Office of the Attorney General
Washington, D. C. 20530

December 16, 2022

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL

SUBJECT: GENERAL DEPARTMENT POLICIES REGARDING CHARGING, PLEAS, AND SENTENCING

Our justice system places enormous responsibility on federal prosecutors and vests them with "'broad discretion' to enforce the Nation's criminal laws," *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The reasoned exercise of that discretion promotes the fair, evenhanded, and effective administration of those laws.

In every case, prosecutors must conduct an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." Janet Reno, *Memorandum to Holders of United States Attorneys' Manual, Title 9: Principles of Federal Prosecution*, 6 Fed. Sentencing Rep. 352 (1994) (issued on Oct. 12, 1993); *see* Justice Manual (JM) § 9-27.400 (updated Feb. 2018).

At the same time, prosecutors' discretion cannot be unfettered. For over four decades, the *Principles of Federal Prosecution* have provided guidance that helps ensure the reasoned exercise of prosecutorial discretion. Those principles are designed to help achieve "regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility." Benjamin R. Civiletti, Preface, U.S. Dep't of Justice, *Principles of Federal Prosecution* at i (1980). This memorandum reaffirms the central guidance provided by those principles, while announcing new policies that will help ensure the fair administration of justice in decisions regarding charging, plea agreements, and sentencing recommendations. It likewise reaffirms the priority the Department has placed on focusing our prosecutorial resources on combatting violent crime.

CHARGING

Initiating and Declining Prosecution

Threshold Requirement. The longstanding threshold requirement of the *Principles of Federal Prosecution* is that a prosecutor may not commence a prosecution unless it is probable that the admissible evidence will be sufficient to obtain and sustain a conviction. *See* JM § 9-27.200. That is, the prosecutor must believe that the person will more likely than not be found

guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal.

Federal Interest / Non-Federal Alternatives. The *Principles* further provide that, even when the threshold requirement is satisfied, a prosecutor should not commence a prosecution if the prosecution would not serve a substantial federal interest or the person is subject to adequate alternatives to federal prosecution. *See* JM § 9-27.220.

In determining whether a prosecution would serve a substantial federal interest, the prosecutor should weigh all relevant considerations, including: federal law enforcement priorities; the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation or prosecution of others; the person's personal circumstances; the interests of any victims; and the probable sentence or other consequences if the person is convicted. JM § 9-97.230.

In determining whether adequate alternatives to federal prosecution are available, the prosecutor should consider whether the person is subject to effective prosecution by state, local, territorial, or Tribal authorities, JM § 9-27.240, or whether there exists an adequate non-criminal alternative to prosecution, JM § 9-27.250. The latter may include federal or state civil or administrative remedies, or pretrial diversion, JM § 9-27.250; § 9-22.000. Every district should develop an appropriate pretrial diversion policy.

Impermissible Considerations. In determining whether to commence prosecution, a prosecutor may not be influenced by: the person's race, religion, gender, ethnicity, national origin, or sexual orientation; or political association, activities, or beliefs; or the prosecutor's personal feelings or self-interest. JM § 9-27.260. Charges may not be filed, nor the option of filing charges raised, simply to exert leverage to induce a plea.

Selection of Charges

Once a determination has been made that prosecution would satisfy the above requirements, the prosecutor must select the most appropriate charges. Ordinarily, those charges will include "the most serious offense that is encompassed by [the defendant's] conduct and that is likely to result in a sustainable conviction." Civiletti, *Principles*, Part C.1. When the quoted standard was adopted in 1980, however, only "rare federal offenses [carried] a mandatory minimum term of imprisonment," *id.*, and the U.S. Sentencing Guidelines had not yet been promulgated. Today, statutory offenses with mandatory minimum provisions are common, and those provisions also drive the levels of adjacent Sentencing Guidelines.

Accordingly, in selecting the appropriate charges, prosecutors should consider whether the consequences of those charges for sentencing would yield a result that "is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and

rehabilitation." Janet Reno, *Bluesheet on Charging and Plea Decisions*, at 1-2 (May 1, 1994). Such decisions should be informed by an individualized assessment of all the facts and circumstances of each particular case. The goal in any prosecution is a sanction that is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to satisfy these considerations.

Mandatory Minimum Offenses

The proliferation of provisions carrying mandatory minimum sentences has often caused unwarranted disproportionality in sentencing and disproportionately severe sentences. *See Statement of the Judicial Conference of the United States before the House Judiciary Committee* 5, 10 (July 11, 2014). For this reason, charges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges (*i.e.*, those for which the elements are also satisfied by the defendant's conduct, and do not carry mandatory minimum terms of imprisonment) would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, harm to victims, or other considerations outlined above. Prosecutors, in the exercise of their discretion and through discussions with their supervisors, should determine whether the remaining charges would, in fact, capture the gravamen of the defendant's conduct and danger to the community and yield a sanction "sufficient" to satisfy the considerations outlined above.

As a general matter, the decision whether to seek a statutory sentencing enhancement should be guided by these same principles.

In some cases, our duty to ensure that the laws are faithfully executed will require that prosecutors charge offenses that impose a mandatory minimum sentence, particularly where other charges do not sufficiently reflect the seriousness of the defendant's conduct, the danger the defendant poses to the community, or other important federal interests. This may well be the case, for example, for defendants who have committed or threatened violent crimes, or who have directed others to do so.[1]

Department policy requires that prosecutors always be candid with the court, the probation office, and the public as to the full extent of the defendant's conduct and culpability, regardless of whether the charging document includes such specificity.

An accompanying memorandum issued today provides additional specific policies for charging offenses, including mandatory minimum offenses, in drug cases.

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[1] For example, a defendant who commits a federal crime of violence, such as a Hobbs Act robbery or hate crime, or a federal drug-trafficking crime, and who also uses or carries a firearm in furtherance of that crime, may appropriately be charged under 18 U.S.C. § 924(c) even if the prosecutor could potentially proceed by charging the substantive offense alone and seek a firearm enhancement at sentencing, if the latter would not sufficiently account for the defendant's conduct or danger to the community.

Review, Documentation, Approval, and Evaluation of Charging Decisions

To ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney. All but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision. Each United States Attorney's Office and litigating division of the Department must promulgate written guidance describing its internal indictment and plea agreement review process. *See* JM § 9-27.300.

Any decision to include a mandatory minimum charge in a charging document or plea agreement must also obtain supervisory approval. Each United States Attorney and Assistant Attorney General for a litigating division must determine, and designate, the appropriate level of supervisory review of charging documents and plea agreements containing mandatory minimum charges, which must be no lower than section chief or equivalent. The Department will develop and implement a software program that enables real-time, trackable reporting by districts and litigating divisions of all charges brought by the Department that include mandatory minimum sentences. Until that time, each United States Attorney's Office and litigating division must report semi-annually to the Executive Office for United States Attorneys the number and percentage of charging documents and plea agreements in which it has included mandatory minimum charges.

Prosecutors have an ongoing obligation to evaluate a case and the provable evidence, even after offenses have been charged. If a prosecutor determines that, as a result of a change in the evidence or for another reason, a charge is no longer readily provable or appropriate, the prosecutor should dismiss those charges, consistent with the written policies of the district or litigating division and the *Principles of Federal Prosecution.*

PLEA AGREEMENTS

Plea agreements are governed by the same fundamental considerations described above for charging decisions.

Charges should not be filed simply to exert leverage to induce a plea; nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant's conduct.

Each district and litigating division must promulgate written guidance regarding the standard elements required in its plea agreements, including any waivers of defendants' rights.

SENTENCING RECOMMENDATIONS

In 18 U.S.C. § 3553(a), Congress has identified the factors courts must consider when imposing sentences. Prosecutors should be guided by the same considerations and should -- as the section provides -- seek sentences that are sufficient, but not greater than necessary, to: reflect the seriousness of the offense, promote respect for the law, and provide just punishment

for the offense; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed correctional treatment. 18 U.S.C. § 3553(a)(2). Prosecutors should also consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(6), (7). In each case, prosecutors should make sentencing recommendations based on an individualized assessment of the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1); JM § 9-27.730.

In many cases, the appropriate balance among these factors will lead to a recommendation for a sentence within the advisory range resulting from application of the Sentencing Guidelines, and prosecutors should generally continue to advocate for a sentence within that range. Prosecutors should consider whether the departure provisions under the guidelines are appropriate, and, if so, should advocate for their application accordingly. When advocating at sentencing, prosecutors must fully and accurately alert the court to all known relevant facts and criminal history and explain why the interests of justice warrant their sentencing recommendations.

Although consistent application of the guidelines encourages uniformity throughout the federal system, it is appropriate for prosecutors to consider whether the penalty yielded by the advisory guideline range is proportional to the seriousness of the defendant's conduct and would achieve the purposes of criminal sentencing articulated in § 3553(a). Based on an individualized assessment of the facts and circumstances of the case, a prosecutor may conclude that a request for a departure or variance above or below the guidelines range is warranted. All prosecutorial recommendations for departures or variances -- upward or downward -- must be supported by specific and articulable factors and documented in the case file. Recommendations for upward departures and variances should also be approved by a supervisor.

TRAINING AND IMPLEMENTATION

Each district and litigating division must provide training to its prosecutors on the charging, plea, and sentencing policies set forth in this memorandum and the accompanying memorandum regarding drug cases, as well as on any additional criteria developed by the district or division. Supervising attorneys selected to review exercises of discretion should be skilled and experienced prosecutors, who are thoroughly familiar with Department and district or litigating division policies, priorities, and practices. All district- or division-specific policies must be readily available to prosecutors and shared with the Executive Office for United States Attorneys.

In making decisions relating to charging, plea agreements, and sentencing recommendations, prosecutors must also be mindful of their obligations under the Victims' Rights and Restitution Act, 34 U.S.C. § 20141; the Crime Victims' Rights Act, 18 U.S.C. § 3771; the Attorney General Guidelines for Victim and Witness Assistance; and other relevant Department policies and procedures.

An accompanying memorandum issued today provides additional, specific policies regarding charging, pleas, and sentencing in drug cases.

This memorandum and the accompanying memorandum regarding drug cases supersede previous memoranda on Department policy regarding charging, pleas, and sentencing. The Deputy Attorney General will oversee implementation of these memoranda and will issue further guidance as appropriate. She will also undertake a review of the *Justice Manual*, including Title 9, Chapter 27, to conform its provisions to the policies set forth in these memoranda. In the interim, the policies in these memoranda supersede any conflicting provisions of the manual.

APPLICATION TO PENDING CASES

The policies contained in this memorandum and the accompanying memorandum regarding drug cases apply to all prosecutions initiated no later than 30 days after the issuance of these memoranda.

In cases in which charges have already been brought prior to the effective date of these memoranda, but in which a final judgment after sentencing has not been imposed by the district court, future decisions in such cases should be informed by the policies contained in these memoranda. Prosecutors are encouraged in such situations to take steps to render the charging document, any plea agreement, and the sentence consistent with these policies -- to the extent possible and as the prosecutors in their discretion deem appropriate in light of the federal interests involved. In addition, if a defendant has already been convicted at trial or by plea following the filing of a notice seeking a statutory sentencing enhancement that is inconsistent with these policies, prosecutors should withdraw the notice before sentencing.

These policies do not apply to matters in which a final judgment after sentencing has been imposed by the district court.[2]

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As Attorney General Civiletti said in the preface to the first edition of the *Principles of Federal Prosecution*: "Important though these principles are to the proper operation of our federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process." Civiletti, *Principles*, at ii. I am confident that you have those qualities, and I am grateful for the work you do every day to pursue justice for all Americans.

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[2] The policies contained in these memoranda, and internal office procedures adopted pursuant thereto, are intended solely for the guidance of attorneys for the government. They are not intended to create a substantive or procedural right or benefit, enforceable at law, and may not be relied upon by a party to litigation with the United States. JM § 9-27.150; *see United States v. Caceres*, 440 U.S. 741 (1979).

PRESS RELEASE

Damian Williams and Breon Peace Announce New Voluntary Self-Disclosure Policy for United States Attorney's Offices

Wednesday, February 22, 2023

For Immediate Release

U.S. Attorney's Office, Eastern District of New York

Policy Sets National Standard for Circumstances Under Which Companies May Receive Credit for Voluntarily Self-Disclosing Criminal Conduct, and Benefits of Self-Disclosure

Earlier today, Damian Williams, United States Attorney for the Southern District of New York and Chair of the Attorney General's Advisory Committee (AGAC) and Breon Peace, United States Attorney for the Eastern District of New York and the Chair of the White Collar Fraud Subcommittee of the AGAC, announced the implementation of the new United States Attorney's Offices' Voluntary Self-Disclosure Policy. The policy, which is effective immediately, details the circumstances under which a company will be considered to have made a voluntary self-disclosure (VSD) of misconduct to a United States Attorney's Office (USAO). The policy

provides transparency and predictability to companies and the defense bar concerning the concrete benefits and potential outcomes in cases where companies voluntarily self-disclose misconduct, fully cooperate, and timely and appropriately remediate. The goal of the policy is to standardize how VSDs are defined and credited by USAOs nationwide, and to incentivize companies to maintain effective compliance programs capable of identifying misconduct, expeditiously and voluntarily disclose and remediate misconduct, and cooperate fully with the government in corporate criminal investigations. The policy was developed pursuant to the Deputy Attorney General's September 15, 2022 memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group" (Monaco Memo), which directed each Department of Justice (DOJ) component to develop and publish a VSD policy.

"The new Voluntary Self-Disclosure Policy sets a nationwide standard for how U.S Attorney's Offices will determine whether a company has made a voluntary self-disclosure, and makes transparent the specific, tangible benefits to a company for making a voluntary self-disclosure, fully cooperating, and remediating the criminal conduct" stated United States Attorney Breon Peace. "As a result, no matter where in the country a company operates, it can rely on receiving the same treatment and benefits for voluntarily self-disclosing criminal conduct to a U.S. Attorney's Office. We hope and expect that companies, as good corporate citizens, will take advantage of this new policy to report criminal misconduct by employees and agents when they become aware of it, so that individual wrongdoers can be held accountable. When they do, they will have far better and more predicable outcomes under this policy."

U.S. Attorney Damian Williams said: "The new Voluntary Self-Disclosure Policy is an important step forward in encouraging corporate accountability. This transparent and clearly delineated policy allows for more predictable outcomes, and seeks to incentivize corporations to do the right thing by reporting wrongdoing before detected by regulators and law enforcement. We hope that this new policy has a long-lasting, nationwide effect in promoting honest corporate culture and leads to more companies getting ahead of financial malfeasance before authorities come to them."

The Monaco Memo instructed that each DOJ component that prosecutes corporate crime review its policies on corporate voluntary self-disclosure and, if there was no formal written policy to incentivize self-disclosure, draft and publicly share such a policy. In response, the AGAC, under the leadership of U.S. Attorney Williams, requested that the White Collar Fraud Subcommittee, under the leadership of U.S. Attorney Peace, develop such a policy. The policy announced today was prepared by a Corporate Criminal Enforcement Policy Working Group comprised of U.S. Attorneys from geographically diverse districts, including U.S. Attorney Peace, as well as U.S. Attorney for the Eastern District of Virginia Jessica Aber, U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Hawaii Clare Connors, U.S. Attorney for the Eastern District of North Carolina Michael F. Easley, Jr., U.S. Attorney for the Northern

District of California Stephanie Hinds, U.S. Attorney for the Western District of Virginia Christopher Kavanaugh, and U.S. Attorney for the District of New Jersey Philip Sellinger. Assistant U.S. Attorney Amanda Riedel, White Collar Crimes Coordinator for the Executive Office for U.S. Attorneys, also participated in the development of the policy.

Under the new VSD policy, a company is considered to have made a VSD if it becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the DOJ, and discloses all relevant facts known to the company about the misconduct to a USAO in a timely fashion prior to an imminent threat of disclosure or government investigation. A company that voluntarily self-discloses as defined in the policy and fully meets the other requirements of the policy, by — in the absence of any aggravating factor — fully cooperating and timely and appropriately remediating the criminal conduct (including agreeing to pay all disgorgement, forfeiture, and restitution resulting from the misconduct), will receive significant benefits, including that the USAO will not seek a guilty plea; may choose not to impose any criminal penalty, and in any event will not impose a criminal penalty that is greater than 50% below the low end of the United States Sentencing Guidelines (USSG) fine range; and will not seek the imposition of an independent compliance monitor if the company demonstrates that it has implemented and tested an effective compliance program.

The policy identifies three aggravating factors that may warrant a USAO seeking a guilty plea even if the other requirements of the VSD policy are met: (1) if the misconduct poses a grave threat to national security, public health, or the environment; (2) if the misconduct is deeply pervasive throughout the company; or (3) if the misconduct involved current executive management of the company. The presence of an aggravating factor does not necessarily mean that a guilty plea will be required; instead, the USAO will assess the relevant facts and circumstances to determine the appropriate resolution. If a guilty plea is ultimately required, the company will still receive the other benefits under the VSD policy, including that the USAO will recommend a criminal penalty of at least a 50% and up to a 75% reduction off the low end of the USSG fine range, and that the USAO will not require the appointment of a monitor if the company has implemented and tested an effective compliance program.

In cases where a company is being jointly prosecuted by a USAO and another DOJ component, or where the misconduct reported by the company falls within the scope of conduct covered by VSD policies administered by other DOJ components, the USAO will coordinate with, or, if necessary, obtain approval from, the DOJ component responsible for the VSD policy specific to the reported misconduct when considering a potential resolution. Consistent with relevant provisions of the Justice Manual and as allowable under alternate VSD policies, the USAO may choose to apply any provision of an alternate VSD policy in addition to, or in place of, any provision of its policy.

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Attachment

USAO Voluntary Self Disclosure Policy.pdf [PDF, 241 KB]

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INTRODUCTION

The Deputy Attorney General's September 15, 2022 memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," instructed that each component of the Department of Justice (the "Department") that prosecutes corporate crime should review its policies on corporate voluntary self-disclosure and, if there is no formal written policy to incentivize self-disclosure, it must draft and publicly share such a policy.

The Attorney General's Advisory Committee (AGAC) requested that the White Collar Fraud Subcommittee of the AGAC, under the leadership of U.S. Attorney for the Eastern District of New York Breon Peace (Chair), recommend relevant policies and procedures for consideration. The below policy was prepared by a Corporate Criminal Enforcement Policy Working Group comprised of U.S. Attorneys from geographically diverse districts, including U.S. Attorney Peace, as well as U.S. Attorney for the Northern District of California Stephanie Hinds, U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Hawaii Clare Connors, U.S. Attorney for the District of New Jersey Philip Sellinger, U.S. Attorney for the Eastern District of North Carolina Michael F. Easley, Jr., U.S. Attorney for the Eastern District of Virginia Jessica Aber, and U.S. Attorney for the Western District of Virginia Christopher Kavanaugh. Mandy Riedel, White Collar Crimes Coordinator for the Executive Office for U.S. Attorneys, also participated in the development of this policy.

The Office of the Deputy Attorney General has reviewed and approved this policy. The policy shall apply to all United States Attorney's Offices and is effective immediately.

POLICY[1]

I. Voluntary Self-Disclosure Program

In circumstances where a company becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the Department, companies may come to the United States Attorney's Office (the "USAO") and disclose that misconduct, enabling

[1] The contents of this memorandum provide internal guidance to prosecutors on legal issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties.

the government to investigate and hold wrongdoers accountable more quickly than would otherwise be the case.

In determining the appropriate form and substance of a criminal resolution for any company, prosecutors should consider whether the criminal conduct at issue came to light as a result of the company's timely, voluntary self-disclosure and credit such disclosure appropriately. *See* Memorandum from Deputy Attorney General Lisa Monaco, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group," Sept. 15, 2022 (referred to herein as the "Monaco Memo").[2]

Crediting voluntary self-disclosure of misconduct by companies helps incentivize self-reporting and ensure individual accountability for misconduct. This policy sets forth the criteria the USAO uses in determining an appropriate resolution for an organization that makes a Voluntary Self-Disclosure (VSD) of misconduct to the USAO, the USAO's expectations of what constitutes a VSD, and clear and predictable benefits for such VSDs. Companies that voluntarily self-disclose misconduct to the USAO pursuant to this policy will receive resolutions under more favorable terms than if the government had learned of the misconduct through other means.[3] (*See* Section II – Benefits of Meeting the Standards of Voluntary Self-Disclosure).

In cases where the company is being jointly prosecuted by a USAO and another Department office or component, or where the misconduct reported by the company falls within the scope of conduct covered by VSD policies administered by other Department offices or components,[4] the USAO will coordinate with, or, if necessary, obtain approval from, the Department component responsible for the VSD policy specific to the reported misconduct when considering a potential resolution and before finalizing any resolution. Consistent with relevant provisions of the Justice Manual and as allowable under alternate VSD policies, the USAO may choose to apply any provision of an alternate VSD policy in addition to, or in place of, any provision of this policy.

Even if companies believe the government may already be aware of the misconduct through other means, companies are encouraged to make disclosures to the Department. Prompt

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[2] Consistent with the Monaco Memo, the terms corporation and company apply to all types of business organizations, including but not limited to partnerships, sole proprietorships, government entities, and unincorporated associations. *See* Justice Manual ("JM") § 9-28.200.

[3] The policy applies to all companies, including those that have been the subject of prior resolutions. Department prosecutors will weigh and appropriately credit all VSDs on a case-by-case basis, pursuant to this policy and applicable Department guidance.

[4] *See, e.g.*, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); NSD Enforcement Policy for Business Organizations (National Security Division); Environmental Crimes Section Voluntary Self-Disclosure Policy (Environment and Natural Resources Division); Consumer Protection Branch Voluntary Self-Disclosure Policy for Business Organizations (Consumer Protection Branch); The Corporate Voluntary Self-Disclosure Policy of the Tax Division (Tax Division).

self-disclosures to the government will be considered favorably, even if they do not satisfy all the VSD criteria set forth below.[5]

A. Standards of Voluntary Self-Disclosure

Decisions about whether a disclosure constitutes a VSD will be made by the USAO based on a careful assessment of the circumstances of the disclosure on a case-by-case basis and at the sole discretion of the USAO. The USAO will require that a disclosure meet each of the following standards for it to constitute a VSD under this policy:

1. Voluntary: VSDs only occur when the disclosure of misconduct is made voluntarily by the company. A disclosure will not be deemed a VSD under this policy where there is a preexisting obligation to disclose, such as pursuant to regulation, contract, or a prior Department resolution (*e.g.*, non-prosecution agreement or deferred prosecution agreement).[6]

2. Timing of the Disclosure: A disclosure will only be deemed a VSD when the disclosure is made to the USAO:

    a. "prior to an imminent threat of disclosure or government investigation," U.S.S.G. § 8C2.5(g)(1);

    b. prior to the misconduct being publicly disclosed or otherwise known to the government; and

    c. within a reasonably prompt time after the company becoming aware of the misconduct, with the burden being on the company to demonstrate timeliness.

[5] Regardless of whether a disclosure meets the standards of a VSD, prosecutors will continue to consider the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure or cooperation, in determining whether to seek an indictment. JM § 9-28.400. Separate from this formal VSD Program, the Department continues to encourage corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities. *See* JM § 9-28.900. A corporation's timely and voluntary disclosure of wrongdoing is among the factors prosecutors should consider in reaching a decision as to the proper treatment of a corporate target in conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements. *See* JM § 9-28.300. Prosecutors may also consider a corporation's timely and voluntary disclosure, as an independent factor in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program. *See* JM § 9-28.900.

[6] This policy also does not apply in situations where disclosure of a company's misconduct to the USAO was made by whistleblowers, including those who have informed the Department of fraud and other misconduct in *qui tam* actions.

3. Substance of the Disclosure and Accompanying Actions: For a disclosure to be deemed a VSD under this policy, the disclosure must include all relevant facts concerning the misconduct that are known to the company at the time of the disclosure.

   The USAO recognizes that a company may not be in a position to know all relevant facts at the time of a VSD because the company disclosed reasonably promptly after becoming aware of the misconduct. Therefore, a company should make clear that its disclosure is based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at the time.

   The USAO further expects that the company will move in a timely fashion to preserve, collect, and produce relevant documents and/or information, and provide timely factual updates to the USAO. Should the company conduct an internal investigation, the USAO expects appropriate factual updates as that investigation progresses. *See* JM § 9-28.700.

II. Benefits of Meeting the Standards for Voluntary Self-Disclosure

A. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation

Absent the presence of an aggravating factor, the USAO will not seek a guilty plea where a company has (a) voluntarily self-disclosed in accordance with the criteria set forth above, (b) fully cooperated, and (c) timely and appropriately remediated the criminal conduct.[7] Aggravating factors that may warrant the USAO seeking a guilty plea include, but are not limited to, misconduct that:

1. poses a grave threat to national security, public health, or the environment;

2. is deeply pervasive throughout the company; or

3. involved current executive management of the company.

The presence of an aggravating factor does not necessarily mean that a guilty plea will be required. The USAO will assess the relevant facts and circumstances to determine the appropriate resolution.

[7] In such cases, the resolution could include a declination, non-prosecution agreement, or deferred prosecution agreement. In evaluating whether a company has fully cooperated and timely and appropriately remediated the criminal conduct, the USAO will rely on operative provisions of the Justice Manual and Department policy. *See, e.g.*, Monaco Memo; Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021.

To meet the standards of this VSD policy, appropriate remediation must include, but is not necessarily limited to, the company agreeing to pay all disgorgement, forfeiture, and restitution resulting from the misconduct at issue.

In addition, where a company fully meets the VSD policy, the USAO may choose not to impose a criminal penalty, and in any event will not impose a criminal penalty that is greater than 50% below the low end of the U.S. Sentencing Guidelines fine range.

If, due to the presence of an aggravating factor, a guilty plea is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct, the USAO:

1. will accord or recommend to a sentencing court, at least 50% and up to a 75% reduction off the low end of the U.S. Sentencing Guidelines fine range after any applicable reduction under U.S.S.G. § 8C2.5(g), or the penalty reduction benefit set forth in the alternate VSD policy specific to the misconduct at issue, if applicable; and

2. will not require appointment of a monitor if the company has, at the time of resolution, demonstrated that it has implemented and tested an effective compliance program consistent with Subsection B below.

B. Effective Compliance and Independent Monitorship

The USAO will not require the imposition of an independent compliance monitor for a cooperating company that voluntarily self-discloses the relevant conduct and timely and appropriately remediates the criminal conduct, if the company demonstrates at the time of resolution that it has implemented and tested an effective compliance program. Decisions about the need for a monitor will be made on a case-by-case basis and at the sole discretion of the USAO.

In evaluating whether the company has implemented and tested an effective compliance program, the USAO will refer to the Monaco Memo. This evaluation shall consider resources developed by the Department of Justice's Criminal Division to assist prosecutors in assessing the effectiveness of a company's compliance program (*see, e.g.*, Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020)) or guidance provided by other Department components as to specialized areas of corporate compliance.

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. Accordingly, the Criminal Division is issuing this revised Policy, effective on a prospective basis as of January 2023, which provides, *inter alia*, 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 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, 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, 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; a significant profit[1] to the company from 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:

[1] "Significant profit" means significant proportionally relative to the company's overall profits.

- 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, 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, 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[2] to the company from 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. In cases of parallel resolutions with other authorities that collect penalties, disgorgement, forfeiture, and/or restitution, 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, 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.

[2] "Significant profit" means significant proportionally relative to the company's overall profits.

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.

4. M&A Due Diligence and Remediation

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

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 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;
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 that 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. 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 January 2023]

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 28, 2021

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Lisa Monaco

SUBJECT: Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies[1]

Fighting corporate crime is a top priority of the Department of Justice. By holding accountable individuals and companies responsible for criminal malfeasance, the Department protects the public, promotes the integrity of our markets, discourages unlawful business practices, fights transnational corruption, and upholds the rule of law. Additionally, we ensure public confidence in the fairness of our economic system and make clear that no one is above the law.

This Memorandum makes certain revisions to the Department's existing corporate criminal enforcement policies and practices. The changes announced today will aid Department attorneys immediately in our ongoing efforts to combat corporate crime and ensure consistency in our efforts to prevent corporate criminal conduct from occurring in the first instance; hold accountable individuals responsible for corporate crimes; and ensure that corporations take steps to prevent the recurrence of criminal conduct. I view these changes, which (1) instruct our attorneys to consider a corporation's entire criminal history, (2) clarify a corporation's obligation to provide all information concerning all persons involved in corporate misconduct in order to receive

[1] This Memorandum does not supersede or in any way alter the Antitrust Division's Corporate Leniency Policy.

cooperation credit, and (3) address the use of monitorships, as necessary and fundamental revisions warranting immediate adoption.

I am also announcing, through this Memorandum, the creation of a Corporate Crime Advisory Group within the Department that will consider and, where necessary, recommend additional guidance concerning the three revisions set forth herein. This group will also consider additional revisions and reforms that will strengthen our approach to corporate crime and equip our attorneys with the tools necessary to prosecute it when it occurs.

I am confident that Department attorneys will continue to thoughtfully evaluate the Principles of Federal Prosecution of Business Organizations, as amended by this Memorandum, and other operative guidance, in their determination of the appropriate and just resolution in corporate cases.

I. Creation of the Corporate Crime Advisory Group

I will convene a Corporate Crime Advisory Group within the Department of Justice tasked with reviewing our approach to prosecuting criminal conduct by corporations and their executives, management, and employees. The Corporate Crime Advisory Group will bring together relevant components in the Department and will have a broad mandate to consider various topics that are central to the goal of updating our approach to corporate criminal enforcement. These topics will include traditional considerations embodied in the Principles of Federal Prosecution of Business Organizations, such as cooperation credit, corporate recidivism, and the factors bearing on the determination of whether a corporate case should be resolved through a deferred prosecution agreement ("DPA"), non-prosecution agreement ("NPA"), or plea agreement.

The Corporate Crime Advisory Group will also look internally to see how the Department can best support the tireless work of our dedicated prosecutors and civil attorneys on the front line in combatting corporate crime. The group will consider how the Department can invest in new technologies, such as artificial intelligence, to assist in the often laborious task of processing vast amounts of data. It will also consider how best to employ our resources across the Department to investigate and prosecute corporate crime. Finally, because I firmly believe that the best process includes input from a variety of voices, the Corporate Crime Advisory Group will solicit input from the business community, academia, and the defense bar to make sure that any changes to Department policy take into account multiple perspectives.

I look forward to receiving recommendations from the Corporate Crime Advisory Group. More information about the creation of this group will soon be issued by my office. In the meantime, I am taking additional, immediate steps, described below, to revise and clarify certain aspects of the Department's corporate criminal enforcement policies.

II. Considering a Corporation's History of Misconduct

A corporation's record of past misconduct—including violations of criminal laws, civil laws, or regulatory rules—may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity, and whether any proposed remediation or compliance programs, if implemented, will succeed. Prosecutors must therefore take a holistic approach when considering a company's characteristics, including its history of corporate misconduct, without limiting their consideration to whether past misconduct is similar to the instant offense.

To that end, when making determinations about criminal charges and resolutions for a corporate target, prosecutors are directed to consider *all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family. Some prior instances of misconduct may ultimately prove less significant, but prosecutors must start from the position that all prior misconduct is potentially relevant.

Modifications to Justice Manual (JM) 9-28.600 will be forthcoming consistent with this guidance. All other factors listed in JM 9-28.600 remain in effect and should be considered in combination with this new guidance.

III. Information About Individuals Involved in Corporate Misconduct

This Memorandum reinstates the prior guidance issued by this Office that to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct. *See* Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015). To be clear, this means all nonprivileged information relevant to all individuals involved in the misconduct.

One of the most effective ways to combat corporate misconduct is to hold accountable the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system and economy.

To receive any consideration for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department all nonprivileged information relating to that misconduct. To receive such consideration, companies cannot limit disclosure to those individuals believed to be only substantially involved in the criminal conduct. This requirement includes individuals inside and outside of the company. Department attorneys are best situated to assess the relative culpability of, and involvement by, individuals involved in misconduct, to include those

individuals who, while deemed by a corporation to be less than substantially involved in misconduct, may nonetheless have important information to provide.

Modifications to JM 9-28.700 and 9-47.120 will be forthcoming consistent with this guidance. All prior statements from the Department inconsistent with the guidance set forth herein should be considered rescinded.

IV. Revisions to Monitorship Guidance

This Memorandum modifies standards, policies, and procedures for evaluating the necessity of monitors[2] in corporate criminal matters being handled by Department attorneys in order to (1) bring uniformity to our approach across Department components and United States Attorneys' Offices and (2) clarify the relevant factors for consideration.[3] The principles contained in this Memorandum shall apply to all determinations in criminal matters regarding whether a monitor is appropriate in specific cases, regardless of the form of the resolution.

Independent corporate monitors can be an effective resource in assessing a corporation's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of repeat misconduct and compliance lapses identified during a corporate criminal investigation.

The Department is committed to imposing monitors where appropriate in corporate criminal matters. Department attorneys should analyze and carefully assess the need for the imposition of a monitor on a case-by-case basis. As explained in prior guidance, two broad considerations should guide prosecutors when assessing the need for and propriety of a monitor: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation.

In general, the Department should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship. Where a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship. This is particularly true if the investigation reveals that a compliance program is

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[2] This guidance is limited to monitors, and does not apply to third parties, whatever their titles, retained to act as receivers or trustees or to perform other functions.

[3] This Memorandum revises, supplements, and, in part, supersedes Part A of the guidance provided to the Department's Criminal Division through the October 11, 2018, memorandum entitled, "Selection of Monitors in Criminal Division Matters," issued by then-Assistant Attorney General Brian A. Benczkowski (hereinafter the Benczkowski Memorandum), and further supplements the March 7, 2008, memorandum addressed to all Department components and United States Attorneys entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General Craig S. Morford. This Memorandum revises only Part A of the Benczkowski Memorandum, entitled "Principles for Determining Whether a Monitor is Needed in Individual Cases," and does not alter the remainder of the Benczkowski Memorandum (*i.e.*, Parts B through G), which remains in full force and effect as to the Criminal Division.

deficient or inadequate in numerous or significant respects. Conversely, where a corporation's compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary.

Finally, at a minimum, the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor.

V. Conclusion

The guidance in this Memorandum will apply to all future investigations of corporate wrongdoing. It also applies to those matters pending as of the date of this Memorandum, to the extent practicable.

Revisions to the Justice Manual to reflect the changes described herein are forthcoming.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 15, 2022

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Lisa Monaco

SUBJECT: Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group

By combating corporate crime, the Department of Justice protects the public, strengthens our markets, discourages unlawful business practices, and upholds the rule of law. Strong corporate criminal enforcement also assures the public that there are not two sets of rules in this country—one for corporations and executives, and another for the rest of America. Corporate criminal enforcement will therefore always be a core priority for the Department.

In October 2021, the Department announced three steps to strengthen our corporate criminal enforcement policies and practices with respect to individual accountability, the treatment of a corporation's prior misconduct, and the use of corporate monitors. *See* Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021 ("October 2021 Memorandum"). Simultaneously, we established the Corporate Crime Advisory Group ("CCAG")[1] within the Department to evaluate and recommend further guidance and consider

[1] CCAG members included leaders and experienced prosecutors from all components of the Department that handle corporate criminal matters: the Criminal Division; the Antitrust Division; the Executive Office of United States

revisions and reforms to enhance our approach to corporate crime, provide additional clarity on what constitutes cooperation by a corporation, and strengthen the tools our attorneys have to prosecute responsible individuals and companies.[2] This review considered and incorporated helpful input from a broad cross-section of individuals and entities with relevant expertise and representing diverse perspectives, including public interest groups, consumer advocacy organizations, experts in corporate ethics and compliance, representatives from the academic community, audit committee members, in-house attorneys, and individuals who previously served as corporate monitors, as well as members of the business community and defense bar.

With the benefit of this input, this memorandum announces additional revisions to the Department's existing corporate criminal enforcement policies and practices. This memorandum provides guidance on how prosecutors should ensure individual and corporate accountability, including through evaluation of: a corporation's history of misconduct; self-disclosure and cooperation provided by a corporation; the strength of a corporation's existing compliance program; and the use of monitors, including their selection and the appropriate scope of a monitor's work. Finally, this memorandum emphasizes the importance of transparency in corporate criminal enforcement.

In order to promote consistency across the Department, these policy revisions apply Department-wide. Some announcements herein establish the first-ever Department-wide policies on certain areas of corporate crime, such as guidance on evaluating a corporation's compensation plans; others supplement and clarify existing guidance. The policies set forth in this Memorandum, as well as additional guidance on subjects like cooperation, will be incorporated into the Justice Manual through forthcoming revisions, including new sections on independent corporate monitors.[3]

I. Guidance on Individual Accountability

The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime. Such accountability deters future illegal activity, incentivizes changes in individual and corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system. *See* Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015. Many existing Department policies promote the identification and investigation of the individuals responsible for corporate crimes. The following policies reinforce this priority.

Attorneys; multiple United States Attorneys' Offices; the Civil Division; the National Security Division; the Environment and Natural Resources Division; the Tax Division; and the Federal Bureau of Investigation.

[2] While this Memorandum refers to corporations and companies, the terms apply to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations. *See* Justice Manual ("JM") § 9-28.200.

[3] Department prosecutors will continue to employ the Principles of Federal Prosecution of Business Organizations—as amended by the October 2021 Memorandum and this memorandum—to guide investigations and prosecutions of corporate crime, including with respect to prosecutors' assessment and evaluation of just and efficient resolutions in corporate criminal cases. *See* JM §§ 9-28.000 *et seq.* ("Principles of Federal Prosecution of Business Organizations").

A. Timely Disclosures and Prioritization of Individual Investigations

To be eligible for any cooperation credit, corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct. *See* October 2021 Memorandum, at 3. The mere disclosure of records, however, is not enough. If disclosures come too long after the misconduct in question, they reduce the likelihood that the government may be able to adequately investigate the matter in time to seek appropriate criminal charges against individuals. The expiration of statutes of limitations, the dissipation of corroborating evidence, and other factors can inhibit individual accountability when the disclosure of facts about individual misconduct is delayed.

In particular, it is imperative that Department prosecutors gain access to all relevant, non-privileged facts about individual misconduct swiftly and without delay. Therefore, to receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals. Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Companies seeking cooperation credit ultimately bear the burden of ensuring that documents are produced in a timely manner to prosecutors.

Likewise, production of evidence to the government that is most relevant for assessing individual culpability should be prioritized. Such priority evidence includes information and communications associated with relevant individuals during the period of misconduct. Department prosecutors will frequently identify the priority evidence they are seeking from a cooperating corporation, but in the absence of specific requests from prosecutors, cooperating corporations should understand that information pertaining to individual misconduct will be most significant.

Going forward, in connection with every corporate resolution, Department prosecutors must specifically assess whether the corporation provided cooperation in a timely fashion. Prosecutors will consider, for example, whether a company promptly notified prosecutors of particularly relevant information once it was discovered, or if the company instead delayed disclosure in a manner that inhibited the government's investigation. Where prosecutors identify undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government's ability to assess individual culpability—cooperation credit will be reduced or eliminated.

Finally, prosecutors must strive to complete investigations into individuals—and seek any warranted individual criminal charges—prior to or simultaneously with the entry of a resolution against the corporation. If prosecutors seek to resolve a corporate case prior to completing an investigation into responsible individuals, the prosecution or corporate resolution authorization memorandum must be accompanied by a memorandum that includes a discussion of all potentially culpable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. *See* JM § 9-28.210. In such cases,

prosecutors must obtain the approval of the supervising United States Attorney or Assistant Attorney General of both the corporate resolution and the memorandum addressing responsible individuals.

B. Foreign Prosecutions of Individuals Responsible for Corporate Crime

The prosecution by foreign counterparts of individuals responsible for cross-border corporate crime plays an increasingly important role in holding individuals accountable and deterring future criminal conduct. Cooperation with foreign law enforcement partners—both in terms of evidence-sharing and capacity-building—has become a significant part of the Department's overall efforts to fight corporate crime. At the same time, the Department must continue to pursue forcefully its own individual prosecutions, as U.S. federal prosecution serves as a particularly significant instrument for accountability and deterrence.

At times, Department criminal investigations take place in parallel to criminal investigations by foreign jurisdictions into the same or related conduct. In such situations, the Department may learn that a foreign jurisdiction intends to bring criminal charges against an individual whom the Department is also investigating. The Principles of Federal Prosecution recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecution. JM § 9-27.220. Going forward, before declining to commence a prosecution in the United States on that basis, prosecutors must make a case-specific determination as to whether there is a significant likelihood that the individual will be subject to effective prosecution in the other jurisdiction. To determine whether an individual is subject to effective prosecution in another jurisdiction, prosecutors should consider, *inter alia*: (1) the strength of the other jurisdiction's interest in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction. JM § 9-27.240.

When appropriate, Department prosecutors may wait to initiate a federal prosecution in order to better understand the scope and effectiveness of a prosecution in another jurisdiction. However, prosecutors should not delay commencing federal prosecution to the extent that delay could prevent the government from pursuing certain charges (*e.g.*, on statute of limitations grounds), reduce the chance of arresting the individual, or otherwise undermine the strength of the federal case.

Similarly, prosecutors should not be deterred from pursuing appropriate charges just because an individual liable for corporate crime is located outside the United States.

II. Guidance on Corporate Accountability

A. Evaluating a Corporation's History of Misconduct

As discussed in the October 2021 Memorandum, in determining how best to resolve an investigation of corporate criminal activity, prosecutors should, among other factors, consider the corporation's record of past misconduct, including prior criminal, civil, and regulatory resolutions,

both domestically and internationally.[4] Consideration of a company's historical misconduct harmonizes the way the Department treats corporate and individual criminal histories, and ensures that prosecutors give due weight to an important factor in evaluating the proper form of resolution.

Not all instances of prior misconduct, however, are equally relevant or probative. To that end, prosecutors should consider the form of prior resolution and the associated sanctions or penalties, as well as the elapsed time between the instant misconduct, the prior resolution, and the conduct underlying the prior resolution. In general, prosecutors weighing these factors should assign the greatest significance to recent U.S. criminal resolutions, and to prior misconduct involving the same personnel or management. Dated conduct addressed by prior criminal resolutions entered into more than ten years before the conduct currently under investigation, and civil or regulatory resolutions that were finalized more than five years before the conduct currently under investigation, should generally be accorded less weight as such conduct may be generally less reflective of the corporation's current compliance culture, program, and risk tolerance.[5] However, depending on the facts of the particular case, even if it falls outside these time periods, repeated misconduct may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards.

In addition to its form, Department prosecutors should consider the facts and circumstances underlying a corporation's prior resolution, including any factual admissions by the corporation. Prosecutors should consider the seriousness and pervasiveness of the misconduct underlying each prior resolution and whether that conduct was similar in nature to the instant misconduct under investigation, even if it was prosecuted under different statutes. Prosecutors should also consider whether at the time of the misconduct under review, the corporation was serving a term of probation or was subject to supervision, monitorship, or other obligation imposed by the prior resolution.

Corporations operate in varying regulatory and other environments, and prosecutors should be mindful when comparing corporate track records to ensure that any comparison is apt. For example, if a corporation operates in a highly regulated industry, a corporation's history of regulatory compliance or shortcomings should likely be compared to that of similarly situated companies in the industry. Prior resolutions that involved entities that do not have common management or share compliance resources with the entity under investigation, or that involved conduct that is not chargeable as a criminal violation under U.S. federal law, should also generally receive less weight. Prior misconduct committed by an acquired entity should receive less weight if the acquired entity has been integrated into an effective, well-designed compliance program at the acquiring corporation and if the acquiring corporation addressed the root cause of the prior

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[4] The term "resolution" covers both post-trial adjudications and stipulated non-trial resolutions, such as plea agreements, non-prosecution agreements, deferred prosecution agreements, civil consent decrees and stipulated orders, and pre-trial regulatory enforcement actions.

[5] Corporations should be prepared to produce a list and summary of all prior criminal resolutions within the last ten years and all civil or regulatory resolutions within the last five years, as well as any known pending investigations by U.S. (federal and state) and foreign government authorities. Attorneys for the government may tailor (or expand) this request to obtain the information that would be most relevant to the Department's analysis.

misconduct before the conduct currently under investigation occurred, and full and timely remediation occurred within the acquired entity before the conduct currently under investigation.

Department prosecutors should also evaluate whether the conduct at issue in the prior and current matters reflects broader weaknesses in a corporation's compliance culture or practices. One consideration is whether the conduct occurred under the same management team and executive leadership. Overlap in involved personnel—at any level—could indicate a lack of commitment to compliance or insufficient oversight of compliance risk at the management or board level. Beyond personnel, prosecutors should consider whether the present and prior instances of misconduct share the same root causes. Prosecutors should also consider what remediation was taken to address the root causes of prior misconduct, including employee discipline, compensation clawbacks, restitution, management restructuring, and compliance program upgrades.

Multiple non-prosecution or deferred prosecution agreements are generally disfavored, especially where the matters at issue involve similar types of misconduct; the same personnel, officers, or executives; or the same entities. Before making a corporate resolution offer that would result in multiple non-prosecution or deferred prosecution agreements for a corporation (including its affiliated entities), Department prosecutors must secure the written approval of the responsible U.S. Attorney or Assistant Attorney General and provide notice to the Office of the Deputy Attorney General (ODAG) in the manner set forth in JM § 1-14.000. Notice provided to ODAG pursuant to JM § 1-14.000 must be made at least 10 business days prior to the issuance of an offer to the corporation, except in extraordinary circumstances.

While multiple deferred or non-prosecution agreements are generally disfavored, nothing in this memorandum should disincentivize corporations that have been the subject of prior resolutions from voluntarily disclosing misconduct to the Department. Department prosecutors must weigh and appropriately credit voluntary and timely self-disclosures of current or prior conduct. Indeed, timely voluntary disclosures do not simply reveal misconduct at a corporation; they can also reflect that a corporation is appropriately working to detect misconduct and takes seriously its responsibility to instill and act upon a culture of compliance. As set forth in the next section of this Memorandum, when determining the appropriate form and substance of a corporate criminal resolution for any corporation, including one with a prior resolution, prosecutors should consider whether the criminal conduct at issue came to light as a result of the corporation's timely, voluntary self-disclosure and credit such disclosure appropriately.

B. Voluntary Self-Disclosure by Corporations

In many circumstances, a corporation becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the Department. In those cases, corporations may come to the Department and disclose this misconduct, enabling the government to investigate and hold wrongdoers accountable more quickly than would otherwise be the case. Department policies and procedures must ensure that a corporation benefits from its decision to come forward to the Department and voluntarily self-disclose misconduct, through resolution under more favorable terms than if the government had learned of the misconduct

through other means. And Department policies and procedures should be sufficiently transparent such that the benefits of voluntary self-disclosure are clear and predictable.

Many Department components that prosecute corporate criminal misconduct have already adopted policies regarding the treatment of corporations who voluntarily disclose their misconduct. *See, e.g.*, Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); Export Control and Sanctions Enforcement Policy for Business Organizations (National Security Division); and Factors in Decisions on Criminal Prosecutions (Environment & Natural Resources Division). Of course, voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily (*i.e.*, where they have no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department resolution) and when they do so prior to an imminent threat of disclosure or government investigation.[6]

Through this memorandum, I am directing each Department of Justice component that prosecutes corporate crime to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such self-disclosure, it must draft and publicly share such a policy. Any such policy should set forth the component's expectations of what constitutes a voluntary self-disclosure, including with regard to the timing of the disclosure, the need for the disclosure to be accompanied by timely preservation, collection, and production of relevant documents and/or information, and a description of the types of information and facts that should be provided as part of the disclosure process.[7] The policies should also lay out the benefits that corporations can expect to receive if they meet the standards for voluntary self-disclosure under that component's policy.

All Department components must adhere to the following core principles regarding voluntary self-disclosure. First, absent the presence of aggravating factors, the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct. Each component will, as part of its written guidance on voluntary self-disclosure, provide guidance on what circumstances would constitute such aggravating factors, but examples may include misconduct that poses a grave threat to national security or is deeply pervasive throughout the company. Second, the Department will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of resolution, it also demonstrates that it has implemented and tested an effective compliance program. Such decisions about the

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[6] Voluntary self-disclosure of misconduct is distinct from cooperation with the government's investigation, and prosecutors should thus consider these factors separately. *See, e.g.*, JM § 9-28.900 (addressing voluntary disclosures generally); JM § 9-47.120 (describing credit for voluntary self-disclosure in FCPA matters).

[7] For example, the FCPA Corporate Enforcement policy sets forth the following requirements for a corporation to receive credit for voluntary self-disclosure of wrongdoing: the disclosure must qualify under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation"; the corporation must disclose the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden on the corporation to demonstrate timeliness; and the corporation must disclose all relevant facts known to it, "including as to any individuals substantially involved in or responsible for the misconduct at issue." JM § 9-47.120.

imposition of a monitor will continue to be made on a case-by-case basis and at the sole discretion of the Department.

C. Evaluation of Cooperation by Corporations

Cooperation can be a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that is appropriate for indictment and prosecution. JM § 9-28.700. Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. JM § 9-28.720.[8]

Credit for cooperation takes many forms and is calculated differently based on the degree to which a corporation cooperates with the government's investigation and the commitment that the corporation demonstrates in doing so. The level of a corporation's cooperation can affect the form of the resolution, the applicable fine range, and the undertakings involved in the resolution.

Many existing Department policies discuss the Department's expectations for full and effective cooperation. *See, e.g.*, JM § 9-28.720 (Cooperation: Disclosing the Relevant Facts); JM § 9-47.120, ¶ 1.3(b) (Full Cooperation in FCPA Matters). The Department will update the Justice Manual to ensure greater consistency across components as to the steps that a corporation will need to take to receive maximum credit for full cooperation.

Companies seeking credit for cooperation must timely preserve, collect, and disclose relevant documents located both within the United States and overseas. In some cases, data privacy laws, blocking statutes, or other restrictions imposed by foreign law may complicate the method of production of documents located overseas. In such cases, the cooperating corporation bears the burden of establishing the existence of any restriction on production and of identifying reasonable alternatives to provide the requested facts and evidence, and is expected to work diligently to identify all available legal bases to preserve, collect, and produce such documents, data, and other evidence expeditiously.[9]

Department prosecutors should provide credit to corporations that find ways to navigate such issues of foreign law and produce such records. Conversely, where a corporation actively seeks to capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement, an adverse inference as to the corporation's cooperation may be applicable if such a corporation subsequently fails to produce foreign evidence.

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[8] Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and the individual's attorneys. *Id.*

[9] This requirement now applies to all corporations under investigation that are seeking to cooperate. The requirement already applies to investigations involving potential violations of the FCPA. *See* JM § 9-47.120.

D. Evaluation of a Corporation's Compliance Program

Although an effective compliance program and ethical corporate culture do not constitute a defense to prosecution of corporate misconduct, they can have a direct and significant impact on the terms of a corporation's potential resolution with the Department. Prosecutors should evaluate a corporation's compliance program as a factor in determining the appropriate terms for a corporate resolution, including whether an independent compliance monitor is warranted.[10] Prosecutors should assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (1) the time of the offense; and (2) the time of a charging decision. The same criteria should be used in each instance.

Prosecutors should evaluate the corporation's commitment to fostering a strong culture of compliance at all levels of the corporation—not just within its compliance department. For example, as part of this evaluation, prosecutors should consider how the corporation has incentivized or sanctioned employee, executive, and director behavior, including through compensation plans, as part of its efforts to create a culture of compliance.

There are many factors that prosecutors should consider when evaluating a corporate compliance program. The Criminal Division has developed resources to assist prosecutors in assessing the effectiveness of a corporation's compliance program. *See* Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020). Additional guidance has been provided by other Department components as to specialized areas of corporate compliance. *See, e.g.*, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019). Prosecutors should consider, among other factors, whether the corporation's compliance program is well designed, adequately resourced, empowered to function effectively, and working in practice. Prior guidance has identified numerous considerations for this evaluation, including, *inter alia*, how corporations measure and identify compliance risk; how they monitor payment and vendor systems for suspicious transactions; how they make disciplinary decisions within the human resources process; and how senior leaders have, through their words and actions, encouraged or discouraged compliance.

In addition to those factors, this Memorandum identifies additional metrics relevant to prosecutors' evaluation of a corporation's compliance program and culture.

1. Compensation Structures that Promote Compliance

Corporations can help to deter criminal activity if they reward compliant behavior and penalize individuals who engage in misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow the law and avoid legal "gray areas." When conducting this evaluation, prosecutors should consider how the corporation

[10] At the same time, the mere existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. *See* JM 9-28.800.

has incentivized employee behavior as part of its efforts to create a culture of ethics and compliance within its organization.

Corporations can best deter misconduct if they make clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable. In assessing a compliance program, prosecutors should consider whether the corporation's compensation agreements, arrangements, and packages (the "compensation systems") incorporate elements—such as compensation clawback provisions—that enable penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. Since misconduct is often discovered after it has occurred, prosecutors should examine whether compensation systems are crafted in a way that allows for retroactive discipline, including through the use of clawback measures, partial escrowing of compensation, or equivalent arrangements.

Similarly, corporations can promote an ethical corporate culture by rewarding those executives and employees who promote compliance within the organization. Prosecutors should therefore also consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior. Affirmative incentives include, for example, the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise. When effectively implemented, such provisions incentivize executives and employees to engage in and promote compliant behavior and emphasize the corporation's commitment to its compliance programs and its culture.

Prosecutors should look to what has happened in practice at a corporation—not just what is written down. As part of their evaluation of a corporation's compliance program, prosecutors should review a corporation's policies and practices regarding compensation and determine whether they are followed in practice. If a corporation has included clawback provisions in its compensation agreements, prosecutors should consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue.

Finally, prosecutors should consider whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements so as to inhibit the public disclosure of criminal misconduct by the corporation or its employees.

The use of financial incentives to align the interests of the C-suite with the interests of the compliance department can greatly amplify a corporation's overall level of compliance. To that end, I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that develop and apply compensation clawback policies, including how to shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible.

2. Use of Personal Devices and Third-Party Applications

The ubiquity of personal smartphones, tablets, laptops, and other devices poses significant corporate compliance risks, particularly as to the ability of companies to monitor the use of such devices for misconduct and to recover relevant data from them during a subsequent investigation. The rise in use of third-party messaging platforms, including the use of ephemeral and encrypted messaging applications, poses a similar challenge.

Many companies require all work to be conducted on corporate devices; others permit the use of personal devices but limit their use for business purposes to authorized applications and platforms that preserve data and communications for compliance review. How companies address the use of personal devices and third-party messaging platforms can impact a prosecutor's evaluation of the effectiveness of a corporation's compliance program, as well as the assessment of a corporation's cooperation during a criminal investigation.

As part of evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential violations of law, prosecutors should consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved. To assist prosecutors in this evaluation, I have asked the Criminal Division to further study best corporate practices regarding use of personal devices and third-party messaging platforms and incorporate the product of that effort into the next edition of its Evaluation of Corporate Compliance Programs, so that the Department can address these issues thoughtfully and consistently.

As a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified. Prosecutors should also consider whether a corporation seeking cooperation credit in connection with an investigation has instituted policies to ensure that it will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation, including work-related communications (*e.g.*, texts, e-messages, or chats), and data contained on phones, tablets, or other devices that are used by its employees for business purposes.

III. Independent Compliance Monitorships[11]

As set forth in the October 2021 Memorandum, Department prosecutors will not apply any general presumption against requiring an independent compliance monitor ("monitor") as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one.

[11] In September 2021, the Associate Attorney General issued a memorandum concerning the use of monitorships in civil settlements involving state and local governmental entities. Memorandum from Associate Attorney General Vanita Gupta, "Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Government Entities," Sept. 13, 2021. That memorandum continues to govern the use of monitors in those cases.

Rather, the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case.

A. Factors to Consider When Evaluating Whether a Monitor is Appropriate

Independent compliance monitors can be an effective means of reducing the risk of further corporate misconduct and rectifying compliance lapses identified during a corporate criminal investigation. Prosecutors should analyze and carefully assess the need for a monitor on a case-by-case basis, using the following non-exhaustive list of factors when evaluating the necessity and potential benefits of a monitor:[12]

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy;

2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;

3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;

4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);

5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;

6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;

7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;

8. Whether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;

[12] For components or U.S. Attorney's Offices that do not have extensive corporate resolution experience, consultation with DOJ components that more routinely assess such compliance programs, internal controls, and remedial measures is recommended.

9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and

10. Whether and to what extent the corporation is subject to oversight from industry regulators or a monitor imposed by another domestic or foreign enforcement authority or regulator.

The factors listed above are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Department attorneys should determine whether a monitor is required based on the facts and circumstances presented in each case.

B. Selection of Monitors

In selecting a monitor, prosecutors should employ consistent and transparent procedures. Monitor selection should be performed pursuant to a documented selection process that is readily available to the public. *See, e.g.,* Memorandum of Assistant Attorney General Brian A. Benczkowski, Selection of Monitors in Criminal Division Matters, Oct. 11, 2018, Section E ("The Selection Process"); Environment and Natural Resources Division, Environmental Crimes Section, Corporate Monitors: Selection Best Practices (Mar. 2018); Antitrust Division, Selection of Monitors in Criminal Cases (July 2019).[13] Every component involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing Department process, or develop and publish its own selection process before December 31, 2022.[14] All new selection processes must be approved by ODAG and made public before their implementation as part of any corporate criminal resolution. The appropriate United States Attorney or Department Component Head shall also provide a copy of the process to the Assistant Attorney General for the Criminal Division, who shall maintain a record of such processes.

Any selection process must incorporate elements that promote consistency, predictability, and transparency. First, per existing policy, the consideration of monitor candidates shall be done by a standing or *ad hoc* committee within the office or component where the case originated. To the extent that such committees did not previously do so, every monitorship committee must now include as a member an ethics official or professional responsibility officer from that office or component, who shall ensure that the other members of the committee do not have any conflicts of interest in selection of the monitor. There shall be a written memorandum to file confirming that no conflicts exist in the committee prior to the selection process or as to the monitor prior to the commencement of the monitor's work. Second, monitor selection processes shall be conducted in keeping with the Department's commitment to diversity and inclusion. Third, prosecutors shall

[13] This requirement does not apply to cases involving court-appointed monitors, where prosecutors must give due regard to the appropriate role and procedures of the court.

[14] Unless they adopt and publish their own processes pursuant to the principles set forth herein, U.S. Attorney's Offices should follow the selection process developed by the Criminal Division, unless partnering with a Department component that has its own preexisting selection process.

notify the appropriate United States Attorney or Department Component Head of their decision regarding whether to require an independent compliance monitor. In order to promote greater transparency, any agreement imposing a monitorship should describe the reasoning for requiring a monitor.[15] ODAG must approve the monitor selection for all cases in which a monitor is recommended, unless the monitor is court-appointed.[16]

C. Continued Review of Monitorships

In matters where an independent corporate monitor is imposed pursuant to a resolution with the Department, prosecutors should ensure that the monitor's responsibilities and scope of authority are well-defined and recorded in writing, and that a clear workplan is agreed upon between the monitor and the corporation—all to ensure agreement among the corporation, monitor, and Department as to the proper scope of review.

For the term of the monitorship, Department prosecutors must remain apprised of the ongoing work conducted by the monitor.[17] Continued review of the monitorship requires ongoing communication with both the monitor and the corporation.[18]

Prosecutors should receive regular updates from the monitor about the status of the monitorship and any issues presented. Monitors should promptly alert prosecutors if they are being denied access to information, resources, or corporate employees or agents necessary to execute their charge. Prosecutors should also regularly receive information about the work the monitor is doing to ensure that it remains tailored to the workplan and scope of the monitorship. In reviewing information relating to the monitor's work, prosecutors should consider the reasonableness of the monitor's review, including, where appropriate, issues relating to the cost of the monitor's work. In certain cases, prosecutors may determine that the initial term of the monitorship is longer than necessary to address the concerns that created the need for the monitor, or that the scope of the monitorship is broader than necessary to accomplish the goals of the monitorship. For example, a corporation may demonstrate significant and faster-than-anticipated improvements to its compliance program, and this could reduce the need for continued monitoring. Conversely, prosecutors may determine that newly identified concerns require lengthening the term or amending the scope of the monitorship.

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[15] The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

[16] *See* Morford Memorandum, at p. 3 (requiring, for cases involving the use of monitors in DPAs and NPAs, that "the Office of the Deputy Attorney General must approve the monitor").

[17] In cases of court-appointed monitors, the court may elect to oversee this inquiry.

[18] Per existing policy, any agreement requiring a monitor should also explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation, given the facts and circumstances of the case. *See* Acting Deputy Attorney General Gary C. Grindler, "Additional Guidance on the Use of Monitors in Deferred Prosecutions and Non-Prosecution Agreements with Corporation," May 25, 2010.

IV. Commitment to Transparency in Corporate Criminal Enforcement

Transparency regarding the Department's corporate criminal enforcement priorities and processes—including its expectations as to corporate cooperation and compliance, and the consequences of meeting or failing to meet those expectations—can encourage companies to adopt robust compliance programs, voluntarily disclose misconduct, and cooperate fully with the Department's investigations. Transparency can also instill public confidence in the Department's work.

When the Department elects to enter into an agreement to resolve corporate criminal liability, the agreement should, to the greatest extent possible, include: (1) an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement; and (2) a statement of relevant considerations that explains the Department's reasons for entering into the agreement. Relevant considerations may, for example, include the corporation's voluntary self-disclosure, cooperation, and remedial efforts (or lack thereof); the cooperation credit, if any, that the corporation is receiving; the seriousness and pervasiveness of the criminal conduct; the corporation's history of misconduct; the state of the corporation's compliance program at the time of the underlying criminal conduct and the time of the resolution; the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable; other applicable factors listed in JM § 9-28.300; and any other key considerations related to the Department's decision regarding the resolution.

Absent exceptional circumstances, corporate criminal resolution agreements will be published on the Department's public website.

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Robust corporate criminal enforcement remains central to preserving the rule of law—ensuring the same accountability for all, regardless of station or privilege. Thank you for the work you do every day to fulfill the Department's mission.

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

Tuesday, January 17, 2023

Location
Washington, DC
United States

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, Chief of Staff Jessica Kim, Deputy Assistant Attorneys General Lisa Miller and Kevin Driscoll, Deputy Chief of Staff Dahoud Askar, Senior Counsel Keith Edelman, Glenn Leor Lorinda Laryea, the Chief and Principal Deputy Chief of the Fraud Section, and Brent Wi TOP 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, Lauren Kootman, 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, timely and appropriately remediates, there is a presumption that we will decline to pros TOP absent certain aggravating circumstances involving the seriousness of the offense or the e

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 avoiding a guilty plea or an indictment is voluntary self-disclosure. It is also the clearest

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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 opportunit TOP 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 possibility of a declination — even in the face of aggravating factors — to take extraordin measures before, during, and after a Criminal Division investigation to earn such an outcome.

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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

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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 cooperatic remediation under the CEP because of late and incomplete cooperation and failure to ta

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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.

Topics

FINANCIAL FRAUD | FOREIGN CORRUPTION

Attachment

Criminal Division Corporate Enforcement Policy [PDF, 177 KB]

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Components

Criminal Division

Criminal - Criminal Fraud Section

Criminal - Money Laundering and Asset Recovery Section

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