



Mar 07, 2023

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New Policy From DOJ Offers Predictability and Incentives to Self- Report Misconduct

Representatives of the United States Attorney's Office (USAO) [announced](#) on February 22, 2023, the immediate implementation of a new [Voluntary Self-Disclosure Policy](#). This new policy was created in response to a September 2022 memorandum from the Deputy Attorney General, which requested that each component of the Department of Justice (DOJ) review its policies on corporate voluntary self-disclosure and revise or create a formal written policy that incentivizes such self-disclosure.

The stated intention of the new policy is to provide transparency and predictability to companies and the defense bar concerning the benefits, and potential outcomes, in cases where companies voluntarily self-disclose misconduct, fully cooperate with the government, and remediate the misconduct in a timely and appropriate manner. In general, the policy requires that: (1) the disclosure of misconduct is made voluntarily (not to include instances where there is a pre-existing obligation to disclose, *e.g.*, by regulation or contract); (2) the disclosure be made prior to an imminent threat of disclosure, prior to the misconduct being publicly disclosed, and within a reasonably prompt time after the company becomes aware of the misconduct; and (3) the disclosure includes all relevant facts concerning the misconduct that are known to the company.

The incentives created by this new policy are significant and include the following:

- Absent the presence of aggravating factors, the USAO will not seek a guilty plea where a company has satisfied the aforementioned conditions for a voluntary self-disclosure. Aggravating factors include, but are not limited to: (1) misconduct that poses a grave threat to national security, public health, or the environment; (2) misconduct that is deeply pervasive throughout the company; and (3)

misconduct that involves the current executive management of the company.

- Where a company fully meets the requirements of the policy, 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 percent below the low end of the U.S. Sentencing Guidelines fine range.
- Even in those instances where aggravating factors warrant a guilty plea, if the company has fully complied with the policy, the USAO will recommend to a sentencing court a 50 – 75 percent reduction off of the low end of the U.S. Sentencing Guidelines fine range, and will not require appointment of a monitor if the company has implemented and tested an effective compliance program consistent with the policy (such decisions to be made on a case-by-case basis).

As stated by U.S. Attorney Breon Peace in announcing the policy, with this new national standard in place, “no matter where in the country a company operates, it can rely on receiving the same treatment and benefits for voluntarily self-disclosing criminal conduct to a U.S. Attorney’s Office.” The incentives provided by the policy are expected to encourage corporate accountability by providing clear, tangible benefits to timely self-disclose misconduct, rather than waiting for the authorities to come knocking.

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