

US Attorney's Offices to Offer up to 75% Reduction in Corporate Fines to Incentivize Companies to Self-Report Misconduct

On February 22, 2023, the U.S. Attorney General's Advisory Committee (AGAC) announced a new voluntary self-disclosure (VSD) policy to serve as the template for U.S. Attorney's Offices (USAO) nationwide that prosecute corporate crime.¹ The new policy is meant to provide "transparency and predictability" to companies and defense attorneys concerning "the concrete benefits and potential outcomes in cases where companies voluntarily self-disclose misconduct, fully cooperate, and timely and appropriately remediate."²

Under the new policy, which is similar to the policies that have been in place for some time for prosecutors working for the litigating components of the U.S. Department of Justice (DOJ) in Washington, D.C. (such as the Foreign Corrupt Practice Act Unit and the Criminal Division) a company is considered to have made a VSD of potential misconduct if it discloses all relevant facts known to the company to the USAO before the conduct is publicly reported or otherwise known to the DOJ.³ A company may receive full cooperation credit under the DOJ policies and VSD policy for USAOs and benefit from the maximum reduction of fines only where there is also no imminent threat of disclosure or government investigation.⁴

Absent any aggravating factors, a company that effectively makes a VSD, fully cooperates, and remediates the criminal conduct in a timely manner (including agreeing to pay all disgorgement, forfeiture, and restitution resulting from the misconduct) will receive significant benefits, including that the USAO:

- a. will not seek a guilty plea;
- b. may choose not to impose any criminal penalty;
- c. in any event, will not impose a criminal penalty that is greater than an amount that is 50% below the low end of the U.S. Sentencing Guidelines (USSG) fine range; and
- d. will not seek the imposition of an independent compliance monitor if the company demonstrates that it has implemented and tested an effective compliance program.⁵

In contrast, the policy identifies three aggravating factors that may warrant a USAO to seek a guilty plea from the company despite full compliance with the policy. Those include situations in which the misconduct:

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

Still, a USAO may elect to forego a guilty plea despite aggravating factors. Moreover, even if a USAO determines to insist that the company enter a guilty plea, the company will still receive the other benefits of the VSD policy.⁶

The AGAC announcement comes on the heels of the DOJ's own enhanced Corporate Enforcement Policy (CEP), which grants as much as a 75% reduction in fines for companies that voluntarily self-disclose wrongdoing to the government and fully cooperate with federal investigations into the conduct.⁷ Prior to the AGAC's new policy, there was no formal standard for the multitude of USAOs to follow with regard to how VSD should be handled and what benefits should be conferred on companies that self-disclose. That dearth of uniformity in policy was long a source of confusion and frustration to companies and their attorneys when weighing the risks and benefits of self-disclosing – since a USAO in New York, for example, could treat VSD differently than a USAO



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in Virginia or Miami, and all three could take a different approach than the DOJ itself.

Deputy Attorney General Lisa Monaco recognized these challenges in September 2022 when she issued a memo charging each component of the DOJ that prosecutes corporate crime, including the USAO's to review their VSD policies and make them available to the public.⁸ The AGAC responded by creating a White Collar Fraud Subcommittee, comprised of U.S. Attorneys from geographically diverse districts to draft a VSD policy for all USAOs to adopt, with the hope of offering increased transparency and predictability across DOJ and USAO enforcement offices and greater consistency among corporate resolutions.⁹

¹ Memorandum from Attorney General Advisory Committee (AGAC) re: "United States Attorneys' Offices Voluntary Self-Disclosure Policy" (Feb. 2023), <https://www.justice.gov/usao-edny/press-release/file/1569406/download> [hereinafter, "VSD Policy"].

² See DOJ, "Damian Williams and Breon Peace Announce New Voluntary Self-Disclosure Policy for United States Attorney's Offices" (February 22, 2023), <https://www.justice.gov/usao-edny/pr/damian-williams-and-breon-peace-announce-new-voluntary-self-disclosure-policy-united> [hereinafter, "Press Release"].

³ See VSD Policy § IA, p. 3.

⁴ *Id.*

⁵ *Id.* at § IIA, p. 4-5

⁶ *Id.*

⁷ See 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Jan. 2023), <https://www.justice.gov/opa/speech/file/1562851/download>.

⁸ Memorandum from Deputy Attorney General re: "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group" (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

⁹ See Press Release.
