

“More Cooperation Please”: DOJ Revises Enforcement Policy to Encourage Even Greater Cooperation

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The United States Department of Justice (“DOJ”) published a revised version of its corporate enforcement policy on January 17, 2023.¹ As Assistant Attorney General Kenneth Polite pointed out in his public remarks on the revisions, the DOJ sought with these changes to “provide specific, additional incentives to companies for voluntary self-disclosures, as well as for cooperation and remediation.”²

Coming as they do on the heels of a major study suggesting that corporate securities fraud is widespread and on the rise, the revisions to the policy serve as an important reminder to corporations of the importance of developing robust compliance programs to detect fraud and effectively communicate with the DOJ and other agencies.³ These policy revisions also make clear that it is critically important for companies to carefully and thoroughly identify and weigh the various cost-benefit considerations that accompany a decision to self-disclose.

The DOJ’s Announcement

Although AAG Polite touted the DOJ’s recent successes in combatting corporate crime in his remarks, he also acknowledged that the DOJ “could never completely identify and address this area of criminality without corporations—our corporate citizens—coming forward and reporting the conduct of these wrongdoers.”⁴ Thus, AAG Polite said, the DOJ has sought “to clarify the benefits of promptly coming forward to self-report, so that chief compliance officers, general counsels, and others can make the case in the boardroom that voluntary self-disclosure is a good business decision.”⁵

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That was what motivated the DOJ to announce the FCPA Corporate Enforcement Policy in 2016, and to expand it to apply to all corporate cases prosecuted by the Criminal Division in 2018.⁶ Similarly, AAG Polite explained, the present revisions to the policy are intended to “offer companies new, significant, and concrete incentives to self-disclose misconduct.”⁷

The Revisions to the Corporate Enforcement Policy

AAG Polite focused on three specific changes in his remarks. *First*, companies that voluntarily self-disclose misconduct will now be eligible for declinations, even where aggravating circumstances that may ordinarily warrant a criminal prosecution are present, provided they meet the following criteria:

- The voluntary self-disclosure was made “immediately” upon the company becoming 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 that enabled the identification of the misconduct and led to the company’s voluntary self-disclosure.
- The company provided “extraordinary cooperation” with the Department’s investigation and undertook “extraordinary remediation.”⁸

AAG Polite explained that distinguishing between “extraordinary” and “full” cooperation would focus on “immediacy, consistency, degree, and impact” and be “more [a matter of] degree than kind.”⁹

Second, companies that voluntarily self-disclose, cooperate, and remediate but do not receive declinations will still receive a DOJ recommendation of at least 50 percent, and up to 75 percent off of the low end of the U.S. Sentencing Guidelines fine range, unless they are criminal recidivists.¹⁰ (Recidivists will be eligible for a similar reduction, but generally not from the low end of the range.¹¹) As AAG Polite pointed out, this represents a significant benefit from the previous potential *maximum* reduction of 50 percent off the Guidelines range.¹²

Finally, companies that do not voluntarily self-disclose, but do engage in extraordinary cooperation and remediation, will be eligible for a DOJ recommendation reduction of up to 50 percent from the low end of the Guidelines fine range.¹³ (This doubles the prior maximum recommended reduction available under such circumstances pursuant to the prior version of the policy.)¹⁴ Again, recidivists will be eligible for a similar reduction, but generally not from the low end of the Guidelines range.¹⁵

Deterring Corporate Crime

AAG Polite closed his remarks with a message to corporations:

[O]ur job is not just to prosecute crime, but to deter and prevent criminal conduct. Through our enforcement efforts and our policies, we are committed to incentivizing companies to detect and prevent crime in their own operations, and to come forward and cooperate with us when they identify criminal wrongdoing.

We need corporations to be our allies in the fight against crime.

And we believe that our revised policies will, at the end of the day, further our ability to bring individual wrongdoers—the corporate executives, employees, and agents who engage in misconduct—to justice.

Your resources—particularly your investment in your compliance function—can help increase your corporate civic engagement and lead to lasting solutions to corporate criminality.¹⁶

Study Suggests Corporate Crime Is on the Rise

A recent academic study that has received lots of attention, including in the popular press, suggests that such solutions are needed. Earlier this month, Professors from the University of Toronto, the University of California at Berkley, and the University of Chicago published research “estimat[ing] that on average 10 percent of large publicly traded firms are committing securities fraud every year” and “corporate fraud destroys 1.6 percent of equity value each year, equal to \$830 billion in 2021.”¹⁷

The study also concluded that “[a]ccounting violations, less severe than alleged securities fraud, are more prevalent, with an average annual pervasiveness of 41%” and two out of three corporate frauds go undetected.¹⁸ In short, as one of the authors stated in a *New York Times* article on the study, corporate fraud is “widespread” and “disturbingly common.”¹⁹ Of course, the study is not without its critics, who state among other things, that the authors’ definition of “fraud” is both nebulous and overinclusive thereby rendering the study unreliable.

Be it as it may and irrespective of whether corporate fraud is on the rise, one prime point of the study is that corporate fraud exists. Thus, the current discussion of corporate fraud (in an environment of difficult economic times) as well as corporate cooperation and compliance serve as an important reminder for corporations of the high value of robust compliance programs. Beyond the obvious benefit of serving as a shield with the DOJ in the unfortunate event of a government investigation, compliance programs can help detect wrongdoing before it comes to the attention of regulators or even potentially

deter it entirely.²⁰ Indeed, the DOJ itself has repeatedly stressed that it will consider “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” in considering whether to bring charges.²¹

As we have previously advised, the DOJ’s guidance on such compliance programs has stressed the need to provide these programs with adequate resources, incorporate lessons learned, and take a reasonable, individualized approach to compliance.²² Corporations and those who advise them should carefully develop and continually evaluate their compliance programs to ensure they are providing maximum protection from liability. And, of course, if wrongdoing is detected, it should be appropriately investigated and remediated, along with careful consideration to the all-important decision of making a voluntary self-disclosure to government officials.

Notes

1. United States Department of Justice, *Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy* (January 2023), available at <https://www.justice.gov/opalspeech/file/1562851/download>.
2. United States Department of Justice, *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division’s Corporate Enforcement Policy* (Jan. 17, 2023), available at <https://www.justice.gov/opalspeech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>.
3. Alexander Dyck et al., *How Pervasive is Corporate Fraud?*, REVIEW OF ACCOUNTING STUDIES (Jan. 5, 2023), available at <https://link.springer.com/article/10.1007/s11142-022-09738-5>.

4. *Polite Remarks*, *supra* note 2.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Dyck et al., *supra* note 3.
18. *Id.*
19. Ephrat Livni, *Just How Common Is Corporate Fraud?*, N.Y. TIMES (Jan. 14, 2023), available at <https://www.nytimes.com/2023/01/14/business/dealbook/how-common-is-corporate-fraud.html>.
20. See generally J. Paul McNulty et al., *What an Effective Corporate Compliance Program Should Look Like*, 9 J.L. ECON. & POL’Y 375 (2013).
21. U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (June 2020), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.
22. Boutros et al., *DOJ Releases Revised Guidance on Corporate Compliance Programs and in Doing so Takes a More Nuanced Approach to Compliance Investigations* (June 8, 2020), available at <https://www.dechert.com/knowledge/onpoint/2020/6/doj-releases-revised-guidance-on-corporate-compliance-programs-a.html>.