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U.S. Attorney's Offices Nationwide to Implement New Voluntary Self-Disclosure Policy, Incentivizing Companies to Be "Good Corporate Citizens"

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February 23, 2023 – On February 22, 2023, Damian Williams and Breon Peace, United States Attorneys for the Southern and Eastern Districts of New York, respectively, and both leaders of the Attorney General's Advisory Committee (AGAC), announced a new voluntary self-disclosure policy for corporate criminal enforcement that applies to all United States Attorney's Offices (USAO) nationwide.

Broadly speaking, the policy defines the circumstances under which prosecutors will consider that a company has "voluntarily self-disclosed" misconduct to a USAO, such that the company qualifies for "specific, tangible benefits" in the resolution of a criminal investigation.

According to the press release announcing the policy, the policy is meant to "provide[] transparency and predictability to companies and the defense bar concerning the concrete benefits and potential outcomes in cases where companies voluntarily self-disclose misconduct, fully cooperate, and timely and appropriately remediate."¹ Reading between the lines, the goal of the policy appears to be twofold: (1) to ensure that USAOs nationwide adhere to a standard practice when evaluating corporate self-disclosures; and (2) to further incentivize companies to act as "good corporate citizens" by self-reporting potential violations, cooperating with the government in criminal investigations and developing effective compliance programs capable of detecting misconduct.

We detail below (1) the criteria USAOs will use to determine whether a company has made a timely, voluntary self-disclosure under the new policy, as well as (2) the benefits companies can expect to receive when they do so. We also analyze (3) how this new policy differs from the policy of the Department of Justice's Criminal Division on the same topic.

1. Criteria for Voluntary Self-Disclosure Under the New Policy

In order to qualify for benefits under the policy, companies must disclose misconduct voluntarily and in a timely and substantively fulsome manner.

- **Voluntary:** To reap the benefits of the policy, companies must not have a pre-existing obligation to disclose the misconduct, including a duty to disclose pursuant to a regulation, contract, or prior resolution with the Department of Justice.
- **Timely:** In order to be considered timely, a company must report the misconduct before there is an “imminent threat of the misconduct being revealed” or before the start of a government investigation. The disclosure must also be before the misconduct becomes public or before the government learns of it through other means. Companies bear the burden of demonstrating to prosecutors that the disclosure is timely.
- **Substantively Fulsome:** Finally, the disclosure must “include all relevant facts of the misconduct that are known to the company at the time of the disclosure.” The policy recognizes that companies may not have all relevant facts at the time of the disclosure, due to the nature of ongoing investigations, and allows companies to caveat their disclosure by noting that it is based upon a preliminary investigation. The USAO expects that companies will actively preserve, collect, and produce relevant information to the USAO, as well as provide timely factual updates, when an investigation is ongoing.

2. Benefits to Companies When They Voluntarily Self-Disclose Misconduct

Companies that meet the criteria outlined above can expect to receive certain tangible benefits from the USAO:

- **First**, absent aggravating factors, the USAO will not seek a guilty plea from a company that meets the self-disclosure criteria, fully cooperates, and implements appropriate remediation. In such cases, the USAO may resolve the matter with a declination, i.e., a decision not to prosecute, a non-prosecution agreement, or a deferred prosecution agreement. In determining whether a company has fully cooperated and implemented appropriate remediation, the USAO will rely on existing Department guidance, including the 2021 memorandum by Deputy Attorney General Lisa Monaco.²
- **Second**, the policy provides that even if a case involves “aggravating factors,” the USAO may still use its discretion to resolve a criminal investigation without a guilty plea from the company. Aggravating factors include, but are not limited to, misconduct that (1) poses a “grave threat” to national security or public health, (2) is “deeply pervasive” within a company, or (3) implicates the company’s current executive management. In such cases, “[t]he USAO will assess the relevant facts and circumstances to determine the appropriate resolution.”
- **Third**, the new policy provides financial benefits to companies that voluntarily self-disclose misconduct.
 - Absent aggravating factors, when a company “fully meets the [voluntary self-disclosure] policy,” the USAO may impose no monetary criminal penalty. In any event, including in the presence of aggravating factors, the USAO will accord or recommend to a sentencing court a 50% to 75% reduction off the low end of the U.S. Sentencing Guidelines fine range after any applicable statutory reductions or penalty offsets established by other policies.
- **Fourth**, the USAO will not require companies to submit to an independent compliance monitor if the company voluntarily self-discloses the misconduct, timely and appropriately remediates the misconduct, and demonstrates at the time of the resolution that it has an effective and tested compliance program in place.

3. Differences Between The New Policy and Existing Criminal Division Guidance

The new policy was created pursuant to the Deputy Attorney General’s September 15, 2022 memorandum, known colloquially as the “Monaco Memo,” which instructed each Department of Justice component to develop and publish a voluntary self-disclosure policy. (For more detail on the Monaco Memo, see our previous client alert [here](#)).

Last month, the Assistant Attorney General for the Criminal Division released revisions to the Criminal Division’s Corporate Enforcement Policy, which sets out the Criminal Division’s voluntary self-disclosure policy. That policy, which was covered by us in a previous [client alert](#), contains a few notable differences and similarities to the new USAO policy, of which companies should be aware:

- **Criminal Division’s Emphasis on Recidivism.** Both the USAO and the Criminal Division policies consider the presence of aggravating factors when determining what credit a company should receive for a voluntary self-disclosure. While both policies provide for a reduction of at least 50% and up to a 75% off the low end of the U.S. Sentencing Guidelines fine range for companies that meet the self-disclosure criteria, the Criminal Division specifically excludes criminal recidivists from the guarantee that the fine calculation will be based on the low end of the range. Rather, for repeat violators, Criminal Division prosecutors have discretion to determine from where within the Sentencing Guidelines range the reduction should be calculated. Additionally, unlike the USAO policy, the Criminal Division’s policy specifically cites criminal recidivism as an aggravating factor in its non-exhaustive list of considerations.
- **Criminal Division’s Detailed Standard for Cooperation.** Both the USAO and the Criminal Division policies require companies to promptly disclose all known relevant factors; to preserve, collect, and produce all relevant information; and to timely provide factual updates to prosecutors in order to receive benefits under the policies. However, in addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations, the Criminal Division specifically requires companies to: (1) attribute facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; (2) de-conflict witness interviews and other investigative steps that a company intends to take as part of its internal investigation to prevent the company’s investigation from conflicting or interfering with the Criminal Division’s investigation; and (3) subject to the individuals’ Fifth Amendment rights, require company officers and employees who possess relevant information to submit to interviews by the Criminal Division, and, where possible, facilitate interviews of third parties.
- **Opportunities to Receive Credit without Voluntary Self-Disclosure.** If a company did not voluntarily self-disclose its misconduct to the Criminal Division, but later fully cooperated and timely and appropriately remediated, the company will still be eligible to receive up to a 50% reduction off of the low end of the U.S.S.G. fine range, except in the case of a criminal recidivist, in which case the reduction of up to 50% will generally not be from the low end of the United States Sentencing Guidelines fine range. The USAO policy, on the other hand, does not address scenarios in which a company does not voluntarily self-disclose its misconduct.

Regardless of the similarities and differences between the Criminal Division and USAO policies, companies should be prepared to take advantage of both policies and their attendant benefits. The USAO policy, for its part, specifically notes that the USAO may choose to apply any provision of an alternative voluntary self-disclosure policy in addition to, or in place of, any provision of the USAO policy, so it remains possible for companies to take advantage of advantageous provisions in the Criminal Division policy or other applicable policies.

Considerations Going Forward

The new policy provides transparency and a certain level of certainty for companies that face corporate criminal investigations by United States Attorney’s Offices. While the policy does not differ significantly from other DOJ guidance, it standardizes practices across United States Attorney’s Offices nationwide and reinforces the Department of Justice’s message that companies should implement effective compliance programs that allow them to detect violations and proactively disclose potential misconduct. Companies should carefully review these policy changes and take appropriate steps to maintain or develop robust compliance programs in order to put themselves in the best position possible should they be subject to a criminal investigation in the future by a U.S. Attorney’s Office.

If you have any questions about the matters discussed in this advisory, please contact one of the authors or any member of Hughes Hubbard’s [Anti-Corruption & Internal Investigations](#) and [White Collar & Regulatory Defense](#) practices.

References

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- 1 Press Release, Department of Justice, 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->

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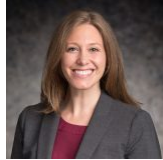
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