

Regulatory Alert

Regulatory Insights



January 2023

DOJ Revises Criminal Division's Corporate Enforcement Policy

KPMG Insights: Revisions to the DOJ Criminal Division's Corporate Enforcement Policy respond to a request from the Deputy Attorney General that the Divisions write voluntary self-disclosure policies and "clarify the benefits 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." The Criminal Division's policy revisions are intended to offer companies "new, significant, and concrete incentives to self-disclose misconduct." The benefits, however, are not automatic as the Division has discretion to assess on a case-by-case basis whether a company has fully cooperated with an investigation and whether it has provided "extraordinary" cooperation giving consideration to the "scope, quantity, quality, and timing" of a company's efforts to cooperate.

Companies should review the Deputy Attorney General's recent revisions to the DOJ's approach for addressing corporate ethics and compliance matters including a "mix of incentives and deterrence" related to individual accountability, history of misconduct, and corporate culture (see KPMG Regulatory Alert, [here](#)). Further, companies should ensure appropriate investment in their compliance function (people, process, and technology) to prevent, detect, and timely respond to misconduct as well as to provide demonstrable reporting of issues identification, notification, escalation, and resolution/remediation.

The Department of Justice's (DOJ) Assistant Attorney General [announced](#) the "first significant changes" to the Criminal Division's (the Division) Corporate Enforcement Policy (CEP) since 2017. The changes, which apply to "all corporate criminal matters handled by the Criminal Division, including all FCPA [Foreign Corrupt Practices Act] cases nationwide," expand on previous policies announced in September 2022 (see KPMG Regulatory Alert, [here](#)) that introduced a "mix of incentives and deterrence" to enhance corporate ethics and compliance in the areas of individual accountability, history of misconduct, voluntary self-disclosure, independent compliance monitors, and culture.

Prior to these new changes, the Division's policy provided that when a company has voluntarily self-disclosed misconduct to the Division, fully cooperated, and timely and appropriately remediated, there would be a presumption that the company would receive a declination absent "aggravating circumstances" involving the seriousness of the offense or the

nature of the offender, such as involvement in the misconduct by the company's executive management; significant profit to the company from the misconduct; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism.

The Division's new approach entails:

- Permitting prosecutors to determine a declination is an appropriate outcome in cases that involve "aggravating circumstances" if the company is able to demonstrate that it has met each of the following three factors:
 - Voluntarily and immediately self-disclosing misconduct upon becoming aware of an allegation of misconduct.
 - Having, at the time of the misconduct and self-disclosure, an effective compliance program and system of internal controls that enabled detection of misconduct.

- Providing “extraordinary” cooperation with the Division’s investigation and undertaking “extraordinary” remediation. *(Note: To receive credit for extraordinary cooperation, companies are required by the Division to go above and beyond the criteria for full cooperation detailed within the CEP.)*
- In cases where a criminal resolution is warranted, recommending a sentencing court:
 - Reduce the low end of the U.S. Sentencing Guidelines fine range by at least 50 percent and up to 75 percent, if a company “voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates.” In cases involving a “criminal recidivist,” the reduction in fines would not be applied at the low-end of the fine range. *(Note: Under such circumstances, a corporate guilty plea would generally not be required nor would the appointment of a monitor.)*
 - Reduce the low end of the U.S. Sentencing Guidelines fine range by up to 50 percent if a company does not voluntarily self-disclose the misconduct but does fully cooperate with the Division’s investigation and implements timely and appropriate remediation. *(Note: all companies will be considered to start from a point of “zero cooperation credit” at the onset of an investigation and must earn credit based on parameters and factors outlined in the CEP.)*

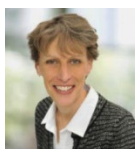
DOJ states it will be looking at how a company disciplines “bad actors” and rewards “the good ones,” with a focus on individual accountability. Echoing sentiments expressed during the September 2022 revisions, the Division reiterates its ongoing commitment to incentivizing compliance and preventing and deterring criminal conduct along with the importance of investment in the compliance function to help increase companies’ “corporate civic engagement” and ability to detect and prevent criminal misconduct within their own operations.

Relevant KPMG Thought Leadership:

- KPMG Regulatory Alert | [DOJ shifts policies, encouraging compliance "incentives and deterrence" \(September 2022\)](#)
- KPMG Regulatory Alert | [DOJ shifts policies, encourages companies to focus on compliance investment \(November 2021\)](#)
- KPMG Regulatory Alert | [Effective Compliance Programs: Updated DOJ Guidance \(June 2020\)](#)

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