

THE DOJ ANNOUNCES NEW NATIONWIDE VOLUNTARY SELF-DISCLOSURE POLICY

In an effort to not only establish a uniform standard for how U.S. Attorney Offices (“USAOs”) assess and credit voluntary self-disclosures but to also incentivize early and voluntary self-disclosure of corporate criminal misconduct, the Department of Justice (“DOJ”) has implemented a new Voluntary Self-Disclosure (“VSD”) Policy to be used by USAOs nationwide (the “Policy”). The Policy, which was announced on February 22, 2023, and went into effect immediately, sets forth: (1) the criteria that USAOs use in determining an appropriate resolution for an organization that makes a VSD; (2) the USAOs’ expectations of what constitutes a VSD; and (3) the “clear and predictable benefits” of VSDs. The Policy underscores the importance of maintaining an effective corporate compliance program capable of identifying misconduct, quickly and voluntarily disclosing and remediating misconduct and cooperating fully with the government’s investigation.

STANDARDS OF VOLUNTARY SELF-DISCLOSURE

For a company’s disclosure to constitute a VSD and receive credit, it must satisfy each of the following standards:

- **Voluntary:** A company must voluntarily make the disclosure. A disclosure is not voluntary when it is made to fulfill another reporting obligation, such as pursuant to a regulation, contract or prior DOJ resolution.
- **Timing:** The disclosure must be 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 becomes aware of the misconduct. The company has the burden to demonstrate timeliness.
- **Substance:** The disclosure must include all relevant facts concerning the misconduct that are known to the company at the time of the disclosure. The company should provide ongoing updates to the USAO of its continued internal investigation and preserve, collect and produce relevant documents and information.

BENEFITS OF SELF-REPORTING

The USAO will not seek a guilty plea against the company when it has submitted a disclosure that satisfies the criteria listed above, as long as the company has also: (a) fully cooperated with investigators; and (b) timely and “appropriately remediated” the criminal conduct by, among other things, agreeing to pay all disgorgement, forfeiture and restitution resulting from the misconduct. In such cases, a resolution could include a declination, non-prosecution agreement or deferred prosecution agreement.

Moreover, 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.

PRESENCE OF AGGRAVATING FACTORS

Notably, the USAO may still seek a guilty plea – **even if the VSD criteria are otherwise met** – if a company’s misconduct “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.” Nevertheless, the Policy makes it clear that despite the presence of an aggravating factor, companies that have otherwise voluntarily self-disclosed, fully cooperated and timely and appropriately remediated the misconduct will still be afforded favorable treatment, including:

- At least 50% and up to a 75% reduction off the low end of the U.S. Sentencing Guidelines fine range; and
- An agreement not to appoint an independent compliance monitor as long as the company has implemented and tested an effective compliance program.

PRACTICAL TAKEAWAYS

- To qualify as a VSD, the disclosure must be voluntary, timely and fully transparent.
- Absent aggravating factors, the USAO will not seek a company guilty plea where a company has: (1) voluntarily self-disclosed; (2) fully cooperated with investigators; and (3) timely remediated the criminal conduct.

- Even if aggravating factors exist, voluntary self-disclosure can result in favorable treatment such as fine reductions and no costly independent compliance monitoring.

Notwithstanding the DOJ's attempt at providing predictability, transparency and uniformity through the implementation of the VSD Policy, the decision to voluntarily self-disclose evidence of possible corporate misconduct remains complex and should be weighed very carefully with your legal counsel. Above all, the VSD Policy underscores the importance of developing and maintaining a robust, effective compliance program so that companies can detect potential misconduct early on and address it immediately.

If you have questions or would like additional information, please contact:

- **Scott Taebel** at (414) 721-0445 or staebel@hallrender.com;
- **Katherine Kuchan** at (414) 721-0479 or kkuchan@hallrender.com;
- **Lindsay McManus** at (303) 802-1293 or lmcmamus@hallrender.com; or
- Your primary Hall Render attorney.

Hall Render blog posts and articles are intended for informational purposes only. For ethical reasons, Hall Render attorneys cannot give legal advice outside of an attorney-client relationship.