Davis Polk

U.S. Attorneys' Offices release voluntary self-disclosure policy

February 28, 2023 | Client Update | 9-minute read

On February 22, 2023, in their roles on the Attorney General's Advisory Committee, the U.S. Attorneys for the Eastern District of New York and the Southern District of New York announced a new voluntary self-disclosure policy that applies to all U.S. Attorneys' Offices. Although the policy provides additional transparency and creates a degree of consistency, the benefits offered under the policy are less favorable to companies than those offered under other DOJ voluntary disclosure policies.

On February 22, 2023, the Department of Justice (DOJ) released a voluntary self-disclosure policy applying to all U.S. Attorneys' Offices (USAOs) that offers benefits to companies that voluntarily disclose corporate misconduct. According to the new USAO policy, if a company voluntarily and timely discloses misconduct, fully cooperates, and timely and appropriately remediates, the company will be entitled to a presumption that it will not be required to plead guilty, absent aggravating circumstances.

This new USAO policy is similar to, but contains key differences from, existing voluntary disclosure policies in other DOJ components, including the Criminal Division, Antitrust Division, and National Security Division. For example: (1) while these other policies provide for a presumption of a declination or non-prosecution agreement, the new USAO policy offers companies only a presumption that they will not have to plead guilty (and thus could be subjected to either a non-prosecution or deferred prosecution agreement); (2) while the other DOJ policies offer concrete benefits to companies that fully cooperate and remediate, even where they do not voluntarily disclose, the USAO policy does not contain any such provision; and (3) the aggravating circumstances included in these policies differ, and while the Criminal Division's Corporate Enforcement Policy (CEP) provides a path to achieve a declination even when aggravating circumstances are present, the USAO policy does not.

In short, the USAO policy provides transparency and consistency in how USAOs deal with voluntary disclosures by companies, but it creates a tension between USAOs and other DOJ components, whose policies differ in important ways. The requirements and benefits in the USAO policy leave a number of questions unanswered, so it will be particularly important to see how it is applied in practice by the various USAOs.

1. Background

In September 2022, Deputy Attorney General (DAG) Lisa Monaco announced new guidance related to DOJ corporate enforcement and instructed all DOJ components to issue written voluntary self-disclosure policies outlining the benefits of self-reporting. The speech provided minimum requirements for such policies, including that a company that voluntarily self-discloses misconduct, fully cooperates, and appropriately remediates will receive a presumption against a guilty plea, absent aggravating circumstances. Our client update about that guidance can be found here.

At the time of DAG Monaco's speech, several DOJ components already had disclosure policies on the books, including the Criminal Division, Antitrust Division, and National Security Division. These divisions are organized by subject matter, and oversee various crimes such as antitrust, the Foreign Corrupt Practices Act (FCPA), money laundering, national security, export controls, and various types of fraud. The USAOs, which are organized by geography rather than subject

Copyright 2023 Davis Polk & Wardwell LLP

matter, did not have a disclosure policy at the time of the announcement.

Although the new USAO policy was announced by the U.S. Attorneys for the Eastern and Southern Districts of New York, the new policy applies to all USAOs across the country as the policy was issued by the Attorney General's Advisory Committee. The new policy provides that the DAG's office "has reviewed and approved this policy" and that the policy shall be "effective immediately."

2. The USAO voluntary self-disclosure policy

The new USAO disclosure policy contains several key terms and conditions.

A. Benefits offered by the USAOs

The USAO policy provides that, "[a]bsent the presence of an aggravating factor, the USAO will not seek a guilty plea where a company has (a) voluntarily self-disclosed in accordance with the criteria set forth above, (b) fully cooperated, and (c) timely and appropriately remediated the criminal conduct." According to the policy, this means that, as long as no aggravating factor is present, a company that meets these requirements can receive a deferred prosecution agreement (DPA), non-prosecution agreement (NPA), or a declination.

In addition, in such cases, "the USAO may choose not to impose a criminal penalty, and in any event will not impose a criminal penalty that is greater than 50% below the low end of the U.S. Sentencing Guidelines fine range."

Where an aggravating factor warrants a guilty plea for a company that has voluntarily disclosed, fully cooperated, and timely and appropriately remediated, the USAO will impose, or recommend to a sentencing court to impose, a fine that is between 50% and 75% below the low end of the guidelines fine range. In addition, in such a circumstance, the USAO will also "not require appointment of a monitor if the company has, at the time of resolution, demonstrated that it has implemented and tested an effective compliance program…."

B. Definitions of key terms

In order for a disclosure to qualify under the USAO policy, it must meet several requirements, including that it be "voluntary." According to the policy, a disclosure will not qualify for the benefits of the policy "where there is a preexisting obligation to disclose, such as pursuant to regulation, contract, or a prior Department resolution (e.g., non-prosecution agreement or deferred prosecution agreement)." In addition, the disclosure must be "prior to an imminent threat of disclosure or government investigation," "prior to the misconduct being publicly disclosed or otherwise known to the government," and "within a reasonably prompt time after the company becoming aware of the misconduct, with the burden being on the company to demonstrate timeliness."

Aggravating factors, which could disqualify a company from the presumption against a guilty plea, include, but are not limited to, misconduct that (1) poses a grave threat to national security, public health, or the environment; (2) is deeply pervasive throughout the company; or (3) involves current executive management of the company.

Cooperation, which is required in order to qualify for the benefits of the policy, is not defined beyond what is already contained in the DOJ's Justice Manual.

There is only a limited definition for the term "remediation," which "include[s], but is not necessarily limited to, the company agreeing to pay all disgorgement, forfeiture, and restitution resulting from the misconduct at issue." In addition, "[i]n evaluating whether the company has implemented and tested an effective compliance program, the USAO will refer to the Monaco Memo," and the evaluation "shall consider resources developed by the Department of Justice's Criminal Division to assist prosecutors in assessing the effectiveness of a company's compliance program…or guidance provided by other Department components as to specialized areas of corporate compliance."

C. Key differences between the USAO policy and Criminal Division policy

Despite the fact that the DOJ is "one Department," that includes both the USAOs and the Criminal, Antitrust, National Security, and Environmental and Natural Resources Divisions, among others, the USAO policy contains key differences from other DOJ voluntary disclosure policies. The recently revised Criminal Division policy, the CEP, offers a helpful

Copyright 2023 Davis Polk & Wardwell LLP

comparison.

As an initial matter, the ultimate benefit to companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate is different under the CEP, which offers a presumption of a declination absent aggravating circumstances, and the USAO policy, which offers only a presumption against a guilty plea absent aggravating factors. In other words, even if a company does everything right and no aggravating factors are present, under the USAO policy, the company could still end up with a DPA or NPA.

The aggravating factors for each policy are also distinct. The CEP includes two aggravating factors not included in the USAO policy: “a significant profit to the company from the misconduct” and “criminal recidivism.” This may be a result of the presumption offered in each policy; because the CEP offers a presumption in favor of a declination, the Criminal Division appears not to want to offer such a presumption to criminal recidivists and companies that profited substantially from the misconduct.

The CEP also provides a pathway to overcome the aggravating factors and still achieve a declination (albeit an exacting one), while the USAO policy does not offer such an avenue. Under the CEP, even where aggravating factors are present, a company can still secure a declination if it discloses “immediately,” engages in “extraordinary” cooperation, and had an effective compliance program at the time of the misconduct and disclosure.

In addition, the USAO policy does not offer benefits for companies that do not voluntarily self-disclose but nevertheless fully cooperate and remediate, other than to say that the USAO will take cooperation and remediation into consideration in determining the appropriate outcome. Under the CEP, even where the company does not voluntarily self-disclose, it can earn up to a 50% reduction off the low end of the fine range.

3. Key takeaways

Overall, the USAO policy provides transparency and consistency across the USAOs in how they address voluntary self-disclosures.

Nonetheless, the policy does not go beyond the minimum requirements outlined by DAG Monaco, and does not go as far as some other DOJ policies, like those issued by the Criminal Division, Antitrust Division, and National Security Division.

This creates an interesting dynamic in which companies that uncover misconduct that is investigated and prosecuted by multiple DOJ components and USAOs can choose whether to disclose that conduct to either a DOJ component, such as the Criminal Division, or a USAO depending on which policy is more favorable (although notably that choice is not available in FCPA cases, for which the Criminal Division has sole jurisdiction to investigate and prosecute). For example, if a company uncovers potential sanctions violations and decides to voluntarily self-disclose, it may choose to disclose to the Criminal Division to avail itself of the presumption of a declination, rather than to a USAO given its presumption against a guilty plea.

In addition, where two components with different disclosure policies are working jointly on a case, these components would have to de-conflict and determine which policy to apply, creating a level of uncertainty for companies.

There are fewer terms defined under the new USAO policy than under the existing DOJ voluntary disclosure policies and no defined pathway to overcome aggravating factors, so it will be all the more important for companies and defense counsel to see how the policy is applied in practice.

Finally, it is important to remember that although all of these DOJ voluntary disclosure policies provide real, concrete benefits for companies that choose to voluntarily self-disclose, cooperate, and remediate, the DOJ is but one agency in a much broader community of regulators and enforcers both in the United States and abroad. When a company chooses to disclose to the DOJ, it is also often deciding whether to disclose to other U.S. regulators (such as the Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Trade Commission, and Federal Reserve, to name just a few) and, given the increasingly active role that foreign authorities are playing in investigating and prosecuting corporate misconduct, any number of foreign authorities, as well as potentially opening itself up to civil shareholder class actions and derivative suits. Thus, clients should weigh all appropriate considerations before making the decision to disclose, and to which agency (and which component of the DOJ) to disclose.

Copyright 2023 Davis Polk & Wardwell LLP

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Greg D. Andres
+1 212 450 4724
greg.andres@davispolk.com

Martine M. Beamon
+1 212 450 4262
martine.beamon@davispolk.com

Angela T. Burgess
+1 212 450 4885
angela.burgess@davispolk.com

Robert A. Cohen
+1 202 962 7047
robert.cohen@davispolk.com

Daniel S. Kahn
+1 202 962 7140
daniel.kahn@davispolk.com

Tatiana R. Martins
+1 212 450 4085
tatiana.martins@davispolk.com

Fiona R. Moran
+1 202 962 7137
fiona.moran@davispolk.com

Paul J. Nathanson
+1 202 962 7055
+1 212 450 3133
paul.nathanson@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

Copyright 2023 Davis Polk & Wardwell LLP