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Published by Financier Worldwide Ltd

SPECIAL REPORT ARTICLE REPRINT May 2023

New DOJ policy adds choice and complexity to the decision to self-report

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Companies, including financial services (FS) institutions, have new considerations for self-reporting corporate misconduct to US prosecutors. On 22 February the US Department of Justice (DOJ) announced a new voluntary self-disclosure policy providing uniform incentives for self-reporting corporate misconduct to any US Attorney's Office (USAO). Absent aggravating factors, a company will not be required to plead guilty to criminal charges if it voluntarily and timely discloses misconduct, fully cooperates with the government, and engages in remediation.

This policy opens a new path to engage with local USAOs instead of the DOJ's centralised criminal enforcement divisions. At the same time, the policy leaves key questions unanswered, presents the possibility of inconsistent application and provides nominally fewer benefits than those available under the DOJ's pre-existing voluntary disclosure policies. Companies that discover misconduct should therefore carefully weigh the potential benefits of disclosure to a specific USAO before relying on the policy.

Background

The new USAO policy comes on the heels of other major policy announcements aimed at encouraging self-disclosure, cooperation and remediation for corporate misconduct. In September 2022, the DOJ announced that all of its components that prosecute corporate crime, including the 93 USAOs the DOJ oversees, must issue written policies to incentivise self-disclosure.

In making that announcement, Lisa Monaco, deputy attorney general, clarified that, unless aggravating circumstances are present, such policies must at least provide companies the opportunity to avoid a guilty plea where they voluntarily self-disclose misconduct, fully cooperate and engage in remediation. Putting that announcement into practice, the DOJ's Criminal Division announced changes to its own pre-existing voluntary self-disclosure policy on 17 January 2023, adding incentives for

corporations to self-disclose even where aggravating factors exist. And the new USAO policy followed shortly thereafter.

Historically, USAOs lacked formal voluntary disclosure policies. Companies that sought to self-report misconduct, therefore, commonly approached the DOJ's central enforcement divisions that maintained such policies. FS institutions most often engaged with the DOJ's Criminal Division, which possesses overlapping authority with the USAOs to prosecute numerous financial crimes, including money laundering, securities violations, insider trading, violations of the Bank Secrecy Act and a wide variety of fraud. In announcing the USAO policy, the DOJ thus provided many corporations a previously non-existent choice: to voluntarily disclose misconduct, they may now approach either the local USAOs or one of the DOJ's central enforcement divisions.

The USAO policy

The USAO policy provides that, absent aggravating factors, the USAO will not seek a guilty plea where a company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates the criminal conduct.

Voluntary self-disclosure requires voluntary, timely and comprehensive disclosure. To be voluntary, there cannot be a pre-existing obligation to disclose, such as a contract, regulation or prior agreement with the government (e.g., a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA)). To be timely, a disclosure must be made within "a reasonably prompt time" of the company becoming aware of the information and cannot be made where there is already an "imminent threat" that the information will come to the government's attention. And to be comprehensive, a disclosure must include "all relevant facts concerning the misconduct that are known to the company at the time of disclosure", and be supplemented by updates as the company uncovers new facts.

Cooperation is determined by the considerations listed in the 'Justice Manual', the DOJ's primary guidance document for prosecutors. The USAO policy did not provide any additional detail on what constitutes effective cooperation, but DOJ guidance generally requires companies "move in a timely fashion to preserve, collect, and produce relevant documents and/or information" and provide factual updates from any internal investigation companies decide to conduct.

Remediation includes, but is not limited to, paying all disgorgement, forfeiture and restitution resulting from the misconduct.

Aggravating factors include, but are not limited to, where the misconduct is deeply pervasive throughout the company, involves current executives of the company, or poses a grave threat to national security, public health or the environment.

In addition to avoiding a guilty plea, corporations that meet the requirements of the policy are also entitled to a cap on the available criminal penalty at 50 percent below the low end of the US sentencing guidelines fine range.

A company that fails to fully meet the policy's requirements may still obtain some benefits. Where the failure is solely due to an aggravating factor, for example, the USAO will apply or recommend a fine reduction of 50 to 70 percent off the low end of the applicable fine range after other reductions are applied, and it will not require appointment of a monitor if the company has implemented and tested an effective compliance programme.

Where the government is already aware of the misconduct, the policy specifies that USAOs will continue to look at prompt self-disclosures 'favourably' and take the company's cooperation into account, even though the company will not be eligible for the policy's full benefits.

For many companies, disclosing to the local USAO may also offer intangible benefits beyond those secured under the formal policy. The company and its counsel may have increased familiarity with the local office's enforcement priorities or stronger relationships with prosecutors in that office than one of the centralised enforcement divisions. Alternatively, the local office may view the company as a critical member of the community and may therefore be more likely to credit certain aspects of the company's cooperation or remediation. Those factors may make local disclosure attractive, but companies should also consider potential downsides before deciding to disclose misconduct to a USAO.

Differences compared to pre-existing disclosure policies

The most notable potential downside to disclosure under the USAO policy is that companies may receive fewer benefits by disclosing to their local USAO than by disclosing to a centralised division in the DOJ. The USAO policy offers only the ability to avoid a guilty plea. That complies with the minimum requirements mandated by the DOJ's September 2022 announcement, but leaves USAOs free to pursue DPAs or NPAs based on disclosed conduct. The Criminal Division's voluntary self-disclosure policy, however, entitles companies to the presumption of a declination – an option that avoids any further prosecutorial conduct, including in the form of a DPA or an NPA.

Obtaining the formal benefits of self-disclosure may also prove more difficult under the USAO policy because it lacks any avenue to avoid the preclusive effects of an aggravating factor. Under the Criminal Division's policy, by contrast, companies with effective compliance programmes and internal controls may obtain a declination even where aggravating factors exist. The USAO policy, however, lists fewer aggravating factors than other self-disclosure regimes. For instance, while noting that the list is non-exhaustive, the USAO policy omits "recidivism" and "significant profit" as aggravating factors, which the Criminal Division's self-disclosure programme explicitly recognises.

The USAO policy also fails to offer any explicit monetary benefits where companies fail to meet the voluntary self-disclose requirement but otherwise cooperate and remediate. The policy says that prompt self-disclosure will be viewed "favourably", in instances where the government was already aware of the conduct. But the Criminal Division provides a more concrete incentive: a 50 percent reduction off the low end of the fine range where a company successfully cooperates and remediates, despite failing to self-disclose.

Key considerations for companies

Whether to disclose criminal misconduct is never an easy decision. Given the severity of potential penalties, the variety of foreign and domestic regulators that may pursue enforcement, the potential of whistleblowers disclosing misconduct regardless and varied commercial realities, companies must make that decision on a case by case basis, with the advice of experienced counsel.

The USAO policy provides concrete as well as potential intangible benefits, and therefore warrants close consideration. But companies must critically weigh the benefits of disclosure before relying on the policy. In particular, corporations and their counsel should consider the following issues.

First, different USAOs may apply the policy differently. While the policy provides a uniform framework, the absence of precise definitions and the considerable flexibility that it provides may result in significant variations in application. Companies in the financial services industry should pay particular attention to how the USAOs in the Southern and Eastern Districts of New York – the two offices that handle a disproportionate number of white-collar corporate prosecutions – apply the policy.

Second, in many cases, the policy will provide a choice to FS companies regarding whether to disclose to the Criminal Division or a local USAO. Despite the nominally less favourable terms available under the USAO policy, certain considerations may incentivise approaching a local office instead of the national enforcement division.

Third, in some cases, where a central enforcement division of the DOJ is working jointly on a matter with a particular USAO, there may be a conflict between two applicable voluntary self-disclosure policies. How the DOJ resolves those issues in practice will be material to corporate enforcement and disclosure incentives going forward.

Fourth, regardless of policy, companies will only be able to exercise their options effectively – and obtain the full benefits of self-disclosure – if they are able to quickly detect and assess potential misconduct. Companies should thus effectively resource and maintain internal reporting systems and promptly review reports of misconduct.

Lastly, the relative benefits of self-reporting may change over time. Companies should consult counsel early and consistently revisit their initial determination as any internal investigation progresses or the company's understanding of the misconduct evolves. ■

This article first appeared in the May 2023 issue of Financier Worldwide magazine. Permission to use this reprint has been granted by the publisher.