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# *Department of Justice Issues Voluntary Self-Disclosure Policy for Corporate Criminal Enforcement Applicable to U.S. Attorneys' Offices Nationwide*

February 24, 2023

On February 22, 2023, the Department of Justice (DOJ) issued a Voluntary Self-Disclosure Policy (VSDP) which, effective immediately, applies to all U.S. Attorneys' Offices (USAOs) nationwide with respect to corporate criminal enforcement matters.<sup>1</sup> Distinct from the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy (Criminal Division's Corporate Enforcement Policy),<sup>2</sup> which only applies to components of the DOJ's Criminal Division, the VSDP was approved by the Office of the Deputy Attorney General to immediately apply to all United States Attorney's Offices throughout the country and was developed by the Attorney General's Advisory Committee, a select group of U.S. Attorneys that advises the Attorney General on matters of policy affecting the Offices of the U.S. Attorneys. The VSDP's stated goal is to "standardize how [voluntary self-disclosures] are defined and credited by USAOs nationwide, and to incentivize companies to maintain effective compliance programs capable of identifying misconduct, expeditiously and voluntarily disclose and remediate misconduct, and cooperate fully with the government in corporate criminal investigations."<sup>3</sup> The VSDP was developed pursuant to the direction in the September 2022 "Monaco Memo" that each DOJ component that prosecutes corporate crime

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<sup>1</sup> United States Attorneys' Offices Voluntary Self-Disclosure Policy, (Feb. 22, 2023) (hereinafter VSDP), available at <https://www.justice.gov/usao-sdny/press-release/file/1569411/download>.

<sup>2</sup> DOJ, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, JUSTICE MANUAL § 9-47.120 (2023); *see also*, WilmerHale, DOJ Announces Updates to Corporate Enforcement Policy (Jan. 18, 2023), available at <https://www.wilmerhale.com/en/insights/client-alerts/20230118-doj-announces-updates-to-corporate-enforcement-policy>.

<sup>3</sup> "Damian Williams and Breon Peace Announce New Voluntary Self-Disclosure Policy for United States Attorney's Offices," (Feb. 22, 2023), available at <https://www.justice.gov/usao-sdny/pr/damian-williams-and-breon-peace-announce-new-voluntary-self-disclosure-policy-united>.

develop and publish a voluntary self-disclosure policy.<sup>4</sup> The concrete nature of the incentives set forth in this policy and their applicability to USAOs across the country should allow corporations better to weigh the pros and cons of self-reporting potential criminal violations—and may increase the appeal of such self-reporting in certain circumstances, although significant risks certainly remain.

The VSDP is the latest in a series of concerted efforts by the DOJ to encourage voluntary self-disclosures and underscores the DOJ's recent, public commitment to providing incentives for voluntary self-disclosure.<sup>5</sup> This commitment was most recently reiterated in February 16, 2023 remarks by Deputy Assistant Attorney General Lisa Miller, in which she emphasized, in reference to the updated Criminal Division's Corporate Enforcement Policy, that the "[c]arrots we offer [for voluntary self-disclosure] have never been juicier" and noted that the changes in that policy would "offer companies new and concrete incentives and powerfully make the business case for voluntary self-disclosure."<sup>6</sup> However, the actual "carrots" announced in the VSDP—for instance, that the USAO "will not seek a guilty plea" where all of the VSDP's requirements are met and there are no aggravating circumstances—are less "juicy" than the "presumption of a declination" incentive that is included in the Criminal Division's Corporate Enforcement Policy,<sup>7</sup> and the VSDP introduces few new incentives. The most notable aspect of the policy is that the incentives included in the VSDP are now standardized across all USAOs.

Unlike the Criminal Division's Corporate Enforcement Policy, the VSDP does not provide guidance on the requirements and expectations for obtaining cooperation credit or being determined to have

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<sup>4</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 7, (Sept. 15, 2022) (hereinafter Monaco memo), available at <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>5</sup> See, e.g., Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, (Oct. 28, 2021) (revising the DOJ's criminal enforcement policy, announcing the creation of the Corporate Crime Advisory Group to review the DOJ's approach to corporate enforcement, and modifying the standards used to determine whether a monitorship is appropriate); Lisa O. Monaco, Deputy Attorney General, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022) (establishing four priorities: (1) individual accountability, (2) corporate accountability, (3) independent compliance monitors, and (4) a commitment to transparency. To foster the commitment to transparency, the Monaco Memo directed each DOJ division to publish a written policy incentivizing self-disclosure and making voluntary self-disclosure a prerequisite for any resolution other than a guilty plea); "Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy," (Jan. 17, 2023), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>. See also WilmerHale, "The Corporate Crime Advisory Group Has Spoken: DOJ Revises Corporate Criminal Enforcement Policies" (Sept. 19, 2022), available at <https://www.wilmerhale.com/insights/client-alerts/20220919-the-corporate-crime-advisory-group-has-spoken-doj-revises-corporate-criminal-enforcement-policies>); WilmerHale, "DOJ Announces Updates to Corporate Enforcement Policy" (Jan. 18, 2023), available at <https://www.wilmerhale.com/en/insights/client-alerts/20230118-doj-announces-updates-to-corporate-enforcement-policy>.

<sup>6</sup> "Deputy Assistant Attorney General Lisa H. Miller Delivers Remarks at the University of Southern California Gould School of Law on Corporate Enforcement and Compliance," (Feb. 16, 2023), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-lisa-h-miller-delivers-remarks-university-southern>.

<sup>7</sup> DOJ, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, JUSTICE MANUAL § 9-47.120 (2023).

timely and appropriately remediated other than noting that the USAO will rely on the operative provisions of the Justice Manual and DOJ policy and expressing the requirement that a company must pay all disgorgement, forfeiture and restitution resulting from the misconduct at issue. As its name suggests, the crux of the VSDP is encouraging voluntary self-disclosures by assuring disclosing companies that their disclosure will be treated similarly by all USAOs. Interestingly, the VSDP does contemplate joint prosecution by a USAO and another component of the DOJ. In such cases, and as allowable under an alternate voluntary self-disclosure policy, “the USAO may choose to apply any provision of an alternate [voluntary self-disclosure] policy in addition to, or in place of, any provision of this policy.”<sup>8</sup> It of course remains to be seen whether and how, in practice, distinct voluntary self-disclosure policies will be applied.

Like the Criminal Division’s Corporate Enforcement Policy, under the VSDP, a disclosure must be truly voluntary (i.e., made when there is no preexisting obligation to do so) and timely. This leaves open the possibility that entities in highly regulated industries will not qualify for the credit, if they are already under an obligation to report violations (such as broker-dealers that must report material securities-law violations under FINRA Rule 4530, for example). Like the Criminal Division’s Corporate Enforcement Policy, the VSDP provides that a self-disclosure will only be deemed timely where the disclosure is made (i) before such misconduct is publicly reported or is otherwise made known to the DOJ; (ii) before an imminent threat of such disclosure or a government investigation exists; and (iii) within a reasonably prompt time after the company becomes aware of the misconduct.

If the Company has fully met the requirements of the VSDP, having voluntarily and timely disclosed to the DOJ or relevant USAO “all relevant facts concerning the misconduct that are known to the company at the time of the disclosure,”<sup>9</sup> and the company has fully cooperated and timely and appropriately remediated the criminal conduct, the VSDP provides that the USAO “may choose not to impose a criminal penalty, and in any event will not impose a criminal penalty that is greater than 50% below the low end of the U.S. Sentencing Guidelines fine range.”<sup>10</sup> Additionally:

- *Absent aggravating factors:*
  - The USAO will not seek a guilty plea.
- *Where there are aggravating factors:*
  - A guilty plea may be warranted despite a voluntary self-disclosure where there are aggravating factors, including where the misconduct poses a threat to national

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<sup>8</sup> VSDP, at 2.

<sup>9</sup> VSDP, at 4. The VSDP recognizes that at the time of disclosure, “a company may not be in a position to know all relevant facts at the time of a [voluntary self-disclosure] because the company disclosed reasonably promptly after becoming aware of the misconduct. Therefore, a company should make clear that its disclosure is based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at the time.” *Id.*

<sup>10</sup> *Id.*, at 5.

security, public health, or the environment; is “deeply pervasive” in the company; or involved a company’s current executive management.<sup>11</sup>

- In the event a guilty plea is warranted due to an aggravating factor but a company has “voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct,”<sup>12</sup> the USAO will recommend at least 50% and up to a 75% reduction off of the low end of the U.S. Sentencing Guidelines fine range and will not require appointment of an independent compliance monitor if the company has demonstrated that it has an effective compliance program.<sup>13</sup>

The VSDP makes clear that the government is not backing off its drive to encourage voluntary self-disclosures. On the contrary, with the factors on how to assess a voluntary self-disclosure now standardized across USAOs, the government has taken an important step in removing uncertainty regarding potentially disparate evaluation of a voluntary self-disclosure. Accordingly, the VSDP serves as a good reminder that companies must: (i) develop and maintain an effective compliance program to ensure that any potential misconduct is timely detected and that relevant internal stakeholders at the Company are immediately made aware of the potential misconduct; and (ii) where potential criminal misconduct is suspected, immediately conduct an internal investigation to determine whether misconduct has occurred and assess its potential scope, or at least to gather enough facts to be able to make an informed decision as to voluntary self-disclosure taking into account the provisions of both the VSDP and the Criminal Division’s Corporate Enforcement Policy. The government’s carrots notwithstanding, voluntary self-disclosure may not be right in many instances, but it is important that companies not lose the potential benefits unintentionally and that informed, risk-weighted decisions can be made.

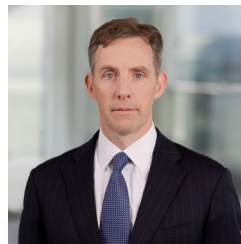
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<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> The USAO will refer to the Monaco Memo when evaluating whether the company has implemented and tested an effective compliance program. *Id.* at 5.



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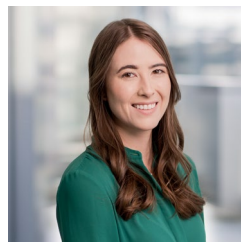
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