9-47.120 - Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy

This policy—previously known as the FCPA Corporate Enforcement Policy—applies to all FCPA cases nationwide and all other corporate criminal matters handled by the Criminal Division.

1. Criteria for a Presumption of a Declination for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in Criminal Division Corporate Matters

In the years since the creation of the FCPA Corporate Enforcement Policy, the Criminal Division has observed that transparency concerning benefits that a company may obtain as a result of voluntary self-disclosure of misconduct can create important incentives for corporate behavior. The Criminal Division handles unique and complex corporate matters involving conduct that spans many jurisdictions, including, but not limited to, FCPA cases. The Criminal Division's policy provides, among other things, that when a company has voluntarily self-disclosed misconduct to the Criminal Division (as defined in Section 5 herein), fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, 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.

To qualify for a declination under this Policy, the Criminal Division will require a company to pay all disgorgement/forfeiture, and/or restitution/victim compensation payments resulting from the misconduct at issue. Where another authority collects disgorgement/forfeiture, and/or restitution/victim compensation payments, 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, Justice Manual 1-12.100.

2. Consideration of Aggravating Circumstances and Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in Criminal Division Corporate Matters

Aggravating circumstances that may warrant a criminal resolution include, but are not limited to: involvement by executive management of the company in the misconduct; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism.

Although a company will not qualify for a *presumption* of a declination if aggravating circumstances are present, prosecutors may nonetheless determine that a declination 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 herein.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Criminal Division:

- will accord, or recommend to a sentencing court, a reduction of at least 50% and up to 75% 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, 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 and egregiousness or pervasiveness of the misconduct within the company); and
- generally will not require appointment of a monitor if a company has, at the time of resolution, demonstrated that it has implemented and tested an effective compliance program and remediated the root cause of the misconduct.

In matters that resolve through a form of criminal disposition (including convictions, guilty pleas, deferred prosecution agreements, or non-prosecution agreements), the Department will generally require the company to pay a criminal penalty/fine as well as, where applicable, disgorgement/forfeiture, and/or restitution/victim compensation payments. In cases of parallel resolutions with other authorities that collect penalties, disgorgement/forfeiture, and/or restitution/ victim compensation payments, the Department will apply, as appropriate, the Department's Policy on Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, Justice Manual 1-12.100.

3. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in Criminal Division Corporate Matters Without Voluntary Self-Disclosure

If a company did not voluntarily self-disclose its misconduct to the Criminal Division in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above and below, the company will receive, or the Criminal Division will recommend to a sentencing court, a reduction of up to 50% 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.

Where a company's self-disclosure does not meet the definition of voluntary self-disclosure articulated in Section 5 below, but the company has demonstrated that it acted in good faith to self-report the misconduct in accordance with Section 5 and that it fully cooperated and timely and appropriately remediated in accordance with the standards set forth below, prosecutors will consider the company's self-disclosure in determining the appropriate resolution, including the appropriate form, the length of the term of the agreement, and the appropriate monetary penalty.

4. M&A Due Diligence and Remediation

Effective beginning in October 2023, the Department-wide M&A Policy, *see* JM 9-28.600 and JM 9-28.900, applies to misconduct uncovered in the context of M&A pre- or post-acquisition due diligence, which is a subset of circumstances addressed by the Criminal Division's CEP. Under the circumstances outlined in the M&A Policy, companies can expect a presumption of a declination for criminal conduct uncovered during M&A due diligence. Specifically, under the M&A Policy, an acquiring entity that: (1) timely discloses to the Department misconduct uncovered as a result of pre- or post-acquisition M&A due diligence, which generally means within 180 days of the closing date of the transaction; (2) timely and fully remediates the misconduct, which generally means within one year of the closing date of the transaction; and (3) agrees to pay all disgorgement/forfeiture, and/or restitution/victim compensation payments resulting from the misconduct at issue, will receive a presumption of a declination. Consistent with the M&A Policy, these baseline timeframes are subject to a reasonableness analysis as determined by Department prosecutors based on the specific facts, circumstances, and complexity of a particular transaction. *See* JM 9-28.900.

An acquiring company that voluntarily discloses misconduct pursuant to the M&A Policy and otherwise satisfies the terms of this policy by fully cooperating, timely and appropriately remediating, and paying any applicable disgorgement/forfeiture, and/or victim compensation payments/restitution will receive a presumption of a declination, even if aggravating circumstances existed as to the acquired company. If an acquiring company voluntarily discloses misconduct pursuant to the M&A Policy and the acquired company otherwise satisfies the terms of this policy, i.e., full cooperation and timely and appropriate remediation, the acquired company may receive a declination.

Again, the six-month and one-year timelines stated above apply only to misconduct uncovered as a result of pre- or post-acquisition M&A due diligence, consistent with the Department-wide M&A Policy. Therefore, all benefits and requirements of this Policy, including those governing the determination of whether a self-report qualifies as a voluntary self-disclosure, remain in full effect for all circumstances that fall outside of the M&A Policy.

5. Definitions

a. *Voluntary Self-Disclosure*

In evaluating self-disclosure, the Criminal Division will make a careful assessment of the circumstances of the disclosure, including the extent to which the disclosure permitted the Criminal Division to preserve and obtain evidence as part of its investigation. 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. 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.S.G.):

- The voluntary disclosure must be to the Criminal Division;
- The company must disclose misconduct not previously known to the Department of Justice;
- 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.

b. *Full Cooperation*

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations to satisfy the threshold for any cooperation credit, *see* JM 9-28.000, the following actions will be required for a company to receive credit for full cooperation for purposes of this Policy (beyond the credit available under the U.S.S.G.):

- Timely disclosure of all non-privileged facts relevant to the wrongdoing at issue, including:

    1) facts gathered during a company's independent internal investigation, if the company chooses to conduct one;
    2) attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts;
    3) timely updates on a company's internal investigation, if the company chooses to conduct one, including but not limited to rolling disclosures of information; and
    4) identification of all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, including the company's officers, employees, customers, competitors, or agents and third-parties, and all non-privileged information relating to the misconduct and involvement by those individuals.

- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Criminal Division to obtain relevant evidence not in the company's possession and not otherwise known to the Criminal Division, it must identify those opportunities to the Criminal Division;
- Timely voluntary preservation, collection, and disclosure of relevant documents and information relating to their provenance, including: (a) disclosure of overseas

documents, the locations in which such documents were found, their custodians, and individuals who authored and/or located the documents; (b) facilitation of third-party production of documents; and (c) where requested, provision of translations of relevant documents in foreign languages;

1) Note: Where a company claims that disclosure of overseas documents is prohibited or restricted due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the existence of such a prohibition or restriction and identifying reasonable and legal alternatives to help the Criminal Division preserve and obtain the necessary facts, documents, and evidence for its investigations and prosecutions.

- De-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation to prevent the company's investigation from conflicting or interfering with the Criminal Division's investigation; and
- Subject to the individuals' Fifth Amendment rights, making company officers and employees who possess relevant information available for interviews by the Criminal Division, including, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees, and, where possible, the facilitation of interviews of third-parties.

c. *Timely and Appropriate Remediation*

The following items will be required for a company to receive full credit for timely and appropriate remediation for purposes of this Policy (beyond the credit available under the U.S.S.G.):

- Demonstration of thorough analysis of causes of underlying conduct (*i.e.*, a root cause analysis) and, where appropriate, remediation to address the root causes;
- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization and the risks related to the businesses in which the organization is engaged, but may include:

1) The company's commitment to instilling corporate values that promote compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
2) The resources the company has dedicated to compliance;
3) The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
4) The authority and independence of the compliance function, including the access the compliance function has to senior leadership and governance bodies and the availability of compliance expertise to the board;
5) The effectiveness of the company's compliance risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;

6) The reporting structure of any compliance personnel employed or contracted by the company;
7) The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors; and
8) The testing of the compliance program to assure its effectiveness.

- Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;
- Appropriate retention of business records, and a prohibition against the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and messaging applications, including ephemeral messaging platforms, that may undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations; and
- Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

6. Comment

Cooperation Credit: The Criminal Division encourages and rewards cooperation. Credit for cooperation takes many forms and is calculated differently depending on the degree to which a company cooperates with the government's investigation and the commitment the company demonstrates in doing so. Where a criminal resolution is warranted, the extent and quality of a company's cooperation will be an important part of the Criminal Division's overall analysis of the case and may impact the proposed form of the resolution, as well as the fine range and fine amount. Once the threshold requirements for cooperation set out at JM 9-28.700 have been met, the Criminal Division will assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when evaluating a company's cooperation under this Policy. A cooperating company must earn credit for cooperation. In other words, a company starts at zero cooperation credit and then earns credit for specific cooperative actions (as opposed to starting with the maximum available credit and receiving reduced credit for deficiencies in cooperation).

To fairly and meaningfully distinguish between companies that provide differing levels and qualities of cooperation, prosecutors should consider, *inter alia*, (i) varying starting points for calculating a fine within the U.S. Sentencing Guidelines range and (ii) varying percentage reductions from the Guidelines range as set forth herein. For example, where a company has demonstrated extraordinary cooperation that exceeds the factors listed herein, the Criminal Division will generally afford a substantial reduction available under this Policy from the bottom of the applicable U.S.S.G. fine range, absent a history of serious prior misconduct. By contrast, a lack of genuine cooperation will result in a company receiving no or minimal credit, and there

will be no general presumption to recommend a sentence at or below the low-end of the U.S.S.G. fine range. Prosecutors are encouraged to use the full spectrum of credit reductions available under this Policy and the starting point in the guidelines to appropriately distinguish between companies, with the most substantial reductions being reserved for only the most extraordinary levels of cooperation and remediation. Moreover, a corporation that fails to demonstrate full cooperation at the earliest opportunity might reduce its ability to earn full cooperation credit.

As set forth in JM 9-28.720, eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver. Nothing herein alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation for purposes of JM 9-47.120(2) and (3)(b), either because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies will be eligible for some cooperation credit if they meet the criteria of JM 9-28.700, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

"De-confliction" is one factor that the Criminal Division may consider in appropriate cases in evaluating whether and how much credit a company will receive for cooperation. When the Criminal Division makes a request to a company to defer investigative steps, such as the interview of company employees or third parties, such a request will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose (*e.g.*, to prevent the impeding of a specified aspect of the Criminal Division's investigation). Once the justification dissipates, the Criminal Division will notify the company that the Criminal Division is lifting its request. Although the Criminal Division may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Criminal Division will not take any steps to affirmatively direct a company's internal investigation efforts.

Where a company asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion. The Criminal Division will closely evaluate the validity of any such claim and will take the impediment into consideration in assessing whether the company has fully cooperated.

Remediation: In order for a company to receive full credit for remediation and avail itself of the benefits of this Policy, the company must have effectively remediated at the time of the resolution.

Voluntary Self-Disclosure: Under this policy, a voluntary self-disclosure must ordinarily be to the Criminal Division. However, the Criminal Division will also apply the provisions of this 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.

Public Release: A declination pursuant to this Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement/forfeiture, and/or restitution/victim compensation. If

a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations under this Policy will be made public.

[updated November 2024]

Temporary Amendment to the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy

Pursuant to the Criminal Division Corporate Whistleblower Awards Pilot Program, which is a three-year initiative effective August 1, 2024, the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy is temporarily amended as follows:

> *If a whistleblower makes both an internal report to a company and a whistleblower submission to the Department, the company will still qualify for a presumption of a declination under the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy—even if the whistleblower submits to the Department before the company self-discloses—provided that the company:*
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> *(1) self-reports the conduct to the Department within 120 days after receiving the whistleblower's internal report, and*
> *(2) meets the other requirements for voluntary self-disclosure and presumption of a declination under the policy.*

Additional guidance is available at www.justice.gov/corporatewhistleblower. The Criminal Division will determine in its sole discretion whether to extend or terminate this amendment.