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THE DISCLOSURE CALCULUS: NAVIGATING THE EVOLVING DOJ LANDSCAPE ON VOLUNTARY SELF-DISCLOSURE

Whether to voluntarily self-disclose potential corporate criminal misconduct to the DOJ has long been among the most consequential decisions a company may face. This article traces the evolution of the DOJ's CEP from its origins in the 2016 FCPA Pilot Program through the first Department-wide CEP issued in 2026, which extends the voluntary self-disclosure framework across virtually all DOJ components and U.S. Attorney's Offices. This article examines how the criteria for voluntary self-disclosure, the incentives available to qualifying companies, and the treatment of aggravating circumstances, such as corporate recidivism, have been refined over time. The article also provides practical guidance on navigating the new self-disclosure calculus and concludes that, despite greater transparency and more favorable incentives, the decision to self-disclose remains a complex, fact-specific judgment that demands careful weighing of the benefits of coming forward against the potential costs.

By Courtney Hague Andrews, Darryl Lew, Gregg Marmaro, and Jasmine Chen *

I. INTRODUCTION

U.S.-domiciled or listed companies have long faced a critical question upon discovering potential corporate wrongdoing: Should they proactively report potential legal violations to enforcement authorities before those authorities possibly discover the misconduct themselves? As reflected in the evolution of the U.S. Department of Justice's ("DOJ" or the "Department") Corporate Enforcement Policy ("CEP"), the most recent version of which was published in March 2026, the DOJ has sought to incentivize companies to voluntarily self-disclose potential corporate misconduct by offering increasingly concrete benefits for companies that do so, and then fully cooperate with the Department's investigation and timely and appropriately remediate the misconduct, and by making clear that more severe outcomes await companies that do not self-disclose and whose conduct is later found out.[1] Still, the voluntary

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[1] Other US government entities like the Securities and Exchange Commission, the Office of Foreign Assets Control within the Department of the Treasury, and the Bureau of Industry and Security within the Department of Commerce, have their own voluntary self-disclosure programs that have evolved over time. Notably, in 2026, the SEC's Enforcement Division updated its Enforcement Manual for the first time since 2017, which provides detailed guidance to companies on the steps they can take to potentially receive cooperation credit. Press Release, U.S. Sec. & Exch. Comm'n, *SEC's Division of Enforcement Announces Updates to Enforcement Manual*, Rel. No. 2026-20 (Feb. 24, 2016), https://www.sec.gov/newsroom/press-releases/

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self-disclosure calculus — whether to self-disclose or instead to investigate and remediate the misconduct, and wait ad see if the DOJ eventually comes knocking — remains challenging. Even a company in a position to make a timely and voluntary self-disclosure and thus qualify for the best disposition under the CEP for criminal misconduct, namely, a formal decision not to prosecute known as a "declination," and disgorgement of ill-gotten gains, typically must weigh that benefit against the potential costs of coming forward. Relevant considerations include, among other things, the likelihood that the government would not otherwise discover the misconduct, the likely cost and disruption of cooperating with a government investigation of uncertain scope and duration, the availability of still meaningful benefits under the CEP for companies that do not self-disclose but fully cooperate and remediate if the Department discovers the conduct on its own, and the publicity attendant to the publication of any negotiated resolution with the DOJ, including a declination.[2]

This article traces the historical development of the DOJ's voluntary self-disclosure policies and offers practical guidance for companies weighing disclosure decisions.

II. HISTORICAL BACKGROUND

The FCPA and the Origins of Voluntary Self-Disclosure

The concept of a voluntary self-disclosure to the DOJ originated in the Department's Antitrust Division in the 1970s, albeit in a different context and with different parameters.[3] The practice of voluntary self-disclosure by corporations later developed in the context of the Foreign Corrupt Practices Act ("FCPA") and evolved over time. For decades following enactment of the FCPA, the voluntary self-disclosure of potential FCPA violations was an informal, and largely *ad hoc*, process.[4] The Department's assessment and treatment of corporate voluntary self-disclosures was based on principles governing corporate prosecutions outlined in memoranda issued by successive Deputy Attorneys General rather than on a formal voluntary self-disclosure policy.[5] Companies that chose to come forward hoped

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2026-20-secs-division-enforcement-announces-updates-enforcement-manual. Other countries like Brazil, the UK, France, Singapore, and Canada similarly have voluntary self-disclosure programs or policies, although the DOJ has the most developed policies and track record of implementing them.

[2] *Voluntary Self-Disclosure*, WHITE & CASE (Sept. 25, 2025), https://www.whitecase.com/insight-our-thinking/2025-global-compliance-risk-benchmarking-survey-voluntary-self-disclosure.

[3] The Antitrust Division first implemented a leniency program in 1978. It issued its Corporate Leniency Policy in 1993, which substantially revised the program, and a Leniency Policy for Individuals in 1994. U.S. Dep't of Just., *Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters* (updated 2017), https://www.justice.gov/d9/pages/attachments/2017/01/13/333756.pdf.

[4] *See, e.g.,* Press Release, U.S. Dep't of Just., *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties* (Nov. 4, 2010) (the Department agreed not to prosecute Noble or its subsidiaries for bribery due to its early voluntary self-disclosure, full cooperation, and extensive remedial measures), https://www.justice.gov/archives/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery; Press Release, U.S. Dep't of Just., *UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China* (Dec. 31, 2009) (the non-prosecution agreement recognizes UTStarcom's voluntary self-disclosure, thorough self-investigation, cooperation, and remedial efforts), https://www.justice.gov/opa/pr/utstarcom-inc-agrees-pay-15-million-penalty-acts-foreign-bribery-china.

[5] *See, e.g.*, Memorandum from Eric Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Just., to All Component Heads and U.S. Att'ys, *Bringing Criminal Charges Against Corporations* (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF; Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Just., to Head of Dep't Components and U.S. Att'ys, *Principles of Federal Prosecution of Business*

for leniency, but had no assurance of receiving it, and there was not a transparent, standard framework against which a company could evaluate whether to make a voluntary self-disclosure other than what could be gleaned from public corporate resolutions.

That situation changed in April 2016, when the DOJ's Criminal Division launched the FCPA Pilot Program — the first formal framework governing corporate voluntary self-disclosures of potential FCPA violations.[6] The FCPA Pilot Program established criteria for timely and voluntary self-disclosure,[7] full cooperation,[8] and timely and appropriate remediation,[9] and provided that a qualifying company would be eligible for a declination after taking into account "countervailing interests."[10] Although companies that received declinations, which are published on the DOJ's website, avoided paying criminal fines and penalties, they were required to disgorge all ill-gotten gains resulting from the FCPA violation.[11] These features have remained as the DOJ's

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Organizations (Jan. 20, 2003); Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., to All U.S. Att'ys et al., *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/dl (the "Yates Memo").

[6] Press Release, U.S. Dep't of Just., *Criminal Division Launches New FCPA Pilot Program* (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

[7] To receive credit, the company must disclose the potential corporate criminal misconduct to the Department "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense, with the burden being on the company to demonstrate timeliness." Fraud Section, U.S. Dep't of Just., *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), https://www.justice.gov/opa/file/838386/dl?inline= (the "1st Ed. FCPA Guidance"). This formulation has essentially remained constant throughout the evolution of the DOJ's voluntary self-disclosure policies. There is not a bright-line rule regarding what will be considered "timely" disclosure in all cases, but there are helpful guideposts in public statements of DOJ officials, other DOJ policies, and in corporate resolutions. *See, e.g.*, Public Remarks of then-Head of the Fraud Section's Corporate Enforcement, Compliance & Policy Unit, Andrew Gentin (noting that although "it's case specific," "the record of the resolutions out there will show that most companies that have disclosed, let's say, up to six months, has been found to be timely"). Gaspard Le Dem, *DOJ Official Clarifies Difference Between "Immediate" and "Timely" Self-Disclosure*, GLOBAL INVEST. REV. (Mar. 24, 2023), https://globalinvestigationsreview.com/just-anti-corruption/article/doj-official-clarifies-difference-between-immediate-and-timely-self-disclosure. *Cf.* Letter from U.S. Dep't of Just. to Albemarle Corp. (Sept. 28, 2023) (finding that a disclosure timely made approximately nine months after obtaining evidence of misconduct was not timely), https://www.justice.gov/d9/2023-09/alb-npa-9.28.23-fully-executed.pdf.

[8] Companies also had to satisfy the threshold standards for cooperation by business organizations described in the U.S. Attorney's Manual and the Yates Memo, including disclosing all facts relevant to the wrongdoing at issue. USAM 9-28.000; the Yates Memo, *supra* note 5. Per the first edition of the FCPA Guidance, once the threshold requirements had been met, the DOJ would evaluate the "scope, quantity, quality, and timing of cooperation" under the unique circumstances of each case. The 1st Ed. FCPA Guidance, *supra* note 7.

[9] Per the 1st Ed. FCPA Guidance, although remediation is highly case specific, the following actions generally were required to receive credit: (1) implementation of an effective compliance and ethics program, based on the size and resources of the company; (2) appropriate discipline of employees; and (3) any additional steps that demonstrate recognition of the seriousness of the misconduct and acceptance of responsibility and measures that reduce risks of repetition. *Id.*

[10] These countervailing interests (which were later called "aggravating circumstances") included "the seriousness of the offense: in cases where, for example, there has been involvement by executive management of the company in the FCPA misconduct, a significant profit to the company from the misconduct in relation to the company's size and wealth, a history of non-compliance by the company, or a prior resolution by the company with the Department within the past five years." *Id.*

[11] On June 6, 2016, the DOJ issued the first public declination of a criminal enforcement action after implementing the FCPA Pilot Program: Akamai Technologies, Inc. and Nortek, Inc. *See, e.g.*, Letter from U.S. Dep't of Just. to Akamai Techs., Inc. (June 6, 2016) ("Consistent with the FCPA Pilot Program," the Criminal Division has closed its inquiry into the matter based on a number of factors, including but not limited to "Akamai's prompt voluntary self-disclosure of the misconduct," "the thorough investigation and fulsome cooperation by the Company," "its agreement to continue to cooperate in any ongoing investigations of individuals," "the steps that the Company has taken to enhance its compliance program and its internal accounting controls," "the Company's full remediation," and "the fact that Akamai will be disgorging to the SEC the full amount of disgorgement as determined by the SEC."), https://www.justice.gov/criminal/criminal-fraud/file/865411/dl.

voluntary self-disclosure program has evolved and expanded beyond the FCPA.

Even if a company were not to qualify for a declination under the Pilot Program, companies that voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated were eligible for "up to a 50% reduction"[12] from the bottom of the applicable U.S. Sentencing Guidelines ("USSG") fine range, whereas companies that did not voluntarily self-disclose corporate misconduct were capped at a 25% reduction.[13]

In November 2017, the DOJ made the FCPA Pilot Program permanent, incorporating the program's principles into the Justice Manual as the FCPA Corporate Enforcement Policy.[14] The FCPA CEP retained the core structure of the FCPA Pilot Program and was the subject of various revisions.

In 2021 and 2022, then-Deputy Attorney General ("DAG") Lisa Monaco outlined various policy changes in connection with the FCPA CEP in speeches and memoranda, including to provide clarity around the treatment of corporate criminal recidivists.[15] Specifically, DAG Monaco issued memoranda directing prosecutors to take a holistic approach in evaluating instances of prior corporate misconduct, continuing to consider past criminal, civil, and regulatory resolutions, both domestically and internationally, and to focus on prior criminal resolutions entered into within 10 years of the conduct under investigation, and civil or regulatory resolutions within five years of the conduct under investigation.[16] This assessment of prior misconduct extended beyond the immediate corporate entity to include its "parent, divisions, affiliates, subsidiaries, and other entities within the corporate family."[17]

The 2023 CEP — Extension to All Corporate Criminal Resolutions

In January 2023, the DOJ Criminal Division announced a new CEP that applied beyond the FCPA to cover all DOJ corporate criminal matters. Under the previous FCPA CEP, the presumption of declination was not available in cases involving a broad range of "countervailing interests," including corporate recidivism.[18] Moreover, corporate recidivists were capped at a 25% reduction off of the applicable USSG fine range, potentially disincentivizing them to voluntarily self-disclose corporate misconduct.

In addition to extending to all corporate criminal cases the FCPA CEP's presumption of a declination

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[12] *See*, *e.g.*, Press Release, U.S. Dep't of Just., *General Cable Corporation Agrees to Pay $20 Million Penalty for Foreign Bribery Schemes in Asia and Africa* (Dec. 29, 2016) https://www.justice.gov/archives/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and; Letter from U.S. Dep't of Just. to General Cable Corp. (Dec. 22, 2016) (explaining that, although General Cable voluntarily and timely self-disclosed to the Fraud Section, fully cooperated, and engaged in extensive remediation, the Department entered into a non-prosecution agreement with a 50 percent reduction off the bottom of the applicable USSG fine range rather than a declination because of the existence of countervailing interests, including that certain high-level executives responsible for overseeing international operations knowingly and willfully failed to implement adequate internal accounting controls over payments to third parties, resulting in illegal payments in at least five countries over a 10-year span and more than $50 million in profits to the company).

[13] *See*, *e.g.*, Press Release, U.S. Dep't of Just., *Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges* (Oct. 24, 2016) (the criminal penalty in this case is 20 percent below the bottom of the applicable USSG fine range because the company did not voluntarily self-disclose or fully remediate the FCPA violations, although it fully cooperated with the Department's investigation), https://www.justice.gov/archives/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges.

[14] Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., *Remarks at the 34th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2017), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[15] *See, e.g*., Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* (Oct. 28, 2021), https://www.justice.gov/archives/dag/file/1173651-0/dl?inline (the "2021 Monaco Memo"); Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., *Remarks on Corporate Criminal Enforcement* (Sept. 15, 2022), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

[16] Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sept. 15, 2022), https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf (the "2022 Monaco Memo").

[17] The 2021 Monaco Memo, *supra* note 15.

[18] The 1st Ed. FCPA Guidance, *supra* note 7.

where the defined criteria were met, the 2023 CEP provided a new pathway to declination despite the presence of aggravating circumstances.[19] Under the 2023 CEP, a company was entitled to the presumption of a declination if it (1) voluntarily self-disclosed the misconduct "immediately upon the company becoming aware of the allegation of misconduct," (2) had an "effective compliance program and system of internal accounting controls, which enabled the identification of the misconduct and led to the company's self-disclosure," and (3) "provided extraordinary cooperation" and "undertook extraordinary remediation."[20] Notably, the 2023 CEP did not define what would constitute "immediate" disclosure or "extraordinary" cooperation and remediation, and thus created significant uncertainty for companies that were recidivists or potentially presented other aggravating circumstances.

The 2023 CEP also increased fine reductions for qualifying companies that did not meet the requirements for a declination. Specifically, the 2023 CEP increased the possible reductions from the applicable USSG fine range from 50% to 75% for companies that timely and voluntarily self-disclosed and fully cooperated and remediated but were not eligible for a declination, and from 25% to 50% for companies that did not timely and/or voluntarily self-disclose but fully cooperated and remediated.[21]

In August 2024, the DOJ launched a Whistleblower Awards Pilot Program[22] to fill gaps for certain criminal misconduct[23] in other federal whistleblower award programs.[24] Whereas the 2023 CEP considered disclosures made after a company received a whistleblower report threatening to report the

[19] Aggravating circumstances include "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism." U.S. Dep't of Just., Justice Manual, § 9-47.120 (updated March 2019), https://www.justice.gov/criminal/criminal-fraud/file/838416/dl.

[20] U.S. Dep't of Just., Justice Manual, § 9-47.120 (updated January 2023), https://www.justice.gov/archives/opa/speech/file/1562851/dl?inline=.

[21] Notably, no company that entered into a negotiated disposition of an FCPA case with the Department under the 2023 CEP after failing to timely and voluntarily self-disclose earned the maximum available 50% reduction off of the applicable USSG fine range despite cooperation and remediation that, as described, would almost certainly have qualified for maximum fine reductions under prior iterations of the CEP. The Department made clear that the maximum 50% fine reduction for companies that did not timely and/or voluntarily self-disclose was reserved for those that "truly distinguish[ed] themselves and demonstrate[d] extraordinary cooperation and remediation." Kenneth A. Polite, Jr., Assistant Att'y Gen., U.S. Dep't of Just., *Remarks on Revisions to the Criminal*

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Division's Corporate Enforcement Policy at Georgetown University Law Center (Jan. 17, 2023), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law. *See, e.g.*, Press Release, U.S. Dep't of Just., AAR CORP to Pay Over $55M to Resolve Foreign Corrupt Practices Act Investigation (Dec. 19, 2024), https://www.justice.gov/archives/opa/pr/aar-corp-pay-over-55m-resolve-foreign-corrupt-practices-act-investigation (AAR's self-disclosure was not treated as a "voluntary self-disclosure" because foreign media had already reported on irregularities and an independent source had alerted the Department, but AAR nevertheless received a 45% reduction in the criminal penalty in light of its timely self-disclosure before it knew of the government's awareness, extensive cooperation including proactive preservation and forensic analysis of electronic evidence (such as imaging mobile devices, recovering deleted documents, and decrypting recovered chat messages), and significant remediation measures, including an enterprise-wide review and reduction of high-risk third-party agents and enhancement of its compliance program and controls); Letter from U.S. Dep't of Just. to Albemarle Corp. (Sept. 28, 2023), https://www.justice.gov/d9/2023-09/alb-npa-9.28.23-fully-executed.pdf (Albemarle Corporation similarly received a 45 percent reduction of the criminal penalty. Although its self-disclosure was not considered "reasonably prompt," it still received substantial cooperation credit because, among other reasons, it undertook robust remediation, including terminating 11 employees, withholding bonuses from 16, overhauling its business model to eliminate sales agents and most third parties, restructuring its sales team's compensation and incentives, and using data analytics to monitor its compliance program).

[22] U.S. Dep't of Just.,*Corporate Whistleblower Awards Pilot Program* (2024), https://www.justice.gov/criminal/media/1362326/dl?inline.

[23] The Whistleblower Awards Program initially focused on four areas: (1) certain crimes involving financial institutions and their employees; (2) foreign corruption involving privately held companies and others that are not issuers of U.S. securities; (3) domestic corruption involving companies; and (4) health care fraud schemes targeting private insurers not subject to qui tam recovery under the False Claims Act.

[24] *Corporate Whistleblower Awards Pilot Program, supra* note 22.

misconduct to the government not to be voluntary (on the theory that the disclosure did not occur "prior to an imminent threat of discovery by the DOJ"), the CEP was temporarily amended in 2024 (to run contemporaneously with the Whistleblower Pilot Program) to allow a company that receives an internal whistleblower report to qualify for a "presumption of a declination" if the company were thereafter to self-disclose the conduct to the DOJ within 120 days of receiving the whistleblower report, and were to satisfy the other requirements.[25]

Notwithstanding these developments, the 2023 CEP, even as amended, still offered only a *presumption* of declination for companies that voluntarily self-disclosed corporate misconduct and met the other criteria and thus resulted in a lack of predictability in outcomes following a voluntary self-disclosure.

The 2025 CEP — Guaranteed Declination

In May 2025, perhaps recognizing the disincentives to voluntary self-disclosure that remained under the 2023 CEP, the Criminal Division revised it in two key respects to make corporate voluntary self-disclosure more attractive. First, the DOJ revised the CEP to provide that, in the absence of aggravating circumstances, "the Criminal Division *will* decline to prosecute a company for criminal conduct" if it voluntarily self-discloses misconduct, fully cooperates, timely and appropriately remediates, and pays the necessary amount of disgorgement/forfeiture or restitution.[26] The 2025 CEP further provided that, even where aggravating circumstances existed, prosecutors retained discretion to recommend a declination upon weighing the severity of those circumstances and a company's cooperation and remediation. In addition, the 2025 CEP narrowed the definition of "recidivism" — an aggravating circumstance. Whereas under the 2023 framework DOJ prosecutors were directed to consider prior criminal resolutions entered into within 10 years of the conduct under investigation, and civil or regulatory resolutions within five years of the conduct under investigation by the subject entity or any entity within its corporate family, the 2025 CEP adopted a more limited definition of corporate recidivism, considering only a "criminal adjudication or resolution *within the last five years* based on *similar misconduct by the entity engaged in the current misconduct*." By guaranteeing a declination for qualifying companies and adopting a narrower definition of "recidivism," the DOJ provided greater predictability of outcome for companies considering voluntary self-disclosure.

Further seeking to incentivize voluntary self-disclosures and recognizing the potential uncertainty of whether disclosures would be considered timely and voluntary, the 2025 CEP created a so-called "near miss" pathway for companies that acted in good faith to self-disclose but fell short of making a qualifying disclosure for largely technical reasons. In such cases, the 2025 CEP directed prosecutors to (1) resolve the matters via a non-prosecution agreement that had a term of less than the typical three years, (2) not require an independent compliance monitor, and (3) provide a fine reduction of 75% off the low end of the USSG range.

III. RECENT DEVELOPMENTS

The 2026 CEP — Extension to All Department Components and U.S. Attorney's Offices

In March 2026, the DOJ issued its first-ever Department-wide CEP, establishing uniform standards and incentives across all federal corporate criminal cases nationwide, with the sole exception of antitrust matters. The 2026 CEP superseded prior DOJ component-specific and US Attorney's Office-specific corporate enforcement policies.[27]

While the 2026 CEP closely resembles the 2025 version, it differs from that policy in a few notable respects, including the definition of "corporate recidivism" as an aggravating circumstance. The new 2026 CEP broadens the definition of "recidivism" compared to the 2025 CEP but without going as far as the more expansive definition of recidivism adopted in 2022. Under the 2026 CEP, "recidivism" means a criminal adjudication or resolution (1) for any misconduct within the last five years regardless of whether the prior conduct is similar to the misconduct at issue in the current self-disclosure or (2) for similar conduct to that at issue in the current self-disclosure

[25] U.S. Dep't of Just., *Temporary Amendment to the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy* (Aug. 2024), https://www.justice.gov/criminal/media/1362316/dl?inline.

[26] U.S. Dep't of Just., Justice Manual, § 9-47.120 (updated May 12, 2025), https://www.justice.gov/d9/2025-05/revised_corporate_enforcement_policy_-_2025.05.11_-_final_with_flowchart_0.pdf.

[27] U.S. Dep't of Just., *Corporate Enforcement and Voluntary Self-Disclosure Policy* (2026), https://www.justice.gov/dag/media/1430731/dl?inline.

regardless of when that prior adjudication or resolution occurred.[28]

Another notable difference is that the 2026 CEP's "near miss" pathway provides a range for the available fine reduction rather than a flat percentage. Whereas the 2025 CEP provided a "75% reduction from the low end" of the applicable USSG fine range in "near miss" scenarios,[29] the 2026 CEP provides a reduction of "at least 50% but not more than 75%" off the low end of the range.[30]

The 2026 CEP further provides that a company must disclose the misconduct "to the appropriate component of the Department," but notes that a "[g]ood faith disclosure to one component where the matter is later brought to another appropriate component for investigation" also qualifies.[31] Importantly, disclosures made only to federal regulatory agencies, state and local governments, or civil regulatory agencies generally will not qualify as voluntary self-disclosures, but the 2026 CEP leaves room for prosecutors to consider "good faith disclosures" to such entities, which "may qualify if appropriate under the circumstances."[32] In all cases, such disclosures to non-DOJ authorities "may be considered as part of a company's cooperation and remediation" — a concept that did not appear expressly in the 2025 CEP.[33]

Finally, while the 2025 CEP recognized that the effectiveness of a company's compliance and ethics programs for a timely and appropriate remediation may "vary based on the size and resources of the organization," the 2026 CEP explicitly states that "the Department will take into consideration the size, sophistication, and financial condition of the cooperating company when assessing the scope, quantity, quality, impact and timing of cooperation." This development is welcome for smaller companies and those with fewer resources as it explicitly acknowledges that the standard for full cooperation is not one-size-fits-all.

IV. THE CURRENT DISCLOSURE CALCULUS

When a company discovers likely corporate criminal misconduct, it must weigh the potential pros and cons of voluntary self-disclosure against those of non-disclosure in the circumstances presented. Although the 2026 CEP arguably simplifies and clarifies more than prior iterations the outcomes companies can reasonably expect following a voluntary self-disclosure, the decision to do so remains complex. Making a self-disclosure and obtaining either a declination or the significant benefits available through the "near miss" pathway comes with the costs of paying disgorgement (with a declination) or a significantly reduced fine (with a "near miss"), the costs of full cooperation with a government investigation of uncertain duration and scope in terms of legal fees and business disruption, potential reputational impact arising from publication of the disposition, and potential follow-on civil litigation. Some companies certainly opt to disclose. Other companies opt to forgo the benefits and avoid the costs of self-disclosure on the basis that the DOJ may never discover the misconduct and, even if it were to do so, the company can still obtain meaningful benefits through full cooperation and timely and appropriate remediation.[34] Informed by their risk tolerance and approach to risk management, it can be helpful for companies to think through in advance the types of cases, if any, in which they would in principle be prepared to voluntarily self-disclose (e.g., following receipt of certain types of whistleblower reports, only if they could qualify for a declination, etc.) as doing so can facilitate decision-making in a crisis. Key factors that can inform this decision are set forth below.

1. *Whether Disclosure Would Be Considered Voluntary and Timely*

To qualify for the most significant benefit under the CEP, namely a declination, a company's self-disclosure must be both voluntary and timely. Companies that would like the option to voluntarily self-disclose if they can qualify for a declination must assess timeliness and voluntariness under the facts and circumstances at issue using available guideposts. Although companies generally have a reasonable amount of time to investigate alleged misconduct and make a timely disclosure,[35] the longer a company takes to investigate and disclose likely criminal misconduct, the greater the risk the DOJ will consider the disclosure untimely. Given that the time-period to make a qualifying disclosure under the Whistleblower Awards Pilot Program is within 120 days of receiving the

[28] *Id.* pt. I.

[29] Justice Manual § 9-47.120, *supra* note 27.

[30] *Id.* pt. II.

[31] *Id.* pt. II, n.5.

[32] *Id.*

[33] *Id.*

[34] Companies that do not self-disclose are well-advised to conduct a thorough internal investigation, remediate the misconduct, and be prepared to cooperate fully if the DOJ were later to discover it.

[35] *Supra* note 7.

whistleblower report, companies are well-advised to implement procedures to triage escalations, identify those that are potential candidates for disclosure, and investigate alleged misconduct promptly so as to give themselves the opportunity, if desired, to make a qualifying voluntary disclosure.

Even where self-disclosure would not be considered voluntary, e.g., due to factors beyond a company's control such as public reporting on the alleged corporate misconduct, a company can assess the still significant benefits potentially available under the new "near-miss" pathway and consider if they outweigh the potential downsides of disclosure.

2. *Existence/Likelihood of Aggravating Factors*

The presence of aggravating factors remains a significant consideration in the voluntary self-disclosure calculus as it affects the maximum benefit available under the 2026 CEP. Other than corporate recidivism, aggravating factors may not be readily apparent from an escalation, providing yet another reason to identify and investigate expeditiously matters that are potential candidates for voluntary self-disclosure.

3. *Department's Corporate Enforcement Priorities*

Misconduct that implicates the DOJ's corporate criminal enforcement priorities is another consideration that may counsel in favor of self-disclosure.[36] In contrast, companies that identify technical corporate criminal violations that are not the focus of the Department's enforcement priorities, e.g., in the FCPA context misconduct involving "routine business practices or the type of corporate conduct that involves de minimis or low-dollar, generally accepted business courtesies" rather than "serious misconduct,"[37] may be comfortable accepting the relatively lower risk of non-disclosure, recognizing that future administrations will likely change the Department's current enforcement priorities. In addition, doubts about the existence of US jurisdiction over the subject conduct, as well as statute of limitations considerations, can also factor into a decision to forgo self-disclosure.

4. *Willingness to Fully Cooperate and Remediate the Corporate Misconduct*

Finally, full, proactive cooperation and timely, appropriate remediation are required for a company to maximize the potential benefits available to it under the 2026 CEP. A company considering making a disclosure must therefore be prepared to expend the generally significant effort and resources necessary to satisfy the Department's cooperation and remediation criteria. In this regard, the 2026 CEP now explicitly recognizes that the DOJ will take into account a company's size, sophistication, and financial condition when assessing the scope and quality of cooperation, which should enable smaller companies with fewer resources to maximize their cooperation credit without holding them to the same standard as bigger companies with greater resources and a more sophisticated compliance infrastructure.

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[36] The Criminal Division's 2025 White Collar Enforcement Plan identifies 10 areas of priority focus: waste, fraud, and abuse that harm the public fisc, including procurement fraud and healthcare fraud; trade and customs fraud, including tariff evasion; fraud perpetrated through variable interest entities, including "ramp and dumps," securities fraud, and other market manipulation schemes; investment fraud victimizing U.S. investors, individuals, and markets; national security threats; material support by corporations to FTOs, including recently designated cartels and TCOs; complex money laundering, including Chinese money laundering organizations; violations of the Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act; bribery and associated money laundering that impacts U.S. national interests, undermines U.S. national security, harms the competitiveness of U.S. businesses, and enriches foreign corrupt officials; and crimes (1) involving digital assets that victimize investors and consumers; (2) that use digital assets in furtherance of other criminal conduct; and (3) willful violations that facilitate significant criminal activity. Memorandum from Matthew R. Galeotti, Head of Crim. Div., U.S. Dep't of Just., to All Crim. Div. Personnel, *Focus, Fairness, and Efficiency in the Fight*

footnote continued from previous column…

Against White-Collar Crime (May 12, 2025), https://www.justice.gov/criminal/media/1400046/dl?inline.

[37] The 2025 FCPA investigations and enforcement guidelines implement Executive Order 14209, titled *Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security (*Exec. Order No. 14209, 90 Fed. Reg. 9587 (Feb. 10, 2025)), and set non-exhaustive factors for prosecutors to consider when evaluating whether to pursue FCPA action, including (1) total elimination of cartels and transnational criminal organizations; (2) safeguarding fair opportunities for US companies; (3) advancing US national security; and (4) prioritizing investigations of serious misconduct; Memorandum from Todd Blanche, Deputy Att'y Gen., U.S. Dep't of Just., to the Head of the Crim. Div., *Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act ("FCPA")* (June 9, 2025), https://www.justice.gov/dag/media/1403031/dl.

V. CONCLUSION

The current self-disclosure landscape is more favorable than ever before, but not without risk. The 2026 CEP offers greater transparency and certainty to facilitate a company's evaluation of the pros and cons of self-disclosure, but it does not eliminate the need for case-specific judgment about whether and when to come forward, taking into account the factors in the disclosure calculus. Ultimately, companies will need to weigh these factors carefully and make informed decisions about self-disclosure in the context of their own circumstances. From a company's perspective, in addition to a CEP that describes benefits and outcomes in an increasingly transparent and predictable manner, a growing DOJ track record of negotiated resolutions that explain outcomes in a way consistent with the policy can further reduce uncertainty and help assuage the abiding concerns companies have with voluntary self-disclosure. ■