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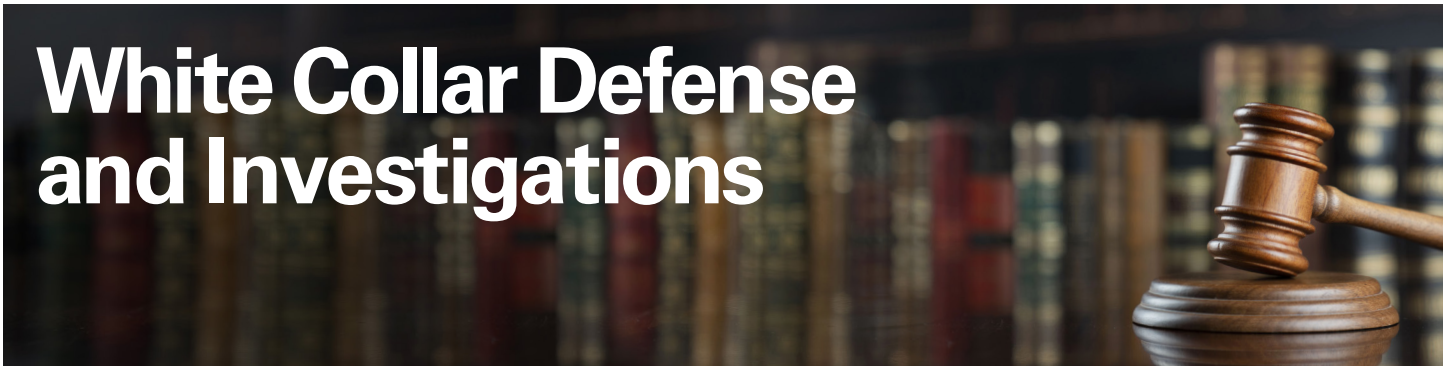

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DOJ Implements Voluntary Self-Disclosure Policy for US Attorneys' Offices

On February 22, 2023, the Department of Justice (DOJ) adopted a new policy that establishes a national standard for voluntary self-disclosure credit in corporate criminal enforcement actions brought by U.S. Attorneys' Offices (USAO).

Like the DOJ Criminal Division's recently updated Corporate Enforcement and Voluntary Self-Disclosure Policy, the USAO policy was developed at the direction of Deputy Attorney General (DAG) Lisa Monaco. (See her September 15, 2022, memorandum "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions With Corporate Crime Advisory Group" (Monaco Memo).)

The USAO and the Criminal Division voluntary self-disclosure policies are substantively aligned with each other.

Overall, both policies make clear that if a company voluntarily self-discloses misconduct by an employee or agent of the company, fully cooperates, and timely and appropriately remediates the criminal conduct (including agreeing to pay all disgorgement, forfeiture and restitution resulting from the misconduct), it is likely to receive certain benefits, including:

- Prosecutors will not seek a guilty plea.
- Prosecutors may choose not to impose any criminal penalty (and instead seek a declination, deferred prosecution agreement or nonprosecution agreement).
- If a criminal penalty is deemed appropriate, prosecutors will recommend a criminal penalty that is at least 50% and up to 75% below the low end of the U.S. Sentencing Guidelines (USSG) fine range.
- Prosecutors will not seek to impose an independent compliance monitor if the company has implemented and tested an effective compliance program at the time of the resolution.

Where a company is being jointly prosecuted by a USAO and another DOJ component, the USAO will coordinate with the DOJ component and may decide to apply provisions of that component's voluntary self-disclosure policy in addition to, or in place of, any USAO policy provision.

In our takeaways from the new USAO policy, we point out key similarities and differences with the Criminal Division policy.

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Policy Objectives

Like the Criminal Division, the USAO's stated goal in implementing this new policy is to standardize how voluntary self-disclosures are defined and credited, and to incentivize companies to promptly and voluntarily self-disclose misconduct.

Damian Williams, U.S. attorney for the Southern District of New York, said the new policy "allows for more predictable outcomes, and seeks to incentivize corporations to do the right thing by reporting wrongdoing before [it is] detected by regulators and law enforcement."

The USAO policy emphasizes that, even in the absence of a timely voluntary self-disclosure, prosecutors will continue to consider the corporation's pre-indictment conduct (*e.g.*, cooperation) in determining whether to seek an indictment.

Separate from the formal voluntary self-disclosure program, the USAO policy also encourages corporations — as part of their compliance programs — to conduct internal investigations, fully and timely cooperate, and remediate misconduct. This is in line with the Criminal Division's policy and other DOJ pronouncements.

Voluntary Self-Disclosure Requirements

Both the USAO and the Criminal Division policies define "voluntary self-disclosure" as circumstances where a company:

- Had no preexisting obligation to disclose.
- Made the disclosure "within a reasonably prompt time" after becoming aware of the misconduct.
- Made the disclosure prior to an "imminent threat" of disclosure or government investigation, and prior to the misconduct being publicly disclosed or otherwise known to the government.
- Disclosed all relevant facts concerning the misconduct that were known to the company at the time.

Timeliness of the disclosure. The Criminal Division policy specifically requires disclosure to the Criminal Division and encourages self-disclosure "at the earliest possible time," even when a company has not completed an internal investigation.

The USAO policy does not include this language. But, in practice, the Criminal Division and the USAO are likely to assess timeliness in a similar way. The assessment will generally come down to the specific facts and circumstances of each case, including the information known to the company at the time of the disclosure and the chronology of events.

The burden will be on the company to demonstrate that the disclosure was timely.

Disclosure of relevant facts and evidence. The Criminal Division policy also specifies that disclosure of "all relevant facts" includes "all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue."

The USAO policy does not specifically refer to facts and evidence about individuals, but this is undoubtedly required. As stated in the Monaco Memo, "to be eligible for any cooperation credit, corporations must disclose to the [DOJ] all relevant, non-privileged facts about individual misconduct."

Benefits of Meeting the Standards for Voluntary Self-Disclosure

Where a company "fully" meets the requirements of the USAO policy, the USAO may choose not to impose a criminal penalty. Instead the USAO may issue a declination or seek another type of resolution, such as a deferred prosecution agreement or nonprosecution agreement.

In any event, where the voluntary self-disclosure requirements are met, the USAO will not impose a criminal penalty that is greater than 50% below the low end of the USSG fine range.

In addition, under the new policy, absent the presence of an aggravating factor, U.S. Attorneys' Offices will not seek a guilty plea where a company has:

- Voluntarily self-disclosed.
- Fully cooperated.
- Timely and appropriately remediated the criminal conduct.

Aggravating factors that may warrant the USAO seeking a guilty plea include, but are not limited to, misconduct that:

- Poses a grave threat to national security, public health or the environment.
- Is deeply pervasive throughout the company.
- Involved current executive management of the company.

The Criminal Division policy identifies additional aggravating factors, such as a significant profit to the company from the misconduct and corporate recidivism. Although these are not listed in the USAO policy, they are likely to be circumstances the USAO will consider in making investigative, charging or resolution decisions.

However, while the USAO policy states that prosecutors may seek a guilty plea where "an aggravating factor" is present, the Criminal Division policy states that prosecutors generally will not require a guilty plea, including for criminal recidivists, absent the presence of "particularly egregious or multiple aggravating factors."

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If a guilty plea is ultimately required, companies that have met voluntary self-disclosure requirements may receive other benefits under both policies, including, as mentioned above, a fine reduction and no need for an independent compliance monitor.

The USAO policy does not describe any monetary benefits where companies fail to meet the voluntary self-disclosure requirements but satisfy requirements for cooperation and remediation.

By contrast, the Criminal Division policy states that if a company does not self-disclose the misconduct but fully cooperates and "timely and appropriately" remediates, the Criminal Division will recommend up to a 50% reduction off of the low end of the USSG fine range.

The USAO's approach may indicate that the USAO is focused on incentivizing voluntary self-disclosures in the first instance rather than giving the impression that similar benefits could be earned through cooperation and remediation alone (although companies would continue to receive credit for the latter).

Declinations

The USAO policy does not discuss circumstances when companies may receive a declination but generally notes that, absent the presence of "an aggravating factor," a resolution could include a declination, a nonprosecution agreement or a deferred prosecution agreement.

The Criminal Division policy provides that when a company has voluntarily self-disclosed misconduct, fully cooperated, and timely and appropriately remediated, there will be a presumption that the company will receive a declination absent aggravating circumstances.

Unlike the USAO policy, the Criminal Division policy goes further and provides specific guidance to prosecutors about when a company may receive a declination even where aggravating circumstances exist.

The policy states that a company may receive a declination in such circumstances if:

- The voluntary self-disclosure was made "immediately" upon the company becoming aware of the allegations of misconduct.
- The company had an effective compliance program and system of internal accounting controls at the time of the misconduct.
- The company provided "extraordinary cooperation" and undertook "extraordinary remediation."

The Criminal Division has not defined the terms "immediately" and "extraordinary."

Cooperation, Remediation and Evaluation of Compliance Programs

The USAO policy does not provide any new guidance or requirements for cooperation, remediation or evaluation of compliance programs beyond what has already been implemented via the Justice Manual or other DOJ policies (such as the Monaco Memo; DAG Monaco's October 28, 2021, memorandum "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies"; and the Criminal Division's Evaluation of Corporate Compliance Programs, which was updated in June 2020).

In line with previous DOJ pronouncements, the USAO policy states that companies are expected to "move in a timely fashion to preserve, collect, and produce relevant documents and/or information."

In addition, companies are expected to provide "timely" factual updates to the USAO and "appropriate factual updates as the investigation progresses" if the company has decided to conduct an internal investigation.

What Should Companies Do?

Over the past several months, the DOJ has laid out policies that strongly encourage and reward timely voluntary self-disclosures and remind companies that such disclosures are essential to obtain certain benefits.

Going forward, prosecutors are likely to take a much tougher stance where companies do not voluntarily self-disclosure in a timely manner, even where their cooperation and remediation efforts meet DOJ standards.

These new policies provide clarity on the DOJ's position and offer rewards for self-disclosure. However, companies that learn of misconduct or apparent violations of U.S. laws or regulations still face a difficult choice.

In analyzing whether to make a self-disclosure, companies should assess the impact of a self-disclosure outside of their interaction with the DOJ. This can be difficult to assess before the record is fully developed. Examples of potential impacts include:

- Disclosure obligations to investors.
- The possibility of civil litigation.
- Impacts to financial covenants.
- The appropriateness (or necessity) of making simultaneous disclosures in other jurisdictions or to other regulatory bodies.

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Companies can take steps now to best position themselves in light of these new policies, including:

- Implement policies and procedures that strongly encourage internal reporting of employee misconduct.
- Promptly review all reports of misconduct and work to quickly determine whether to make a self-disclosure. Decisions not to self-disclose should be carefully revisited on a regular basis as additional facts and information are gathered.
- Conduct thorough investigations of misconduct. If a self-disclosure was made and the company is cooperating, it should establish a robust framework for sharing the results of its internal investigation with the DOJ and other authorities, as appropriate.

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