

# U.S. Attorney’s Offices Issue Nationwide Corporate Voluntary Self-Disclosure Policy

February 27, 2023

On February 22, 2023, the Department of Justice announced a new corporate Voluntary Self-Disclosure Policy for U.S. Attorney’s Offices nationwide (the “USAO Policy”).<sup>1</sup> The USAO Policy sets forth clearer and concrete benefits for companies that voluntarily and timely self-report misconduct as had been directed by the September 15, 2022 memorandum from the Deputy Attorney General for the Department of Justice (“DOJ”) (the “Monaco Memorandum”).<sup>2</sup> The USAO Policy also follows the significant revisions to the DOJ Criminal Division’s Corporate Enforcement and Voluntary Self-Disclosure Policy recently announced on January 17, 2023 (the “Corporate Enforcement Policy”).<sup>3</sup>

The USAO Policy applies to all U.S. Attorney’s Offices and is effective immediately. As such, it standardizes what was previously a patchwork of different practices across U.S. Attorney’s Offices and fills a gap where no comprehensive voluntary self-disclosure policy previously existed.

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<sup>1</sup> See U.S. Attys.’ Offs., *Voluntary Self-Disclosure Policy*, <https://www.justice.gov/usao-sdny/press-release/file/1569411/download>.

<sup>2</sup> See Dep’y Att’y Gen’l, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group*, at 7 (Sept. 15, 2022); see also our Alert Memorandum on this topic, “U.S. Department of Justice Announces Changes to Corporate Criminal Enforcement Policies,” dated Sep. 19, 2022, [available at https://www.clearlyenforcementwatch.com/2022/09/u-s-department-of-justice-announces-changes-to-corporate-criminal-enforcement-policies/](https://www.clearlyenforcementwatch.com/2022/09/u-s-department-of-justice-announces-changes-to-corporate-criminal-enforcement-policies/).

<sup>3</sup> See also our Alert Memorandum on this topic, “U.S. Department of Justice Announces Revisions to Corporate Criminal Enforcement Policy,” dated Jan. 23, 2023, [available at https://www.clearlygottlieb.com/-/media/files/alert-memos-2023/us-department-of-justice-announces-revisions-to-corporate-criminal-enforcement-policy.pdf](https://www.clearlygottlieb.com/-/media/files/alert-memos-2023/us-department-of-justice-announces-revisions-to-corporate-criminal-enforcement-policy.pdf). The DOJ Criminal Division’s Corporate Enforcement Policy was formerly known as the FCPA Corporate Enforcement Policy.

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## I. Standard for Voluntary Self-Disclosure

For a company to qualify for fine reductions and other benefits under the USAO Policy, it must (1) voluntarily self-disclose the misconduct in a timely manner, (2) fully cooperate, and (3) timely and appropriately remediate the misconduct—the same three factors companies must satisfy to qualify for credit under the DOJ Criminal Division’s Corporate Enforcement Policy.<sup>4</sup> The USAO Policy focuses on the first of these elements (voluntary self-disclosure) and refers USAOs to other DOJ policies when assessing the remaining two elements (whether a company has fully cooperated and timely and appropriately remediated the misconduct).<sup>5</sup>

Similar to the DOJ Criminal Division’s Corporate Enforcement Policy, a company must meet the following criteria to obtain voluntary self-disclosure credit under the USAO Policy:

1. Disclose misconduct voluntarily and not pursuant to a preexisting obligation, such as a prior non-prosecution agreement with the DOJ.<sup>6</sup>
2. Disclose misconduct “prior to an imminent threat of disclosure or government investigation”<sup>7</sup> and prior to the government’s awareness of the misconduct, but within a reasonably prompt time after the company becomes aware of the misconduct.
3. Disclose “all relevant facts concerning the misconduct that are known to the company at the time of the disclosure.”<sup>8</sup>

<sup>4</sup> The USAO Policy also addresses situations where the misconduct at issue falls within the scope of multiple DOJ components or offices. Under these circumstances, the USAO Policy provides that the USAO will coordinate with, or obtain approval from, the responsible DOJ component or office before finalizing any resolution with a company. See USAO Policy at 2.

<sup>5</sup> See USAO Policy at 4 n.7. The Policy notes that appropriate remediation includes, among other things, the payment of all disgorgement, forfeiture, and restitution arising from the misconduct at issue. See id. at 5.

<sup>6</sup> See id. at 3–4.

The Policy explicitly acknowledges that a company may not know “all relevant facts” when it makes the initial self-disclosure. Therefore, it instructs companies to make clear whether and when their disclosure is only preliminary and advises that, in those situations, companies will be expected to provide factual updates as they learn additional relevant information.<sup>9</sup>

## II. Benefits of Voluntary Self-Disclosure

A company that meets the standards for voluntary self-disclosure under the USAO Policy may receive substantial benefits:

*First*, in the absence of aggravating factors, the USAO will not seek a guilty plea from a company that voluntarily self-discloses on a timely basis, fully cooperates and timely and appropriately remediates.<sup>10</sup> However, the USAO may still enter into a non-prosecution agreement or even a deferred prosecution agreement with the company.<sup>11</sup> This contrasts with the DOJ Criminal Division’s Corporate Enforcement Policy, which provides that companies meeting its terms will presumptively receive a declination in the absence of aggravating circumstances.<sup>12</sup> Moreover, under the USAO Policy, the USAO may impose a lower criminal penalty or no penalty at all, but companies will still be required to pay all disgorgement, forfeiture and restitution resulting from the misconduct.<sup>13</sup> Aggravating factors that may warrant a guilty plea under the USAO Policy include misconduct that poses a grave threat to national security, public health, or the environment; misconduct that is pervasive throughout the company; or

<sup>7</sup> See id. at 3 (citing U.S.S.G. § 8C2.5(g)(1)).

<sup>8</sup> See id.

<sup>9</sup> See id. at 4. Note that the DOJ Criminal Division’s Corporate Enforcement Policy does not explicitly instruct companies to clarify when their disclosure is preliminary. See Dep’t of Just., Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, <https://www.justice.gov/opa/speech/file/1562851/download>.

<sup>10</sup> See id. at 4.

<sup>11</sup> See id. at 4 n.7.

<sup>12</sup> See id. at 4.

<sup>13</sup> See id. at 5.

misconduct that involves current company executive management.<sup>14</sup>

*Second*, even where a guilty plea is warranted because of the presence of one or more aggravating factors, a company is eligible to receive a 50% to 75% fine reduction from the low end of the U.S. Sentencing Guidelines (“U.S.S.G.”) fine range. This mirrors the most recent revisions to the DOJ Criminal Division’s Corporate Enforcement Policy.<sup>15</sup>

*Third*, where a company demonstrates it has implemented an effective and tested compliance program at the time of resolution, the USAO will not require the appointment of a monitor, even where an aggravating factor is present.<sup>16</sup> The USAO Policy notes that the relevant USAO, at its sole discretion, will assess the need for a monitor on a case-by-case basis, with guidance from the Monaco Memorandum and the DOJ’s Evaluation of Corporate Compliance Programs.<sup>17</sup>

Finally, in an effort to incentivize corporate self-disclosure of potential misconduct, even where a company does not meet all criteria for voluntary self-disclosure, the USAO Policy sets out that it will consider “prompt” self-disclosure favorably.<sup>18</sup>

## Conclusion

The USAO Policy sets a more concrete, nationwide standard for how USAOs will treat companies that voluntarily and promptly self-disclose misconduct. Key takeaways from the Policy include that:

- The USAOs expect companies to expeditiously disclose all known misconduct, even where an internal investigation is ongoing. In order to preserve the potential benefits of voluntary self-disclosures, companies will have to promptly investigate potential misconduct and more quickly

decide whether to disclose the misconduct. In making those determinations, companies should consider the factors laid out in the USAO Policy, including whether the misconduct involves any aggravating factors.

- Absent aggravating factors, companies that voluntarily self-disclose on a timely basis, fully cooperate, and timely and appropriately remediate will not be required to enter into a guilty plea. Instead, the USAO Policy offers Assistant U.S. Attorneys the flexibility to pursue other resolutions without adopting the presumption (as does the DOJ Criminal Division’s Corporate Enforcement Policy) of a declination.
- Consistent with the recent DOJ Criminal Division’s Corporate Enforcement Policy, even where aggravating factors are present, companies that voluntarily self-disclose, fully cooperate and remediate, will benefit from a 50% to 75% fine reduction from the bottom of the U.S.S.G. fine range. Unlike the DOJ Criminal Division’s Corporate Enforcement Policy, the USAO Policy does not provide specific guidance for companies with a history of misconduct (recidivists), but it does highlight specific offenses considered “aggravating factors” such as misconduct involving environmental, national security or public health concerns.
- One of the stated goals of the USAO Policy is to incentivize companies to develop and maintain effective compliance programs. Companies with an effective compliance program stand to gain by identifying misconduct early and reducing the need for an independent compliance monitor under the Policy.

<sup>14</sup> See *id.* Note that this list of aggravating factors is not exhaustive. *Id.*

<sup>15</sup> See Corporate Enforcement Policy at 2.

<sup>16</sup> See USAO Policy at 5.

<sup>17</sup> See *id.* Section B “Effective Compliance and Independent Monitorship”; DOJ Press Release, *Damian Williams and Breon Peace Announce New Voluntary Self-Disclosure*

*Policy for United States Attorney's Offices* (Feb. 22, 2023), <https://www.justice.gov/usao-edny/pr/damian-williams-and-breon-peace-announce-new-voluntary-self-disclosure-policy-united> (“We hope that this new policy . . . leads to more companies getting a head of financial malfeasance before authorities come to them.”).

<sup>18</sup> See USAO Policy at 2–3.

The USAO Policy issued on February 22, 2023 puts into effect the directive from the Monaco Memorandum and follows the DOJ Criminal Division's recent Corporate Enforcement Policy in providing written guidance to USAOs on how to consider and treat corporate voluntary disclosures. Like other DOJ policies, it seeks to create strong incentives to voluntarily disclose misconduct promptly, cooperate with the DOJ, and take steps to remediate.

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