Simpson Thacher

Regulatory and Enforcement Alert

New Voluntary Self-Disclosure Policy for U.S. Attorney's Offices Provides for Flexibility, but No Presumption of Declination

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On February 22, 2023, the U.S. Department of Justice released its Voluntary Self-Disclosure Policy for United States Attorney's Offices (the "USAO VSD Policy") pursuant to Deputy Attorney General Lisa Monaco's September 15, 2022 memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group" (the "Monaco Memo"). The Monaco Memo directed that each DOJ component that prosecutes corporate crime must review its policies on corporate voluntary self-disclosure, and draft and publicly share such a policy if one did not already exist. The DOJ's Criminal Division implemented that directive with its new Corporate Enforcement Policy (the "CEP") released last month. The Department's 94 USAOs did not have a common policy in place, and followed suit with this most recent guidance, which was developed by an Attorney General's Advisory Subcommittee led by Eastern District of New York U.S. Attorney Breon Peace, as well as U.S. Attorney for the Southern District of New York, Damian Williams, who chairs the Attorney General's Advisory Committee.

The Criminal Division's CEP and new USAO VSD Policy are similar in many ways, but with one critical difference. Whereas the CEP creates a presumption that a self-disclosing company that fully cooperates and remediates will receive a *declination from prosecution* absent aggravating circumstances, the USAO VSD Policy only offers a presumption that the company *will not have to plead guilty*. In other words, under the USAO VSD Policy, other forms of criminal resolutions, including deferred prosecution agreements ("DPA") and non-prosecution agreements ("NPA"), both of which generally require detailed admissions of wrongdoing, remain on the table. The USAO VSD Policy gives discretion to the USAO to decline prosecution, and in situations where the USAO chooses to move forward with a criminal resolution, the Policy provides that it should not impose a criminal penalty greater than 50% below the low end of the applicable U.S. Sentencing Guidelines fine range. Obviously, there is a significant difference between an outright declination and a DPA or NPA, even where the latter outcomes include a substantial fine reduction.

The core of the USAO VSD Policy is that the company is considered to have voluntarily self-disclosed when it timely notifies a USAO before misconduct becomes known to the DOJ, and discloses all relevant facts known to the company at the time of the disclosure about the misconduct, prior to the imminent threat of a disclosure or government investigation. These elements echo the guidance provided in the Monaco Memo and the CEP. The USAO VSD Policy explicitly acknowledges that "a company may not be in a position to know all relevant facts at the time of a [self-disclosure] because the company disclosed reasonably promptly after becoming aware of the

conduct." The USAO VSD Policy encourages companies to "make clear that its disclosure is based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure or the relevant facts known to it at the time," and, like the CEP provides, should continue to update the USAO as any internal investigation proceeds.

In contrast to the more specific requirements set forth in the CEP, the USAO VSD Policy generally tracks the minimum requirements dictated in the Monaco Memo for DOJ voluntary self-disclosure policies. Specifically, the USAO VSD Policy does not include some of the more specific examples of what constitutes full cooperation set forth in the CEP, such as the requirements to attribute disclosed facts to specific sources (so long as doing so does not violate attorney-client privilege), identify all relevant individuals, and proactively cooperate even when not specifically asked. The USAO VSD Policy appears to favor flexibility for its prosecutors, noting, for instance, that where a company is being, or could, based on the conduct at issue, be jointly prosecuted by the USAO and another DOJ department, "the USAO may choose to apply any provision of an alternate VSD policy in addition to, or in place of, any provision of" the USAO VSD Policy. As with the CEP, the USAO VSD Policy does not require the imposition of an independent monitor for a company that voluntarily self-discloses and timely and appropriately remediates where the company demonstrates that it has implemented and tested an effective compliance program. The USAO VSD Policy does not otherwise expand on the Monaco Memo's guidance as to when the imposition of a monitor is, in fact, appropriate, noting that such decisions will be made on a case-by-case basis.

Where the USAO VSD Policy most meaningfully expands upon the Monaco Memo, it often tracks the CEP in doing so—specifically, the USAO VSD Policy, like the CEP, provides that where an aggravating factor disqualifies a self-reporting company from receiving the full benefit of voluntarily self-disclosing, the U.S. Attorney's Office will recommend a 50% to 75% reduction off the low end of the U.S. Sentencing Guidelines fine range. Unlike the CEP, however, the USAO VSD Policy does not require "extraordinary" cooperation and remediation to receive this 50% to 75% reduction.

The USAO VSD Policy also expands on the Monaco Memo in another respect: the inclusion of misconduct that poses a "grave threat to . . . public health or the environment" as an aggravating factor that may warrant a USAO seeking a guilty plea. The USAO VSD Policy and CEP both include the involvement of executives as an aggravating factor, and posing a threat to national security and pervasiveness of the misconduct throughout the company are also identified as potentially aggravating factors in the Monaco Memo.

In its USAO VSD Policy, the DOJ appears to maintain some flexibility for the more than 90 USAOs whose intersections with corporate crime may be very different while still adhering to the basic requirements of the Monaco Memo. The cases and issues likely to confront prosecutors operating in the Southern and Eastern Districts of New York may be different from those in other jurisdictions. Companies should consider both the USAO VSD Policy and the CEP (and the policies of any other potentially relevant DOJ component), as well as the Monaco Memo principles more generally, as they consider whether, when, and where to disclose potential

misconduct to the Department of Justice. Although a company may choose where to disclose, the decision as to which component of the Department ultimately investigates and prosecutes a given matter belongs to the DOJ.

For further reading: To read our previous analysis on the Monaco Memo, click here. To read our previous analysis on the new Corporate Enforcement Policy, click here.

For further information regarding this Alert, please contact one of the following authors:

WASHINGTON, D.C.

Jeffrey H. Knox
+1-202-636-5532
jeffrey.knox@stblaw.com

Karen Porter
+1-202-636-5539
karen.porter@stblaw.com

John Terzaken
+1-202-636-5858
john.terzaken@stblaw.com

Claire Cahoon
+1-202-636-5828
claire.cahoon@stblaw.com

NEW YORK CITY

Martin S. Bell
+1-212-455-2542
martin.bell@stblaw.com

Marc P. Berger
+1-212-455-2197
marc.berger@stblaw.com

Nicholas S. Goldin
+1-212-455-3685
ngoldin@stblaw.com

Joshua A. Levine
+1-212-455-7694
jlevine@stblaw.com