THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy

Washington, DC ~ Tuesday, January 17, 2023

Professor O'Sullivan, thank you for that kind introduction. It's a pleasure to be here with you all today at Georgetown. Not only am I an alum of the Law Center, I'm an alum of this building, Gewirz Residence Hall.

Much has changed since I was a student here. There was no International Law Building, no Ginsburg Fitness Center, no courtyard.

But the ethos of the school has always been about providing a world-class legal education to individuals hailing from diverse backgrounds, perspectives, and careers. The Law Center accurately describes itself as "the place where theory meets practice, where we learn the law in the place where laws are made."

Just before this event, I was lucky enough to meet with students in Professor O'Sullivan's class, and I am proud to say that they continue to represent the best traditions of this institution. I look forward to seeing what each of them contributes to our profession and our world.

Just as unwavering are the values of the Department of Justice, and our commitment to public service, to our incredible colleagues, and the pursuit of justice.

That is why I'd like to begin my remarks by acknowledging the hard work and dedication of the prosecutors across the Criminal Division, who had an incredibly productive year in 2022, ensuring that the Division remains a national leader in corporate enforcement. Many of them were able to join us today, including Principal Deputy Assistant Attorney General Nicole Argentieri, Deputy Assistant Attorneys General Lisa Miller and Kevin Driscoll, Deputy Chief of Staff Dahoud Askar, Senior Counsel Keith Edelman, Glenn Leon and Lorinda Laryea, the Chief and Principal Deputy Chief of the Fraud Section, and Brent Wible and Molly Moeser, the Chief and Principal Deputy Chief of the Money Laundering and Asset Recovery Section. We are also proud to be joined by several alums of the Division, including Kenneth Blanco, Brian Rabbitt, David Bitkower, Joe Beemsterboer, Deb Connor, and Matt Miner. And a special shout out to fellow Criminal Division members and Law Center alums Lorinda Laryea, Andrew Gentin, and David Last.

Many of you have made considerable contributions to the fight against corporate criminality. Offenses that undermine the integrity of our financial institutions and markets, threaten the public safety and national security, wrongfully divert money into the pockets of criminal actors.

We are using every tool at our disposal to combat corporate crime, including more sophisticated data analytics and other means to proactively identify criminal conduct. Our prosecutors, analysts, and agents are bringing to bear an increased array of experiences and expertise. And we are working more closely than ever with our law enforcement partners around the world. The vast majority of our FCPA resolutions in recent years are the result of cooperation and coordination with foreign and domestic authorities.

This past year alone, the Division's Fraud Section (i) secured convictions of over 250 individuals, including more than 50 who were convicted at trial; (ii) entered into seven criminal resolutions with corporations; and (iii) announced two Corporate Enforcement Policy declinations. And the Money Laundering and Asset Recovery Section convicted more than two dozen individuals and obtained two corporate guilty pleas, including a guilty plea from a financial institution that agreed to forfeit $2 billion in connection with one of the largest international financial scandals in history.

And there will be more in 2023.

While we continue to utilize our investigative resources and partners to uncover wrongdoing, we could never completely identify and address this area of criminality without corporations – our corporate citizens – coming forward and reporting the conduct of these wrongdoers.

That is what motivated the Criminal Division back in April 2016, when we first announced a voluntary self-disclosure incentive program—the FCPA Pilot Program. To be as transparent as possible, at that time we laid out a roadmap for what companies could expect if they chose to self-disclose misconduct, fully cooperate with our investigation, and timely remediate.

In November 2017, we expanded the pilot program to become the FCPA Corporate Enforcement Policy (CEP), which we subsequently incorporated into the Department's Justice Manual. Since at least 2018, we have applied this policy to all corporate cases prosecuted by the Criminal Division.

Our existing policy provides that, if a company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, there is a presumption that we will decline to prosecute absent certain aggravating circumstances involving the seriousness of the offense or the nature of the offender. These aggravating circumstances include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the wrongdoing; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism.

Our existing policy also offers the potential benefit of a presumption of a declination to companies that uncover – during the M&A due diligence process – misconduct by subsidiaries or other entities that they are seeking to acquire, and then self-report that misconduct to the Criminal Division.

And if a company self-discloses, but a criminal resolution is warranted, our existing policy offers 50% off of the low end of the applicable Sentencing Guidelines penalty range.

This policy has demonstrated the Department's commitment to rewarding companies that do the right thing when learning about possible misconduct. For instance, just last month, we announced that we declined to prosecute a French aerospace company, Safran SA, after it disclosed FCPA violations that it uncovered during post-acquisition due diligence. The bribe payments to a Chinese consultant that the company uncovered occurred between 1999 and 2015, but the company nonetheless made a full disclosure, fully cooperated, ensured that remediation was complete, and agreed to disgorge the ill-gotten gains of its U.S. subsidiary.

Our corporate resolutions with ABB entities in December 2022 illustrate how the CEP applies to companies that fully cooperate and remediate, even if they did not voluntarily disclose the misconduct. ABB had entered into FCPA resolutions with the Department back in 2004 and in 2010. In the wake of its prior misconduct, ABB implemented a compliance program that detected the FCPA misconduct in South Africa, and the company planned to promptly self-disclose it—it had even scheduled a meeting with the government to do so.

Before the meeting, however, a media report drew public attention to the wrongdoing. But because the company could demonstrate intent and efforts to self-disclose prior to, and without any knowledge of, the media report, the Department weighed both the early detection of the misconduct and the intent to disclose it significantly in ABB's favor. ABB also demonstrated its extensive remediation and cooperation. Despite ABB's recidivist history and the Department's policy disfavoring successive deferred prosecution agreements, parent company ABB Ltd. was still able to avoid a guilty plea, entering into a deferred prosecution agreement with the Department, with two subsidiaries pleading guilty. That said, because ABB was a recidivist, we did not give the company the benefit of a reduction from the low-end of the Guidelines range. Instead, to account for the recidivism, the reduction was from the midpoint between the middle and high-end of the Guidelines.

When a company has uncovered criminal misconduct in its operations, the clearest path to avoiding a guilty plea or an indictment is voluntary self-disclosure. It is also the clearest path to the greatest incentives that we offer, such as a declination with disgorgement of profits. And a functioning compliance program with effective detection mechanisms best positions companies to not only identify misconduct in the first instance, but to make the important decision of whether to disclose it.

We fully understand the significance of a company's decision to voluntarily self-disclose and fully cooperate, and the consequences that such a decision brings. These are complex discussions in boardrooms, and each company and each outside counsel should, of course, choose to do what is in the best interest of the company.

But in providing transparency to the potential incentives, we are underscoring that a corporation that falls short of our expectations does so at its own risk. Make no mistake - failing to self-report, failing to fully cooperate, failing to remediate, can lead to dire consequences.

As Exhibit A – I give you the Balfour Beatty Communities military housing fraud plea. There was no voluntary self-disclosure. The company's cooperation was lackluster, merely the bare minimum for credit under the Guidelines and a reduction for acceptance of responsibility. It also failed to conduct appropriate remediation in a timely manner. Therefore, the company did not get *any* additional reduction of the fine amount under our Corporate Enforcement Policy.

In fact, we determined that the starting point for the fine amount should be between the low end and the mid-point of the applicable U.S. Sentencing Guidelines fine range. Moreover, while the company was not a recidivist, we determined that a guilty plea was warranted due to the seriousness and the pervasiveness of the conduct at multiple bases across military branches. And finally, the company's compliance program was inadequate not only at the time of the offense, but also at the time of the resolution, so we imposed an independent compliance monitor.

As this example illustrates, our default is not a declination; it's not an NPA; and it's not a DPA. We have secured six parent-level corporate guilty pleas during my tenure to date, in cases involving a range of conduct, from foreign bribery and bank fraud to emissions testing fraud and spoofing. We take a nuanced but tough approach, calling it like we see it—and we will continue do so. Companies are not presumed to qualify for a declination—they must earn it by following our policies.

Now, in September of last year, the Deputy Attorney General asked all Department components to write voluntary self-disclosure policies, to the extent that they didn't already have them, and "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."

Although the Division already had such a policy, we took the DAG's call as an opportunity to reassess and strengthen it. Which brings us to today. I am proud to announce the first significant changes to the Criminal Division's CEP since 2017.

As you'll hear, these changes offer companies new, significant, and concrete incentives to self-disclose misconduct. And even in situations where companies do not self-disclose, the revisions to the policy provide incentives for companies to go far above and beyond the bare minimum when they cooperate with our investigations.

CEP Revisions

We are constantly evaluating whether our policies and practices result in appropriately vigorous and fair corporate enforcement. With that in mind, I am pleased to announce important revisions to our Corporate Enforcement Policy, which applies to all corporate criminal matters handled by the Criminal Division, including all FCPA cases nationwide. These revisions provide specific, additional incentives to companies for voluntary self-disclosures, as well as for cooperation and remediation. The revisions make clear that there will be very different outcomes for companies that do not self-disclose, meaningfully cooperate with our investigations, or remediate.

I appreciate that in many situations, companies that have identified potential wrongdoing and are weighing whether to self-disclose that conduct to the Department will be concerned that an aggravating factor may prevent a company from obtaining a declination. And that concern may have led companies and their outside counsel to conclude, under the prior version of the CEP, that it is more prudent not to disclose the misconduct.

The revised CEP presents another path for companies facing such a choice. A path that incentivizes even more robust compliance on the front-end, to prevent misconduct, and requires even more robust cooperation and remediation on the back-end, if a crime occurs. Namely, even if aggravating circumstances are present, although a company will not qualify for a presumption of a declination, under the revised CEP I am announcing today, prosecutors may nonetheless

determine that a declination is the appropriate outcome, if the company can demonstrate that it has met each of the following three factors:

- 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; and
- The company provided extraordinary cooperation with the Department's investigation and undertook extraordinary remediation.

Each of these factors is familiar. That is by design. We are requiring companies seeking the possibility of a declination —even in the face of aggravating factors—to take extraordinary measures before, during, and after a Criminal Division investigation to earn such an outcome. This possibility is directed squarely at companies that take compliance and good corporate citizenship seriously.

While some companies may be able to overcome the aggravating factors and receive a declination with disgorgement by meeting these criteria, others will not. But the revised CEP I'm announcing today contains incentives for those companies as well.

If a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, but a criminal resolution is still warranted, the Criminal Division:

- will now accord, or recommend to a sentencing court, at least 50%, and up to 75% off of the low end of the U.S. Sentencing Guidelines fine range, except in the case of a criminal recidivist. In that case, the reduction will generally not be from the low-end of the fine range, and in all cases, prosecutors will have discretion to determine the starting point within the Guidelines range. This revision represents a significant increase from the previous potential *maximum* reduction of 50% off the Guidelines range; and
- in these circumstances, we will generally not require a corporate guilty plea—including for criminal recidivists—absent multiple or particularly egregious aggravating circumstances. While relevant and important, criminal recidivism alone will not always mean a plea.

This policy applies to all Criminal Division corporate resolutions, not only voluntary self-disclosure cases. There will be many instances in which a company will not have voluntarily self-disclosed conduct to the Criminal Division. In such circumstances, the revised CEP provides Criminal Division prosecutors with a greater range of options to distinguish among companies that commit crime.

The revised CEP provides incentives for companies that do not voluntarily self-disclose but still fully cooperate and timely and appropriately remediate. In such a case, the Criminal Division will recommend up to a 50% reduction off of the low end of the Guidelines fine range. That is twice the maximum amount of a reduction available under the prior version of the CEP. In the case of a criminal recidivist, the reduction will likely not be off of the low end of the range. And in all cases, prosecutors will have discretion to determine the specific percentage reduction and starting point in the range based on the particular facts and circumstances.

To be sure, while 50% off the low end of the Guidelines range is the maximum available (absent a voluntary self-disclosure) under the revised CEP, each and every company starts at zero cooperation credit and must earn credit based on the parameters and factors outlined in the CEP. This is not a race to the bottom. A reduction of 50% will not be the new norm; it will be reserved for companies that truly distinguish themselves and demonstrate extraordinary cooperation and remediation. But having a greater range of cooperation and remediation credit available—from 0% to 50%, instead of from 0% to 25%, and using the full spectrum of the Guidelines from which to apply those reductions—will allow our prosecutors to draw greater distinctions among the quality of companies' cooperation and remediation.

Many of you may be curious as to how our prosecutors will distinguish between "extraordinary" and "full" cooperation under the revised policy. We are well aware of the differences between corporations and individuals, of course. But with respect to how we consider cooperation, the lens and framework through which we analyze the level and degree of cooperation aren't so different.

I'll note some concepts—immediacy, consistency, degree, and impact—that apply to cooperation by both individuals and corporations, which will help to inform our approach to assessing what is "extraordinary." To defense counsel, recall your days as a prosecutor. In assessing the quality of a cooperator's assistance, we value: when an individual begins to cooperate immediately, and consistently tells the truth; individuals who allow us to obtain evidence we otherwise couldn't get, like quickly obtaining and imaging their electronic devices, or having recorded conversations; cooperation that produces results, like testifying at a trial or providing information that leads to additional convictions.

These, of course, are just examples in the individual context. In many ways, we know "extraordinary cooperation" when we see it, and the differences between "full" and "extraordinary" cooperation are perhaps more in degree than kind. 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. At the same time, the government will not affirmatively direct a company's internal investigation, if it chooses to do one, and companies are often well positioned to know the steps they can take to best cooperate in a particular given case. And of course, the facts and circumstances of each case will be unique.

The policy is sending an undeniable message: come forward, cooperate, and remediate. We are going to be closely examining how companies discipline bad actors and reward the good ones. Our number one goal in this area – as we have repeatedly emphasized – is individual accountability. And we can hold accountable those who are criminally culpable—no matter their seniority—when companies come forward and cooperate with our investigation.

Failing to take these steps, a company runs the risk of increasing its criminal exposure and monetary penalties. We have already used this approach not only in the Balfour Beatty Communities case, which I mentioned earlier, but also in cases such as the Bank of Nova Scotia spoofing and the Glencore benchmark manipulation resolutions—where we determined that the appropriate starting point for a Guidelines reduction would be *above* the low-end.

In the Glencore Ltd. case, the company only received a minimal reduction for cooperation and remediation under the CEP because of late and incomplete cooperation and failure to take adequate, timely disciplinary measures with respect to certain personnel involved in, or aware of, the criminal conduct—which was pervasive. And in the Bank of Nova Scotia case, we determined that a fine at the top of the applicable Guidelines range was appropriate because instead of remediating, the company's compliance function contributed to the misconduct.

To all assembled, and especially our students — I started out noting some changes since I was last on campus. But there is one constant – As a member of this community, none of us are sheltered from criminality. We need only walk a block away to experience, in stark terms, the despair and hopelessness of crime, and its root causes, right here in this neighborhood. The answer is not to run away from it, but to use your resources, education, and experiences to increase your civic engagement and help reach truly lasting solutions to these social ills.

To our corporate citizens – the message is the same. You see, our 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.

Thank you so much for hosting me today.

Speaker:
Assistant Attorney General Kenneth A. Polite, Jr.

Attachment(s):
Download Criminal Division Corporate Enforcement Policy

Topic(s):
Financial Fraud
Foreign Corruption

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
Criminal - Money Laundering and Asset Recovery Section

Updated January 18, 2023