

White Collar Defense & Investigations



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“And the Truth Shall Set You Free”—The United States Attorney’s Offices’ New Voluntary Self-Disclosure Policy

On [February 22, 2023](#), the U.S. Attorneys for the Southern and Eastern Districts of New York announced the implementation of a new Voluntary Self-Disclosure Policy (the “Policy”).

The Policy was developed by a working group comprising several U.S. Attorneys from around the country after the September 15, 2022, memo by the Deputy Attorney General, also known as the Monaco Memo. The Policy has now been approved by the Office of the Deputy Attorney General and applied to all United States Attorney’s Offices (“USAO”) nationwide, effective immediately. The Policy details the circumstances under which a company will be considered to have made a voluntary self-disclosure of misconduct to a USAO. The Policy follows the new revisions to the Department of Justice (“DOJ”) Criminal Division’s Corporate Enforcement Policy which set out additional incentives for corporations to self-police and self-report (more information [here](#)).

WHEN IS A COMPANY CONSIDERED TO HAVE MADE A VOLUNTARY SELF-DISCLOSURE?

Under the Policy, a company is considered to have made a voluntary self-disclosure if it becomes aware of misconduct at the company before that misconduct is publicly reported or otherwise known to the DOJ, and discloses all relevant facts known to the company about the misconduct to a

USAO in a timely fashion prior to an imminent threat of disclosure or government investigation.

WHAT ARE THE BENEFITS OF MAKING A VOLUNTARY SELF-DISCLOSURE?

A company that voluntarily self-discloses and fully meets the other requirements of the Policy by fully cooperating and timely and appropriately remediating the criminal conduct, and absent any aggravating factors, will receive “significant benefits,” including the following:

- the USAO will not seek a guilty plea;
- the USAO may choose not to impose any criminal fine, and in any event will not impose a fine that is greater than 50 percent below the low end of the United States Sentencing Guidelines (“USSG”) range.

WHAT ARE THE AGGRAVATING FACTORS?

The Policy identifies three aggravating factors that may warrant a USAO seeking a guilty plea even if the other requirements of the Policy are met:

- (1) if the misconduct poses a grave threat to national security, public health, or the environment;
- (2) if the misconduct is deeply pervasive throughout the company; or
- (3) if the misconduct involved current executive management of the company.

It is important to note that the presence of an aggravating factor does not necessarily mean that a guilty plea will be required; instead, the USAO will assess the relevant facts and circumstances to determine whether a plea is the appropriate resolution. However, even where the USAO requires a guilty plea, a company that has voluntarily self-disclosed, fully cooperated, and appropriately remediated the criminal conduct will still receive the following benefits:

- the USAO will recommend a 50 to 75 percent reduction off the low end of the USSG fine range; and
- the USAO will not require an independent compliance monitor if the company demonstrates that it has implemented and tested an effective compliance program.

KEY TAKEAWAYS

The DOJ intends to standardize how voluntary self-disclosures are treated across the various USAOs around the country and aims to avoid inconsistent resolutions. According to the DOJ, the goals of the Policy are to provide “transparency and predictability” to companies and their counsel regarding what outcomes they can expect following a voluntary self-report.

It is important to note that USAOs have been rewarding companies that voluntarily self-report for years, often with declinations, non-prosecution agreements, and deferred

prosecution agreements. The only part of this Policy that could theoretically add some predictability to negotiating corporate resolutions is the quantification of a fine reduction to no more than 50 percent below the low end of the USSG if there are no aggravating factors, and a 50 to 75 percent reduction if there are. It remains to be seen whether this benefit is “concrete” enough to entice companies to self-report. It is also important to note that companies that provide full cooperation should not be expected to receive the same kind of credit as companies that both self-disclose **and** cooperate. Indeed, to incentivize companies to voluntarily self-report, and to show adherence to this new policy, prosecutors may now be more hesitant to provide declinations and non-prosecution agreements to companies that fully cooperate but did not have the opportunity to make a voluntary self-disclosure.

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