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ALERT

DOJ's "Carrot" Approach to Corporate Enforcement Policy (But Read the Fine Print)

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Last Tuesday, the Department of Justice (DOJ) announced the most recent modifications to its Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP) in an effort to further encourage companies to develop strong compliance programs and self-report misconduct. In a speech about these changes, Assistant Attorney General Kenneth Polite Jr. explained that the new CEP rewards companies with strong compliance programs that voluntarily self-report misconduct as soon as it is discovered even, with some caveats, if aggravating circumstances are present. The revisions further allow companies to receive a partial fine reduction (which it helpfully attempts to define) if they cannot satisfy the high bar set for a declination. The restyled policy, largely taken from the prior Foreign Corrupt Practice Act Pilot Program, applies to all corporate matters involving the DOJ's Criminal Division.

Declinations

The revised CEP doubles down on the Criminal Division's general policy over the last few years that when a company self-discloses misconduct, fully cooperates, and remediates, there is a presumption that the company will receive a declination absent aggravating circumstances. But what happens when aggravating circumstances are present? The most recent iteration of the policy now specifies that a company can still be eligible for a declination — although will not qualify for a declination ***presumption*** — if it: (1) voluntarily self-discloses "immediately upon . . . becoming aware of the ***allegation of misconduct***[;]" (2) had an effective compliance program at the time of the misconduct and disclosure; and (3) provides "extraordinary cooperation" with the DOJ's investigation.

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Companies seeking such credit in the face of aggravating circumstances should pay close attention to the specific language used, particularly with respect to what must be "voluntarily self-disclosed." Where the standard language describing what must be disclosed is "misconduct," implying that the company already deemed the conduct to be wrongful, here the disclosure requirement relates to "allegations of misconduct" and the timing is "immediate." This language choice implies that, to the extent a company thinks aggravating circumstances could be in play, they must report allegations as soon as they receive them — potentially before they have time to meaningfully assess whether there is credible evidence to support the allegations. How companies respond to this new CEP criteria — and DOJ evaluates it — will be closely watched as large companies with well-functioning compliance functions likely receive many allegations of misconduct that amount to nothing — and which would burden both DOJ and the company if "immediate" reporting of mere allegations is truly required to benefit from the revised CEP.

Adding to the complexity, the CEP itself does not expand on what "extraordinary cooperation" means. AAG Polite did share that DOJ will evaluate the "immediacy, consistency, degree, and impact" of the company's cooperation. But what qualifies as "extraordinary" remains hazy. AAG Polite said the DOJ "know[s] 'extraordinary cooperation' when we see it" and it is "not just run of the mill, or even gold-standard cooperation, but truly extraordinary." Drawing some parallels to individual cooperation, he noted prosecutors value (1) immediate and consistent truth-telling; (2) helping investigators obtain evidence otherwise unavailable; and (3) testifying at trial and providing information that leads to other convictions.

The CEP also announced that any declination made pursuant to this policy must be made public — providing opportunities to track how the DOJ applies the program in practice.

Expanded Credit for Voluntary Self-Disclosure

If a criminal resolution is warranted, a company may also qualify for enhanced partial credit if it voluntarily self-disclosed, fully cooperated, and timely remediated. For a nonrecidivist company, the DOJ will recommend ***at least*** a 50%, and as much as a 75%, reduction on a fine that falls on the low end of the sentencing guidelines range. Under the prior policy, a company could expect a maximum 50% reduction. A recidivist company may also qualify for a 50%–75% reduction, but it will "generally not be from the low end" of the guideline range. Instead, prosecutors will evaluate starting points case-by-case.

The DOJ will also generally not require a corporate guilty plea (even if the company is a recidivist) absent "particularly egregious or multiple aggravating circumstances." And a company can generally avoid a compliance monitorship if it has, at the time of resolution, demonstrated an effective compliance program and remediated the cause of the misconduct.

Limited Credit if No Self-Disclosure

When a company does not voluntarily self-disclose misconduct, but later fully cooperates and remediates, the DOJ will still award limited credit under the CEP revisions. Nonrecidivist companies can expect prosecutors to recommend up to a 50% reduction off the low end of the sentencing guidelines fine range. Recidivists, on the other hand, can earn up to 50% off, but the starting point will generally not be the low end of the fine range.

Again, the policy vests substantial discretion in prosecutors to determine the starting point for any reduction.

Takeaways

At bottom, the DOJ's CEP revisions provide companies with additional opportunities to avail themselves of partial credit. But these carrots don't come easy. AAG Polite made it clear that companies now start "at zero cooperation credit" as opposed to the old policy where they started with "maximum available credit" which was lost based on deficiencies in cooperation. The DOJ has set a high bar to achieve these incentives — including requiring companies to make early disclosures, perhaps before it becomes clear that there is credible evidence of a violation. And while the DOJ better quantifies what conduct qualifies for certain levels of credit, other concepts remain less clear. For example, what will the DOJ view as "extraordinary cooperation" in practice? One thing, however, is certain — the CEP revisions echo the DOJ's consistent refrain: compliance, compliance, compliance. Without effective compliance programs — and the collection of data to demonstrate their effectiveness — companies will be unable to satisfy the DOJ.

Last Tuesday's CEP revisions are the latest in a series of DOJ announcements related to Attorney General Lisa Monaco's September Memorandum. More corporate criminal enforcement guidelines are expected in the coming months, including guidance on personal devices, ephemeral messaging, and executive compensation structures. As changes are made, companies should evaluate their compliance programs to ensure they reflect current DOJ guidance.