

CLIENT ALERT

# DOJ's Latest Incentives for Self-Disclosure

## An Offer You Can't Refuse?

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On January 17, 2023, Assistant Attorney General Kenneth Polite, Jr., who oversees the Department of Justice's (the "Department" or "DOJ") Criminal Division, used a speech at Georgetown University Law Center to announce a new Department-wide policy of using major incentives to encourage corporate disclosures of any malfeasance under the purview of the DOJ.<sup>1</sup> This new policy is an expansion of the successful self-disclosure policies most commonly associated with the Criminal Division's Foreign Corrupt Practices Act Unit and the Antitrust Division's criminal enforcement program. It also provides further details of the Department's recent, high-level updates to its corporate enforcement guidance,<sup>2</sup> but might not move the needle for anyone other than recidivist companies.

### New Policy

Under the newly announced policy, even in the presence of aggravating factors that may have previously cautioned a corporate entity from disclosing (such as recidivist malfeasance), prosecutors may still decline to prosecute a company if three factors are present.<sup>3</sup> First, the company must *promptly* make a self-disclosure to the Department after being made aware of the misconduct. Second, at the time of the misconduct and the disclosure, the company must have had an effective compliance program and system of internal accounting controls that enabled the identification of the misconduct for the self-

<sup>1</sup> Michael, Dave, Justice Department Offers New Incentives for Companies to Self-Report Wrongdoing, *Wall Street Journal* (Jan. 28, 2023).

<sup>2</sup> See <https://www.willkie.com/-/media/files/publications/2022/backtothefuturedojmostrecentcorporatteenforcementg.pdf>.

<sup>3</sup> <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>.

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disclosure. Third, the company must make an *extraordinary* effort both to cooperate with the Department and to remediate any deficiencies.

Even if DOJ believes prosecution is warranted, though, the Department is still providing other incentives for voluntary self-disclosure. When DOJ chooses to pursue a criminal resolution, the new policy allows for fine amounts to be up to 75% below the low end of the Sentencing Guidelines' fine range—a significant increase from the previous guidance which only permitted a maximum 50% departure from the Guidelines. For recidivists, this potential 75% departure will be from the Guidelines, but not at the low end of the range.<sup>4</sup> Perhaps most important, in instances where a company timely self-discloses, fully cooperates, and implements timely and appropriate remedial actions—including as recidivists—the Department will not require the company to enter a guilty plea absent “multiple or particularly egregious aggravating circumstances.”<sup>5</sup> And even businesses that fail to self-disclose are eligible for up to a 50% departure on the fine from the low end of the Guideline range if they cooperate and remediate fully, doubling the previous permissible departure. Assistant Attorney General Polite did caution, however, that the maximum permissible departures would *not* be the norm for the Department and would be reserved for companies that distinguish themselves with “extraordinary” cooperation and remediation. What constitutes “extraordinary” cooperation remains unclear. By way of guidance, Assistant Attorney General Polite simply stated, “To receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary.”<sup>6</sup> Presumably, this may include waiving privilege and helping the Department pursue culpable individuals.

### **Implications**

Companies should be encouraged that the DOJ continues to engage thoughtfully on this issue and maintain a transparent approach to enforcement. This new policy shows a clear commitment by the DOJ to focus on incentivizing corporate self-disclosure, which will help with its enforcement priorities to pursue more aggressively prosecutions against individuals perpetrating corporate malfeasance. Assistant Attorney General Polite recognized the evidentiary difficulties in pursuing prosecutions against individuals without the assistance of their corporate employers, and explicitly tied implementation of this policy to the Department's goal to punish individual wrongdoers whenever possible. The new policy removes many of the disincentives that may have previously discouraged corporate recidivists from making voluntary disclosures to the Department. Further, the Department has significantly increased the potential financial incentives for self-disclosure and cooperation. Corporations, and their outside counsel, must recalibrate how they weigh the benefits potentially being conferred by the Department when making decisions on self-disclosure, but should be cautious given that there is no guarantee of the benefits described in the Assistant Attorney General's speech. We anticipate the new policy may lead to more self-disclosures of corporate malfeasance by recidivists, but that the analysis for each individual company will remain highly individualized and context specific. This is particularly true given that Assistant Attorney General Polite admittedly offered little guidance as to what constitutes “extraordinary” cooperation, particularly as compared to “full” cooperation,

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<sup>4</sup> It is unclear from the Department's statements to date what the Department will discount off of.

<sup>5</sup> <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>

<sup>6</sup> *Id.*

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stating that the differences “are perhaps more in degree than kind.” We will continue to monitor this issue to better understand the reaction of the market to this news.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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