DOJ Revises Policy to Incentivize Companies to Self-Report Even If They Cannot Meet All Voluntary Self-Disclosure Requirements

November 25, 2024

On November 22, 2024, Principal Deputy Assistant Attorney General Nicole M. Argentieri announced several important changes to the U.S. Department of Justice's Corporate Enforcement Policy (the "CEP").[1] The changes seek to further incentivize companies to voluntarily self-disclose misconduct, cooperate with DOJ and remediate any wrongdoing. In particular, these revisions provide that: (i) a company can receive significant benefits from a good-faith self-disclosure to DOJ, even if the disclosure does not technically qualify as a "voluntary self-disclosure" under the CEP; (ii) to qualify as a "voluntary self-disclosure," the company must disclose "original" information of which DOJ was not previously aware; and (iii) a company that voluntarily self-discloses can receive a presumption of a declination even if it earned "significant profit" from the misconduct.

Key Changes to the Corporate Enforcement Policy. When DOJ last amended the CEP, in January 2023, it expanded the range of circumstances in which a company that self-discloses misconduct could be eligible for a declination with disgorgement. DOJ specified that companies can receive a declination even if aggravating factors exist—but only if the company meets DOJ's rigorous expectations for voluntary self-disclosure, cooperation, and remediation. DOJ's newly announced revisions to the CEP expand and clarify the incentives for companies that voluntarily self-disclose in good faith, even if they fall somewhat short of DOJ's full expectations.

- First, even when a company's self-disclosure did not meet the strict requirements to be a "voluntary self-disclosure" (for example, if not "reasonably prompt"), the company still may receive significant benefits if it nevertheless acted in good faith to self-report, fully cooperated and timely and appropriately remediated. Those benefits may include a non-prosecution agreement, increased credit for cooperation and remediation and a shorter term of non-prosecution agreement or deferred

[1] U.S. Dep't of Justice, Principal Deputy Assistant Attorney General Nicole M. Argentieri, "Transparency in Criminal Division Enforcement" (Nov. 22, 2024), https://www.justice.gov/opa/blog/transparency-criminal-division-enforcement; U.S. Dep't of Justice, "Corporate Enforcement and Voluntary Self-Disclosure Policy" (updated Nov. 2024), https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline.

prosecution agreement. In other words, prosecutors may consider even an "imperfect" self-disclosure in determining how to resolve the matter.

- Second, DOJ has clarified that a "voluntary self-disclosure" must involve the disclosure of information of which DOJ was not already aware. When a company makes a good-faith self-disclosure of information already known to DOJ, prosecutors may consider that self-disclosure, but the company will not be eligible for a declination with disgorgement. Again, DOJ's goal is to incentivize companies to come forward even if they believe that DOJ already may be aware of the information at issue.

- Third, DOJ has decided to "remove[] one of the aggravating circumstances—significant profit—that could make a company ineligible for a presumption of a declination" under the CEP.[2] DOJ's reasoning for this change is that the amount of profits derived from misconduct may not be known early in an investigation, and companies should not hesitate to self-disclose due to a concern that DOJ later will determine those profits to have been significant.

Implications of DOJ's Amendments to the CEP. The current administration's DOJ continues to prioritize self-disclosure and cooperation as key pillars in its corporate enforcement framework. With the newest changes, DOJ seeks to "balance [its] desire to incentivize reasonably prompt disclosures of crimes . . . with the reality that sometimes companies may come forward and fulfill many of [the CEP's] requirements but not qualify for a [Voluntary Self-Disclosure]."[3] As an example of "a company that tried to do the right thing, but narrowly missed the [voluntary self-disclosure] mark," DOJ cited its recent settlement with Albemarle Corporation. Even though Albemarle's self-disclosure was not sufficiently prompt to meet DOJ's voluntary self-disclosure criteria, the company received a non-prosecution agreement rather than a deferred prosecution agreement, as well as a substantial penalty discount.[4]

Of course, a key question is how this corporate enforcement framework may change under the new administration. We will be watching closely for any public remarks or policy pronouncements and will provide an update as soon as we have more information.

---

[2] U.S. Dep't of Justice, Principal Deputy Assistant Attorney General Nicole M. Argentieri, "Transparency in Criminal Division Enforcement" (Nov. 22, 2024), https://www.justice.gov/opa/blog/transparency-criminal-division-enforcement.

[3] *Id.*

[4] *Id.*; U.S. Dep't of Justice, "Albemarle to Pay Over $218M to Resolve Foreign Corrupt Practices Act Investigation" (Sept. 29, 2023), https://www.justice.gov/opa/pr/albemarle-pay-over-218m-resolve-foreign-corrupt-practices-act-investigation.

Please do not hesitate to contact us with any questions.

Helen V. Cantwell
Partner, New York
+1 212 909 6312
hcantwell@debevoise.com

Andrew J. Ceresney
Partner, New York
+1 212 909 6947
aceresney@debevoise.com

Andrew M. Levine
Partner, New York
+1 212 909 6069
amlevine@debevoise.com

David A. O'Neil
Partner, Washington, D.C.
+1 202 383 8040
daoneil@debevoise.com

Winston M. Paes
Partner, New York
+1 212 909 6896
wmpaes@debevoise.com

Jane Shvets
Partner, New York
+1 212 909 6573
jshvets@debevoise.com

Douglas S. Zolkind
Partner, New York
+1 212 909 6804
dzolkind@debevoise.com

Erich O. Grosz
Counsel, New York
+1 212 909 6808
eogrosz@debevoise.com