarily disclose, a declination is off the table, assuming the company cannot prove that it was about to disclose. That said, the company can still avoid

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a guilty plea and be eligible for an NPA or DPA and obtain the benefit of a 50% reduction off the low end of the sentencing range unless it is a criminal recidivist.

**How Does a Corporation's History of Misconduct Fit In?**

The original DAG memo directed prosecutors to consider corporations' past history of misconduct, including criminal, civil and regulatory resolutions, domestic and international. In the September 2022 memo, the DAG noted that the greatest weight is to be given to recent U.S. criminal resolutions — including pleas and NPAs and DPAs — and prior misconduct involving either the same personnel or management. The CEP does not mention civil or regulatory resolutions in connection with either recidivists or aggravating circumstances. Query whether they will be considered in any way under the CEP.

**And the New USAO Policy?**

On Feb. 22, 2023, the Attorney General's Advisory Committee and the Corporate Criminal Enforcement Policy Working Group, comprised of several United States Attorneys, announced the United States Attorneys' Offices Voluntary Self-Disclosure Policy, drafted in response to the DAG directive. (See, "Damian Williams and Breon Peace Announce New Voluntary Self-Disclosure Policy for United States Attorney's Offices," USAO-EDNY, Dept. of Justice.) Worthy of its own analysis, what is important to note is disclosure to a United States Attorney's Office does not lead to a presumption of a declination when the disclosing company fully cooperates and remediates. The presumption is that the USAO will not request a guilty plea; rather, based on facts and circumstances, the resolution could include a declination, an NPA or a DPA. Also, the guidance on how a USAO will treat aggravating circumstances leaves much more to the USAO's discretion.

**Conclusion**

Under the revised CEP, the calculus for most companies may tip them into voluntarily disclosing. Without doing so, the chances of a declination seem nonexistent. On the other hand, the extraordinary cooperation required of companies with aggravated circumstances may cause those companies — particularly those with more than one aggravating circumstance—to think twice before disclosing. Whether they do or not, if they cannot or do not wish to provide what the DOJ deems extraordinary cooperation, disclosure may not provide a resolution much different than would have resulted had they waited and then fully cooperated.

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