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# The Department of Justice Announces Expansion of Self-Disclosure-Based Leniency Principles to All Corporate Cases

By Antonio M. Pozos and Joseph A. Rillotta

OJohn P. Cronan, the acting head of the Criminal Division of the Department of Justice (DOJ), and Benjamin Singer, Chief of the Criminal Fraud Section’s Securities and Financial Fraud Unit, have announced that the Criminal Division will follow the principles set forth in the DOJ’s Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (the “FCPA Enforcement Policy” or “Policy”) in all corporate criminal cases handled by the Criminal Division.

The announcement, made March 1 during a panel at the ABA’s 2018 National Institute on White Collar Crime, is significant because the Policy divides companies into two categories: those that self-disclose misconduct and those that do not. For companies voluntarily self-disclosing misconduct, the Policy creates “a presumption that the company will receive a declination absent aggravating circumstances” if the company fully cooperates, engages in timely and appropriate remediation, and disgorges any ill-gotten gains. Further, if a company complies with the self-disclosure, cooperation and remediation requirements, but the DOJ still decides to prosecute, the Policy states that the DOJ “will accord, or recommend to a sentencing court, a 50 [percent] reduction off the low end” of the otherwise applicable fine (except in the case of a criminal recidivist). On the other hand, companies that do not self-disclose are eligible, at most, for only a 25 percent fine reduction.

To illustrate the potential benefits of voluntary self-disclosure, Cronan and Singer pointed to the recent resolution of a matter involving [Barclays](#), a target of a long-running DOJ investigation concerning foreign exchange trading. Cronan and Singer explained that the DOJ declined to bring formal charges against Barclays, unlike other financial institutions, because Barclays self-disclosed the illegal conduct at issue, fully cooperated, engaged in timely remediation, and agreed to disgorge \$12.9 million that it illegally gained as part of the scheme. In contrast, Singer confirmed that companies that do not voluntarily self-

disclose illegal conduct will only be eligible for a fine reduction of up to 25 percent for cooperation and remediation, even if the cooperation and remediation are otherwise fully satisfactory and acceptable to the DOJ.

Although the Criminal Division’s new self-disclosure policies are not binding on any U.S. Attorney’s Office, it is safe to assume that the Criminal Division will seek to persuade U.S. Attorney’s Offices to toe a similar line in any cases that they work jointly with the Division. Indeed, Singer specifically referenced the matter of [Volkswagen AG](#), which was jointly prosecuted by the Criminal Division and the U.S. Attorney’s Office for the Eastern District of Michigan. Singer noted that, in that case, the Criminal Division and the U.S. Attorney’s Office agreed to limit Volkswagen’s potential fine reduction to a maximum of 25 percent, in light of the company’s failure to self-disclose. (Ultimately, Volkswagen received a 20 percent reduction off the low end of the Sentencing Guidelines.)

Before Cronan and Singer’s remarks, it was not clear to companies whether the substantial benefits that can accrue from self-disclosure under the FCPA Enforcement Policy – up to an including declination – were available outside of the FCPA context. Now, at least in cases involving the DOJ’s Criminal Division, it appears that the principles of this Policy more broadly apply. Accordingly, companies must carefully examine their potential eligibility for a declination of prosecution or a fine reduction under the Policy’s principles, and they must weigh the potential benefits of self-disclosure – regardless of their industry or the nature of the potential violation. Companies would be well-advised to do so in consultation with counsel who not only understand their industry, but are also well-versed in the intricacies of the FCPA Enforcement Policy, and in the opportunities and risks presented by the DOJ’s revised approach to corporate criminal enforcement.

## White Collar Defense and Corporate Investigations Team

Primary Contacts



**Antonio M. Pozos**  
Partner  
Philadelphia  
(215) 988-3327  
antonio.pozos@dbr.com



**Joseph A. Rillotta**  
Partner  
Washington, D.C.  
(202) 230-5636  
joseph.rillotta@dbr.com