

## **PROPOSED FREQUENTLY ASKED QUESTIONS RE USAO VSD POLICY**

### **PURPOSE**

#### **What is the purpose of the USAO VSD policy?**

- Incentivize corporate responsibility and a culture of compliance, and promote individual accountability, by clarifying and standardizing USAO policies on voluntary disclosure and corporate cooperation
- Incentivize companies to maintain effective compliance programs capable of identifying misconduct, expeditiously and voluntarily disclose and remediate misconduct, and cooperate fully with the government
- Provide transparency and predictability to companies and the defense bar concerning the benefits and potential outcomes in cases in which companies voluntarily self-disclose misconduct, fully cooperate and timely and appropriately remediate

### **PROCESS**

#### **What was the process you undertook to arrive at the policy?**

- In October 2021, the DAG undertook a top-to-bottom review of the Department's corporate enforcement policies to assess what was working, where we could improve and identify gaps.
- To conduct this review, the DAG created the Corporate Crime Advisory Group (CCAG) – a group of DOJ practitioners from various components – Crim, ATR, TAX, USAO, ENRD, NSD and tasked them with reviewing and recommending policy revisions and/or guidance to ODAG to strengthen the Department's corporate enforcement policies by addressing the following areas:
  - Individual accountability
  - Company history of misconduct
  - Cooperation
  - Resolutions (NPAs, DPAs, and guilty pleas)
  - Monitors
- The DAG also sought input from leaders outside of the Department representing academia, public interest groups, consumer advocacy groups, corporate monitors, industry, members of the business community and the defense bar, among others.
- This rigorous review and assessment led to the updated/revised corporate enforcement policies announced by the DAG in September 2022.

- The policies aimed to reinforce that individual accountability remains a top priority for the Department and provided transparency and predictability on how companies can benefit from being good corporate citizens
- Specifically, the revised policies sought to:
  - Provide clarity for prosecutors and the defense bar on individual accountability and timely investigations and charging
  - Provide transparency in determining dispositions taking into account the following:
    - Evaluation of company's cooperation
    - Evaluation of company's history of misconduct and recidivism
    - Evaluation of company's compliance program
  - Provide consistency and predictability within each DOJ component with respect to voluntary self-disclosure by companies
    - DOJ components that prosecuted corporate crimes were directed to review, update and/or create formal written VSD policies to incentivize VSD and set forth the expectations for meeting the policy and benefits of doing so
      - DOJ components that had pre-existing policies: CRM, ATR, NSD, ENRD
      - Individual USAOs may have had their own policies, but goal was to develop a uniform policy
  - The September 2022 Memo also identified additional metrics in evaluating corporate compliance and culture, including how companies track data on personal devices/in third-party applications and how companies use compensation plans to incentivize good corporate behavior, and provided guidance on when DOJ would consider the imposition of a monitor in connection with the disposition of a corporate case.
    - Updated guidance on these topics are forthcoming

## **THE USAO VSD POLICY**

### **What are the key elements of the VSD policy?**

- **VOLUNTARY:** Voluntary disclosure made by the company to the USAO. Voluntary means that the company did not have preexisting obligation to disclose, such as pursuant to regulation, contract, or a prior Department resolution (e.g., non-prosecution agreement or deferred prosecution agreement).
- **TIMING:** Disclosure was made prior to an imminent threat of disclosure or government investigation, prior to the misconduct being publicly disclosed or otherwise known to the

government; and within a reasonably prompt time after the company becoming aware of the misconduct, with the burden being on the company to demonstrate timeliness.

- **SUBSTANCE:** Disclosure must include all relevant facts concerning the misconduct that are known to the company at the time of the disclosure.

#### **BENEFITS OF SELF-REPORTING UNDER THE USAO VSD POLICY**

- Absent an aggravating factor, if company meets the USAO VSD policy, fully cooperates and timely and appropriately remediates, the USAO will not seek a guilty plea
- Aggravating factors:
  - 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.
- Appropriate remediation includes, but is not limited to, company agreeing to pay all disgorgement, forfeiture, and restitution resulting from the misconduct at issue
- If criminal fine imposed, will not be greater than 50% off the low end of the sentencing guidelines
- If guilty plea is warranted due to presence of aggravating factor, then
  - USAO will recommend fine of at least 50% and up to 75% off low end of sentencing guidelines
  - Not require an appointment of a monitor if company has, at the time of resolution, demonstrated that it has implemented and tested an effective compliance program

#### **Will all USAOs adopt this policy or will there be modifications by each?**

- All USAOs will adopt this policy

#### **Why didn't the Department come up with one policy that applies to all components?**

**(Likely variation: why does the Criminal Division have a different policy than the USAOs?)**

- One size doesn't fit all. Each component has its own jurisdictional mandate. Each component's policy is designed to address the particular types of cases handled by that component.
- For example, the mandate of the USAOs sweeps more broadly than the Criminal Division – while there is overlap in certain areas (fraud cases, organized crime and gangs, narcotics cases, public integrity), the USAOs are also responsible for bringing cases in substantive areas not handled by the Criminal Division (for example, national security cases, environmental crimes, civil rights, etc.).

**Do you think this policy will result in more self-reporting?**

- That is certainly the hope.
- We hope that companies will step up and own up when misconduct occurs, and to cooperate with the government so that individual wrongdoers can be held accountable; when they do, they will have far better and more predictable outcomes under this policy.

**Why give a discount off the fine for a company with an aggravating factor?**

- We want to incentivize companies that identify potential misconduct to voluntarily come forward and report it to us, cooperate and remediate.
- A company which does those things, even when there is an aggravating factor, will get a concrete benefit. It's important for companies to know that the potential existence of an aggravating factor will not preclude them from getting a material discount off of any potential resolution if they otherwise comply with the policy.

**What is the policy on companies that have acquired other companies and discover misconduct during or shortly after the acquisition? Will you apply the CRM policy?**

- Those cases will be evaluated under this policy. In a case where a company acquires or merges with another and discovers misconduct, promptly self-reports and remediates the misconduct without an aggravating factor, consistent with the policy, a VSD will result in a declination, non-prosecution agreement or a deferred prosecution agreement.
- The section on M&A in the CRM policy similarly says that the CRM policy will be applicable to acquiring companies, so we believe our approach here is consistent.
  - [While we will not be bound by the Criminal Division policy, we will take it into account in determining the appropriate resolution.]

**Are you concerned that companies will forum shop and self-report to CRM instead of the USAOs?**

- The purpose of the Monaco memo was to incentivize companies that become aware of potential misconduct to voluntarily self-disclose that conduct to the Department, and this policy is designed to help further that goal generally.
- Of course, we discourage forum shopping. In cases in which the conduct occurs in our respective districts, we would expect companies to disclose the conduct to the USAO in the district.
- However, we understand that there may be cases in which companies choose to self-disclose to the Criminal Division in Main Justice or other authorities for a variety of reasons. And, we routinely collaborate with the Criminal Division and other authorities on such investigations.

**In cases in which USAOs work jointly with CRM on cases, which policy will be applied?**

- 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. Consistent with relevant provisions of the Justice Manual and as allowable under alternate VSD policies, the USAO may choose to apply any provision of an alternate VSD policy in addition to, or in place of, any provision of this policy

**Will you apply the same discounts reflected in the CRM policy in circumstances where the company has not self-disclosed the conduct but did cooperate and remediate?**

- Our policy focuses only on cases in which there is a voluntary self-disclosure.
- In cases in which there is not a voluntary self-disclosure, our prosecutors will continue to evaluate all of the facts, circumstances, and the law, as required by the Justice Manual, and use discretion in determining the appropriate resolution, which includes the amount of any fine.
- As a general matter, consistent with the Justice Manual and the United States Sentencing Guidelines, USAOs reward companies for cooperation and remediation, and that will continue.
- Given the broad scope of matters handled by the USAOs – which again, is far broader than those handled by the Criminal Division – we have not adopted a uniform policy to apply set discounts in cases in which no voluntary self-disclosure has been made.

**Why is only the involvement of “current” executive management an aggravating factor, rather than any executive management?**

- We want to incentivize self-disclosure even in cases in which executive management was involved.
- We want to make clear that we will not consider involvement of executive management as an aggravating factor in situations where, for example, the conduct is historical and involved members of executive management who are no longer with the company

**COMPARING CRIMINAL DIVISION’S POLICY**

**Why didn’t the US Attorney community adopt the presumption of declination where the company complies with VSD policy?**

- The USAO VSD policy includes a presumption against a guilty plea if certain aggravating factors are not present. While a declination is one of the possible outcomes in lieu of a guilty plea, we wanted to be very clear that additional resolutions also are possible, including non-prosecution agreements and deferred prosecution agreements. Given the broad scope of matters that USAOs handle, it is important for prosecutors to have the discretion to determine the appropriate non-guilty plea resolution for the particular case.

#### **Why didn't you include significant profit as an aggravating factor?**

- Again, we want to encourage companies, large or small, who may have profited a lot or a little from the misconduct, to self-disclose.
- While the size and scope of the crime and related profits are important considerations, our policy will not label it an aggravating factor and thereby subject the company to a potential guilty plea.
- Instead, even companies which may have profited significantly from the misconduct will be eligible for a non-guilty plea resolution if they comply with the requirements of the policy.
- Importantly, other aspects of the resolution directly address any profits that a company might have earned from misconduct. Indeed, a requirement for any company benefiting from this policy is that they agree to pay all disgorgement, forfeiture, and restitution resulting from the misconduct at issue.

#### **Why didn't you include recidivism as an aggravating factor?**

- We do not want to discourage companies which may have had prior criminal or regulatory resolutions from voluntarily self-reporting misconduct and taking steps to cooperate and remediate. In fact, our hope is that companies with prior criminal or regulatory resolutions are making the extra effort to implement robust compliance programs that can identify future misconduct, and that the improved corporate culture of those companies will lead to reporting of such misconduct if it occurs.
- As a result, we want to make clear that such companies, who have learned from and changed as a result of their prior misconduct, will not be precluded from benefiting from the policy (or required to plead guilty) solely because they are considered a recidivist.
- It is for these reasons that the Deputy Attorney General made clear in her September 15, 2022 memorandum that recidivist companies should still be entitled to benefit from the voluntary self-disclosure policies.

#### **Why didn't you address cooperation in the policy?**

- Guidance for how all DOJ prosecutors, regardless of component, should evaluate a company's cooperation is addressed at length in the Justice Manual and in the Monaco

Memo (which will lead to additional updates to the JM as well), and the USAOs abide by this guidance.

**If there is a disagreement between components about what policy applies in a joint investigation situation, whose policy controls? Who is the arbiter in disputes between components as to whose policy applies?**

- 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. Consistent with relevant provisions of the Justice Manual and as allowable under alternate VSD policies, the USAO may choose to apply any provision of an alternate VSD policy in addition to, or in place of, any provision of this policy.
- USAOs collaborate often and well with other Department offices and components on criminal cases. We would expect that in coordination with the other Department offices and components, an agreement will be reached regarding which policy will be applied.

**Will declinations under the USAO policy be made public, as in the CRM policy?**

- The USAOs will determine whether to make declinations public on a case-by-case basis.
- However, we do expect that in many cases, it will be appropriate for the USAOs to publicize a declination in the context of informing the public of a company's successful VSD, steps taken by the company to remediate and cooperate, and any resulting disengagement, forfeiture, and restitution to victims that resulted from the VSD.