

CLIENT ALERT

# U.S. Attorney's Offices Voluntary Self-Disclosure Policy: 93 Policies in One? Or No Policy at All?

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On February 22, 2023, the Department of Justice issued the “United States Attorneys’ Offices Voluntary Self-Disclosure Policy” (the “USAO Policy”), establishing a unified program for voluntary self-disclosure of corporate misconduct for the 93 U.S. Attorneys’ Offices. The USAO Policy builds on the DOJ’s Criminal Division Policy, “Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy” (“Criminal Division Policy”).<sup>1</sup> It was prepared by the White Collar Fraud Subcommittee of the Attorney General’s Advisory Committee, chaired by U.S. Attorney for the Eastern District of New York Breon Peace.<sup>2</sup>

The USAO Policy applies to all United States Attorneys’ Offices and seeks to further incentivize early and voluntary self-disclosures. The USAO Policy, which is effective immediately, outlines both the situations in which a company will be considered to have made a voluntary self-disclosure (“VSD”) of misconduct to a U.S. Attorney’s Office and the benefits that the company can expect for doing so. We briefly discuss the USAO Policy before discussing its implications.<sup>3</sup>

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<sup>1</sup> <https://www.justice.gov/opa/speech/file/1562851/download>

<sup>2</sup> The USAO Policy was developed by U.S. Attorneys from across the country—including U.S. Attorneys from California, Connecticut, Hawaii, New Jersey, North Carolina, and Virginia—as well as staff in the Executive Office for U.S. Attorneys.

<sup>3</sup> For previous client alerts discussing developments in the DOJ’s corporate enforcement efforts, please see, e.g., [here](#); [here](#); [here](#); [here](#); and [here](#).

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## U.S. Attorney's Offices Voluntary Self-Disclosure Policy: 93 Policies in One? Or No Policy at All?

### **New Policy**

Similar to the Criminal Division Policy, the USAO Policy maintains a relatively high bar for a disclosure to be considered voluntary and timely. A disclosure will not be considered voluntary if the company otherwise had a preexisting obligation to report misconduct, including a regulatory obligation to do so. And a disclosure will only be timely if it is made: (1) prior to an imminent threat of disclosure or government investigation; (2) prior to the misconduct being publicly disclosed or otherwise known to the government; and (3) within a reasonably prompt time after the company becomes aware of the conduct.<sup>4</sup> The USAO Policy further places the burden on the company to demonstrate timeliness.

Similar to the Criminal Division Policy, the USAO Policy promises significant benefits for voluntary self-disclosure, provided that other criteria are met. For instance, the USAO Policy advises that a U.S. Attorney's Office will not seek a guilty plea after voluntary self-disclosure, so long as the company also cooperates "fully" and remediates the criminal conduct. Remediation must include agreeing to full disgorgement, forfeiture, and restitution resulting from the misconduct—sometimes, a fraught negotiation in and of itself. Further, the presence of an "aggravating factor" might yet still lead to the U.S. Attorney's Office seeking a guilty plea.

If the company meets these criteria, the U.S. Attorney's Office will not seek a penalty greater than half of the low-end of the relevant U.S. Sentencing Guidelines fine range. And, even if the U.S. Attorney's Office seeks a guilty plea due to the presence of an aggravating factor, the USAO Policy suggests that the government will recommend that the sentencing court impose a fine with a significant (50 to 75%) discount to the U.S. Sentencing Guidelines Range. In any event, the USAO Policy commits that a U.S. Attorney's Office will not impose an independent compliance monitor, as long as the company has implemented and tested an effective compliance program. Compliance with this policy will be evaluated in the sole discretion of the U.S. Attorney's Office and does not create judicially enforceable rights or causes of action.

### **Implications**

In promulgating this policy, the Department continues to tout a transparent approach to enforcement. There is internal consistency in the Department's approach, as cooperation will be evaluated similarly by Main Justice and the U.S. Attorneys' Offices. In short, we view the USAO Policy as evolutionary, not revolutionary.

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<sup>4</sup> Under the Criminal Division Policy, full credit is only awarded if a company provides "[t]imely disclosure of all non-privileged facts relevant to the wrongdoing at issue; proactive cooperation, including disclosure of all facts that are relevant to the investigation; timely voluntary preservation, collection, and disclosure of relevant documents and information relating to their provenance; de-confliction of 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 subject to the individuals' Fifth Amendment rights, making company officers and employees who possess relevant information available for interviews by the Criminal Division."

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## U.S. Attorney's Offices Voluntary Self-Disclosure Policy: 93 Policies in One? Or No Policy at All?

This new policy largely extends to the U.S. Attorneys' Offices the same guidance previously in place for Main Justice components, with some slight modifications. For example, the Criminal Division Policy's guidance on what constitutes aggravating factors includes "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism."<sup>5</sup> The USAO Policy reads similarly, explaining that aggravating factors include "misconduct that poses a grave threat to national security, public health, or the environment; is deeply pervasive throughout the company; or involved current executive management of the company." Not only the language but the intent of the policies are aligned, as both reward transparency with leniency.

Several other features of the USAO Policy warrant mentioning. As a threshold matter, it is unclear to what extent the USAO Policy will come into play when matters are co-handled in U.S. Attorneys' Offices and litigating components of the Department. Many cases involving corporate malfeasance—and any case involving significant corporate conduct—implement this team approach and are handled by lawyers in a U.S. Attorney's Office and within the appropriate component in Main Justice. In those situations, it is unclear whether the appropriate component in Main Justice will refer to the Criminal Division Policy (or other relevant component's policy) or the USAO Policy.<sup>6</sup> In our experience, it is often Main Justice that takes the lead on these investigations, which suggests that the broader Department approach to VSDs will prevail.

Second, ambiguities in the text of the USAO Policy raise the risk of inconsistent application. For example, one of the "aggravating factors" is that the conduct "involved current executive management of the company." The USAO Policy does not define "involvement" or "executive management" with any clarity. Under the USAO Policy, it is unclear whether mere awareness is enough to constitute an aggravating factor. And does the ability to hire or fire make one part of "executive management"? Are all officers of a company part of the "executive management" team? Can a company define the scope of the "executive management" team for themselves? These terms are vague and subject to interpretation. Answers may differ among U.S. Attorneys' Offices and the litigating components of the Department.

Similarly, conduct that poses a "grave threat to . . . the environment" may be considered an aggravating factor. The U.S. Attorneys' Offices in North Dakota, Alaska, or West Virginia, may have very different views on that question from the Offices in Oregon, Hawaii, or Manhattan. Moreover, the enumerated list of aggravating factors is non-exclusive. If use of the USAO Policy becomes pervasive, it is not hard to imagine that different U.S. Attorneys' Offices will consider different, unenumerated factors to be "aggravating." While inconsistent application is a risk in any policy, the discretion the VSD policy leaves to the U.S. Attorneys' Offices makes that risk particularly acute.

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<sup>5</sup> <https://www.justice.gov/opa/speech/file/1562851/download>.

<sup>6</sup> The USAO Policy states that: "In cases where the company is being jointly prosecuted by a USAO and another Department office or component, or where the misconduct reported by the company falls within the scope of conduct covered by VSD policies administered by other Department offices or components, the USAO will coordinate with, or, if necessary, obtain approval from, the Department component responsible for the VSD policy specific to the reported misconduct when considering a potential resolution and before finalizing any resolution."

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## U.S. Attorney's Offices Voluntary Self-Disclosure Policy: 93 Policies in One? Or No Policy at All?

Ultimately, the USAO Policy does not change the fact that the decision to self-disclose is highly *individualized and context-specific*. The considerations articulated in the USAO Policy are largely the same as those set forth in the Criminal Division Policy. Given the Department's incentivized approach, the decision to voluntarily disclose evidence of possible corporate misconduct is one that must be made carefully, mindful of the unique facts and circumstances in a given situation. The policy clearly reinforces the Department's intent to reward fulsome cooperation, though the risk of inconsistent interpretation makes the results of such disclosure difficult to precisely predict. While the USAO Policy itself imposes time pressure for self-disclosure if one is to avail itself of its benefits, companies should continue to seek out advice from counsel so they can immediately begin weighing the pros and cons of self-disclosure and work to position the company for credit for remediation and cooperation.

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