

## **Frequently Asked Questions: Criminal Division Corporate Enforcement Policy<sup>1</sup>**

- 1. When did the Criminal Division first announce a voluntary self-disclosure program?**
  - In 2016, through the FCPA Pilot Program, the Criminal Division announced the precursor to the Division’s Corporate Enforcement Policy.
  - In 2017, the then-Deputy Attorney General incorporated the FCPA Pilot Program into the Department’s Justice Manual, at which point it was retitled the FCPA Corporate Enforcement Policy (“CEP”).
  - Since 2018, the Criminal Division has applied the policy across the Division—not just in FCPA matters.
  
- 2. What matters does this policy apply to?**
  - [The policy](#) applies to all corporate criminal matters handled by the Criminal Division and all FCPA cases nationwide.
  
- 3. When do the revisions to the CEP take effect?**
  - The revisions are effective as of January 2023.
  
- 4. What is the purpose of the CEP?**
  - The purpose of the CEP is to provide transparency and consistency to companies regarding the Criminal Division’s approach to corporate criminal enforcement.
  - The CEP provides a series of incentives for companies to voluntarily self-disclose misconduct, fully cooperate, and timely and appropriately remediate, and explains how the Criminal Division will evaluate and distinguish between companies with respect to these factors.
  - The policy provides that when a company has voluntarily self-disclosed misconduct to the Criminal Division, fully cooperated, and timely and appropriately remediated, all in accordance with the standards in the policy, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.
  - Even if a company does not ultimately receive a declination, under the CEP, a self-disclosing company will generally not be required to plead guilty and will receive at least 50% off—and up to as much as 75% off—of the low end of the otherwise applicable United States Sentencing Guidelines (U.S.S.G.) fine range if a criminal resolution (rather than declination) is warranted.
  - The CEP provides additional monetary incentives for *all* companies to fully cooperate and remediate, even if they do not voluntarily self-disclose misconduct. Specifically, such companies may receive up to a 50% reduction off of the low end of the otherwise applicable U.S.S.G. fine range.

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<sup>1</sup> This Frequently Asked Questions document is for informational purposes only and does not supplement or modify the Criminal Division Corporate Enforcement Policy. Please consult the policy for further details.

5. **If a company has no “aggravating circumstances,” what will happen if the company timely, voluntarily self-discloses misconduct; fully cooperates and remediates; and agrees to pay any applicable disgorgement?**
- The CEP offers a *presumption* of a declination of charges in this circumstance.
  - CEP declinations are publicly posted on the Criminal Division’s website, and can be found here: <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>.
6. **How does the CEP define “aggravating circumstances” that may require further analysis before a company that voluntarily self-discloses may receive a declination?**
- Aggravating circumstances that may warrant a criminal resolution include, but are not limited to: involvement by executive management of the company in the misconduct; a significant profit<sup>2</sup> to the company from the misconduct; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism.
7. **Can a company still receive a declination where aggravating circumstances are present?**
- Yes.
  - Although a company will not qualify for a *presumption* of a declination if aggravating circumstances are present, prosecutors may nonetheless determine that a declination of any charges is an appropriate outcome if the company demonstrates to the Criminal Division that it has met all of the following 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 disclosure, the company had an effective compliance program and system of internal accounting controls, which 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 that exceeds the respective factors listed in the policy.
8. **What does “extraordinary” cooperation mean?**
- [AAG Kenneth Polite stated when announcing revisions to the CEP in January 2023](#): “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 receive credit for extraordinary cooperation, companies must go above and beyond the criteria for

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<sup>2</sup> “Significant profit” means significant proportionally relative to the company’s overall profits.

full cooperation set in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary.”

**9. If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, what credit does the company receive for these efforts?**

- In this situation, the Criminal Division will accord, or recommend to a sentencing court, at least 50% and up to a 75% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist, in which case a reduction of at least 50% and up to 75% will generally not be from the low end of the U.S.S.G. fine range, and prosecutors will have discretion to determine the starting point for the reduction based on the particular facts and circumstances of the case;
- In assessing the appropriate form of the resolution, the Criminal Division will generally not require a corporate guilty plea—including for criminal recidivists—absent the presence of particularly egregious or multiple aggravating circumstances, such as those described above, excluding recidivism (i.e., involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; and egregiousness or pervasiveness of the misconduct within the company).

**10. What credit can a company receive if it fully cooperates and timely and appropriately remediates, but did not voluntarily self-disclose the misconduct?**

- If a company did not voluntarily self-disclose its misconduct to the Criminal Division in accordance with the standards set forth in the policy, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth in the policy, the company will receive, or the Criminal Division will recommend to a sentencing court, up to a 50% reduction off of the low end of the U.S.S.G. fine range, except in the case of a criminal recidivist, in which case the reduction of up to 50% will generally not be from the low end of the U.S.S.G. fine range.
- Prosecutors will have discretion to determine the specific percentage reduction and starting point in the range based on the particular facts and circumstances of the case.

**11. How does the policy apply in the context of corporate mergers and acquisitions?**

- The Criminal Division recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity.
- Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily

self-discloses the misconduct and otherwise takes action consistent with the policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a declination in accordance with and subject to the other requirements of the policy.

- In appropriate cases, an acquiring company that voluntarily self-discloses misconduct as set forth in the policy may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

## **12. How does the Criminal Division define “voluntary self-disclosure”?**

- As stated in the policy, the Criminal Division will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing (beyond the credit available under the U.S. Sentencing Guidelines):
  - The voluntary disclosure must be to the Criminal Division<sup>3</sup>;
  - The company had no preexisting obligation to disclose the misconduct;
  - The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring “prior to an imminent threat of disclosure or government investigation”;
  - The company discloses the conduct to the Criminal Division within a reasonably prompt time after becoming aware of the misconduct, with the burden being on the company to demonstrate timeliness; and
  - The company discloses all relevant, non-privileged facts known to it, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue, including individuals inside and outside of the company regardless of their position, status, or seniority.

## **13. When should a company report misconduct?**

- The Criminal Division encourages self-disclosure of potential wrongdoing at the earliest possible time, even when a company has not yet completed an internal investigation, if it chooses to conduct one.
- Furthermore, Department-wide policy “encourages early voluntary disclosure of criminal wrongdoing ... even before all facts are known to the company, and does not expect that such early disclosures would be complete.” JM 9-28.700. However, the Department expects that, in circumstances where the company self-discloses before all facts are known, the company will continue to turn over additional information to the government as it becomes available. *Id.*

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<sup>3</sup> Under the policy, a voluntary self-disclosure must ordinarily be to the Criminal Division. However, the Criminal Division will also apply the provisions of the policy where a company made a good faith disclosure to another office or component of the Department of Justice and the matter is partnered with or transferred to, and resolved with, the Criminal Division.

- One of the requirements for receiving a declination where aggravating circumstances are present is that the voluntary self-disclosure must be made immediately upon the company becoming aware of the allegation of misconduct.
- However, even if the self-disclosure is not “immediate,” other strong incentives and potential benefits remain for companies that timely voluntarily self-disclose. Those incentives include:
  - A potential presumption of a declination if the voluntary self-disclosure is timely, if no aggravating circumstances are present;
  - A potential reduction of at least 50%, and up to 75%, off of the low end of the applicable U.S.S.G. fine range if a resolution (rather than declination) is warranted; and
  - If a resolution (rather than declination) is warranted, prosecutors will generally not require a corporate guilty plea, consistent with [Department-wide policy](#).

**14. Is a company that qualifies for a declination under the CEP still required to make any payments to the government or a foreign authority?**

- To qualify for a declination under the policy, a company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.
- Where another authority collects disgorgement, forfeiture, and/or restitution, the Department will apply, in appropriate circumstances, the Department’s Policy on Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, JM 1-12.100.

**15. How does the policy impact the Criminal Division’s prosecution of individuals?**

- [In announcing revisions to the CEP in January 2023, AAG Polite stated](#): “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.”