

Client Alert: DOJ Expands the Reach of Its Policies on Self-Disclosure of Corporate Misconduct

Publications

February 28, 2023

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On February 22, 2023, the Department of Justice announced a new Voluntary Self-Disclosure Policy (the Disclosure Policy) that now governs corporate prosecutions by US Attorney's Offices (USAOs) nationwide. Building on a 2022 memorandum by Deputy Attorney General Lisa Monaco, which instructed DOJ components to review and publicly disclose their policies on corporate voluntary self-disclosure, the Policy adopts a uniform national standard for the timely self-reporting by a company of misconduct by its employees and agents to any of the 94 USAOs.^[1]

The new policy defines the circumstances under which a company will be deemed to have made a voluntary self-disclosure. It also codifies the benefits of self-disclosure, which may include sharp reductions in fines and expanded options for non-guilty plea resolutions. The goal of the policy, as explained by DOJ, is to incentivize companies "to maintain effective compliance programs capable of identifying misconduct, expeditiously and voluntarily disclose and remediate misconduct, and cooperate fully with the government in corporate criminal investigations."^[2]

Below, our team explores the background and contours of the new Disclosure Policy, its significance to corporate clients, and the importance of effective compliance programs.

The 2022 Monaco Memorandum

On September 15, 2022, Lisa O. Monaco, the second-ranked official in the DOJ, issued a memorandum (the 2022 Monaco Memorandum) and delivered a speech announcing revisions to DOJ's corporate criminal enforcement policies and practices.^[3] Most pertinent here, the 2022 revisions set parameters for the voluntary self-disclosure of misconduct and cooperation credit, and required each DOJ component that prosecutes corporate crime, including USAOs, "to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such self-disclosure, it must draft and publicly share such a policy."^[4]

With the goal of making the benefits of voluntary self-disclosure "clear and predictable," the memorandum directed that all components implement formalized policies setting forth expectations regarding:

- The timeliness of a voluntary self-disclosure;
- The requirement that the disclosure be accompanied by timely preservation, collection, and production of relevant documents and/or information;
- The types of information and facts that must be provided as part of the disclosure process;
- The benefits a corporation can expect to receive if it meets the standards for voluntary self-disclosure; and
- Aggravating factors that would require a guilty plea even if the corporation voluntarily and timely self-disclosed, such as where the misconduct posed a grave threat to national security or was deeply pervasive throughout the company.

The 2022 Monaco Memorandum also specified that DOJ would not require the imposition of an independent compliance monitor for a cooperating company that voluntarily self-disclosed relevant conduct if, at the time of resolution, the company demonstrated that it implemented and tested an effective compliance program.^[5] In response to the 2022 Monaco Memorandum, a DOJ Corporate Criminal Enforcement Policy Working Group, composed of US Attorneys from geographically diverse districts, met to craft a new policy for the USAOs.

The 2023 Voluntary Self-Disclosure Policy for USAOs

The new Disclosure Policy standardizes the definition of voluntary self-disclosure and outlines the benefits a company can expect to receive from such disclosure to a USAO. It is intended to ensure, according to DOJ, that no matter where a company operates, it “can rely on receiving the same treatment and benefits for voluntarily self-disclosing criminal conduct to a US Attorney’s Office.”^[6]

Specifically, the Policy directs that, in determining the form and substance of any criminal penalties for a company, a USAO consider whether the “criminal conduct at issue came to light as a result of the company’s timely, voluntary self-disclosure and credit such disclosure appropriately.”^[7] Whether disclosure makes the company eligible for credit will be assessed on a case-by-case basis, considering the following three factors:

- Was the disclosure voluntary? The disclosure must be made voluntarily and not due to a preexisting obligation to disclose, such as pursuant to regulation, contract, or a prior DOJ resolution.
- Was the disclosure timely? To be timely, the disclosure must occur prior to an imminent threat of disclosure or government investigation; prior to the misconduct being publicly disclosed or otherwise known to the government; and reasonably promptly after the company becomes aware of the misconduct.
- Did the disclosure include all relevant facts concerning the misconduct that were known to the company at the time of the disclosure? The company must provide a fulsome disclosure of the relevant facts; must provide timely updates as the investigation progresses; and must preserve, collect, and produce relevant documents and/information.

If a company satisfies these requirements, it ordinarily can expect to receive certain benefits. Notably, if a company voluntarily self-discloses, provides full cooperation, and makes timely and appropriate remediation, such as by agreeing to pay disgorgement, forfeiture, and restitution, the Disclosure Policy states that the USAO “will not seek a guilty plea” to resolve a case absent certain aggravating factors.^[8] The policy also caps the criminal penalty for a cooperating company to one no greater than 50% below the low end of the applicable fine range as calculated under the US Sentencing Guidelines.

Aggravating factors that may cause the USAOs to seek a company’s guilty plea include misconduct that posed a grave threat to national security, public health, or the environment, that was deeply pervasive throughout the company, or that involved current executive management of the company. Even then, however, if the company voluntarily self-discloses, a USAO has discretion to decline to pursue prosecution.

Finally, companies may avoid having to implement monitorships so long as they self-disclose, remediate, and demonstrate at the time of the resolution that they have implemented and tested an effective compliance program (with USAOs referring in their evaluation of an effective compliance program to the 2022 Monaco Memorandum).

The new Disclosure Policy does not apply to *qui tam* actions or similar situations in which a whistleblower reports misconduct directly to DOJ.

Comparison to the Criminal Division Disclosure Policy

The new Disclosure Policy for USAOs remedies the gap created by DOJ’s 2017 adoption of a Corporate Enforcement and Voluntary Self-Disclosure Policy, which governs corporate criminal prosecutions by DOJ’s Criminal Division.^[9] That policy first originated in 2016 as a one-year pilot program in DOJ’s Foreign Corrupt Practices Act (FCPA) unit, ostensibly to “motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.”^[10] In 2017, DOJ expanded its disclosure policy to equally apply to other corporate crime prosecuted by the Criminal Division.^[11]

Thus, from 2017 until the February 2023 enactment of the USAOs’ Disclosure Policy, a company was entitled to credit for disclosure and cooperation if it self-reported to the Criminal Division, but there was no formal policy for self-reporting to a USAO. The USAOs’ Disclosure Policy remedies this discrepancy.

Companies should familiarize themselves with both policies, which are similar in many respects. Like the USAOs’ Disclosure Policy, the Criminal Division policy defines a voluntary self-disclosure as one that is made without a preexisting obligation to disclose, prior to imminent threat of disclosure or government investigation, reasonably promptly, and that includes all relevant facts concerning the misconduct known to the company. Despite some differences in wording, the standards are largely the same.

However, there are three key differences between the policies:

- The Criminal Division policy creates a presumption in favor of declining prosecution if a company voluntarily self-discloses, cooperates, and remedies, and if no aggravating factors are present. By contrast, the USAOs' policy states that the government will not seek a guilty plea under these same conditions and instead will consider alternative resolutions, which could include a non-prosecution or deferred prosecution agreement.
- The policies cite different aggravating factors. Both policies include as aggravating factors the involvement of management in the misconduct and the pervasiveness of the misconduct within the company. However, the USAOs additionally identify misconduct that poses a grave threat to national security, public health, or the environment, while the Criminal Division additionally identifies a significant profit to the company from the misconduct, or criminal recidivism.
- While the Criminal Division's policy specifies that it will seek a reduction of up to a 50% reduction off the low end of the Sentencing Guidelines' fine range for a company that has cooperated and remedied but not self-disclosed, the USAOs' policy is silent on this score. It specifies only the leniency available to a company that has cooperated, remedied, *and* self-disclosed.

Takeaways

As we advised after DOJ issued the 2022 Monaco Memorandum,^[12] and again after revisions to it,^[13] DOJ is focused on companies having compliance-minded leadership. The new Disclosure Policy shows that DOJ and its components continue to pay close attention to corporate crime and to promoting self-disclosure. It also shows DOJ's desire to expand formalized guidance regarding how prosecutors should evaluate corporate cooperation and compliance.

This guidance formalizes and standardizes an incentive structure for a company's self-disclosure of misconduct to a USAO, including that a USAO will not seek a guilty plea if the disclosure meets certain standards. However, as to be expected, the applicable standards are stringent. To qualify for the self-disclosure benefits, companies must at a minimum: (1) promptly investigate allegations of possible misconduct; (2) take immediate steps during the investigation to preserve and collect, for later potential production, relevant documents including electronic communications; (3) make a swift report to the USAO of confirmed misconduct; and (4) ensure that any such report is comprehensive, even if the investigation remains ongoing.

If a company discovers misconduct, it should seek sophisticated counsel that can advise on the pros and cons of self-disclosure, and can assist in negotiating a favorable resolution. In the meantime, as we have previously written, and given DOJ's continued attention to the effectiveness of corporate compliance programs, companies should ensure their compliance programs are well-tailored to the expectations set forth by DOJ.^[14]

Footnotes

[1] US Department of Justice, *United States Attorneys' Offices Voluntary Self-Disclosure Policy* (Feb. 22, 2023), available at <https://www.justice.gov/usao-edny/press-release/file/1569406/download> ("Disclosure Policy").

[2] US Attorney's Office for the Eastern District of New York, *Press Release: Damian Williams and Breon Peace Announce New Voluntary Self-Disclosure Policy for United States Attorney's Offices* (Feb. 22, 2023), available at <https://www.justice.gov/usao-edny/pr/damian-williams-and-breon-peace-announce-new-voluntary-self-disclosure-policy-united> ("EDNY Press Release").

[3] US Department of Justice, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sept. 15, 2022), available at <https://www.justice.gov/opa/speech/file/1535301/download>.

[4] *Id.* at 7.

[5] *Id.*

[6] EDNY Press Release.

[7] Disclosure Policy at 2.

[8] *Id.* at 4.

[9] See US Department of Justice, *9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy* (Jan. 17, 2023), available at <https://www.justice.gov/criminal-fraud/file/1562831/download>.

[10] US Department of Justice, *Criminal Division Launches New FCPA Pilot Program* (Apr. 5, 2016), available at <https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program>.

[11] US Department of Justice, *Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2017), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign>.

[12] Jenner & Block, *Deputy Attorney General Announces Significant Changes to DOJ's Corporate Criminal Enforcement Policies* (Nov. 11, 2021), available at https://www.jenner.com/a/web/qUfPg7pZnNeZrEC1B9UzmX/4k1XkN/Deputy_Attorney_General_Announces_Significant_Changes_to_DOJs_Corporate_Criminal_Enforcement_Policies.pdf.

[13] Jenner & Block, *Deputy Attorney General Announces Revisions to DOJ's Corporate Criminal Enforcement Policies and Practices* (Sept. 19, 2022), available at

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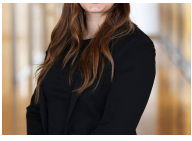
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