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DOJ Launches Formal Voluntary Self-Disclosure Policy for All U.S. Attorney Offices

On February 22, 2023, the Department of Justice (“DOJ”) announced a corporate Voluntary Self-Disclosure (“VSD”) policy (the “VSD Policy” or the “Policy”) for all U.S. Attorney’s Offices (“USAOs”), setting nationwide incentives for voluntary corporate disclosures. Effective immediately, the VSD policy aims to incentivize corporate self-disclosure by setting forth standardized, transparent criteria for self-reporting that, if met, will result in concrete, real-world rewards. Pursuant to this carrot-not-stick approach, companies with qualifying disclosures can avoid a guilty plea, receive a sharp reduction—or total elimination—of a criminal fine, and avoid being saddled with a costly and cumbersome corporate monitorship.

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Development of a Nationwide Policy.

Last fall, in a DOJ memorandum entitled “Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group,” Deputy Attorney General Lisa Monaco tasked each USAO with creating and publicly sharing a VSD policy. In an apparent effort to bring consistency and uniformity nationwide, the Attorney General’s Advisory Committee directed an effort by a working group from DOJ and various USAOs to draft this new VSD policy, which “shall apply” to all USAOs.

Clear Criteria for Qualification as a VSD.

DOJ’s stated goal is to credit voluntary self-disclosure of corporate malfeasance by “standardiz[ing] how VSDs are defined and credited by USAOs nationwide.”

What Qualifies as a Voluntary Disclosure?

For a USAO to determine, in its sole discretion, that a corporate report qualifies as a VSD, the following criteria must be met.

- a. Voluntary Disclosure.
 - The disclosure must be voluntary. Disclosures made pursuant to preexisting legal obligations, such as an active deferred prosecution agreement (“DPA”), for example, will not be considered voluntary.
- b. Prompt Timing.
 - A company must disclose wrongdoing to DOJ prior to any imminent threat of disclosure or government investigation.
 - The conduct may not be already publicly disclosed nor otherwise known by the government.
 - The company must make the disclosure within a “reasonably prompt” time frame after learning of the misconduct, and the company will bear the burden of showing the timeliness of their reporting.
- c. Revealing all Relevant Facts.
 - A qualifying disclosure will reveal all relevant facts concerning the misconduct then known to the company with an understanding that some findings may be only preliminary.

Disclosures meeting these criteria do not automatically qualify as VSDs. The company must cooperate fully by continuing its investigation; by preserving, obtaining, and producing information; and by providing continual factual

updates to the government. Timely and appropriate remediation will also be required, including disgorgement, forfeiture, or restitution of gains from misconduct.

What are the Benefits Afforded to Qualifying VSDs?

Companies that make a qualifying VSD without any aggravating factors (*see infra*) can expect the USAO to do as follows:

- a. Not require a guilty plea;
- b. Not seek a criminal penalty, or, if a penalty is warranted, impose a penalty that is at least 50% reduced from the low end of the applicable U.S. Sentencing Guidelines (“U.S.S.G.”) fine range; and
- c. Not impose an independent compliance monitor (assuming the company demonstrates effective implementation and testing of a robust compliance program).

Aggravating factors do not eliminate the benefits of voluntary self-reporting, but they do reduce them. DOJ considers aggravating factors to include the following:

1. misconduct that poses a grave national security, public health, or environmental threat;
2. misconduct that is deeply pervasive at the company; or
3. misconduct involving current company executive management.

No one factor will require a guilty plea; the USAO will assess the circumstances and individual facts to determine the appropriate resolution. Importantly, even if a guilty plea is required for a company, it will still receive other VSD Policy benefits, including (a) a 50%–75% reduction off of the low end of the U.S.S.G. fine range and (b) no imposition of a compliance monitor (again, assuming that it maintains an effective and pressure-tested compliance program).

Key Takeaways and Analysis.

Beware of Overlapping Policies: Companies considering self-disclosure need to note that the VSD Policy does not automatically supplant other DOJ components’ existing VSD policies, such as Criminal Division or Antitrust Division policies. When a USAO is working alongside another DOJ component division, the USAO may be required to obtain approval from that other division to implement this Policy or may instead apply the component division’s policy instead.

Functioning Compliance Programs Required: The Policy assumes a functioning compliance program as table stakes—no self-reporting company will qualify for the Policy’s benefits without an effective compliance program. DOJ expressly conditions its decision not to impose client monitors on the existence of an effective compliance program, but other aspects of full cooperation—such as a timely disclosure or effective remediation and continued investigation—presume the company maintains a compliance program that is up to the task.

The USAO VSD Policy follows DOJ’s now well-worn trend of aiming to incentivize self-disclosure. The policy sets forth clear criteria and provides both transparency and predictability, moderating geographic discrepancies and the benefits of forum shopping. It delineates the carrots available to self-reporters, leaving the stick reserved for non-disclosing companies heavily implied. However, the VSD Policy still retains significant discretion for individual USAOs, who retain the authority to determine what will constitute a prompt disclosure or an effective compliance program. That said, even if a disclosure does not qualify as a VSD under the policy, DOJ suggests imposed penalties would still be reduced compared to those imposed on companies who do not come forward.

If you have any questions on this topic or need additional information, please contact Ropes & Gray’s [Government Enforcement/White Collar Criminal Defense](#) attorneys.