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WHITE PAPER

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DOJ Announces New Voluntary Self-Disclosure Policy for All U.S. Attorneys' Offices

On February 22, 2023, the U.S. Department of Justice ("DOJ" or "Department") announced the Voluntary Self-Disclosure Policy ("VSD Policy" or "Policy"), detailing the circumstances under which a company can receive credit for voluntarily self-disclosing criminal conduct to U.S. Attorneys' Offices ("USAOs"). This represents a shift in corporate enforcement at the USAOs, which had generally lacked formal policies for self-disclosure credit and applied varying and nontransparent approaches on an office-by-office basis.

The VSD Policy, which is effective immediately, aims to standardize how USAOs define and credit "voluntary self-disclosure" by companies across the country. The Policy is meant to provide enhanced transparency and predictability for companies contemplating self-reporting corporate misconduct. In particular, the VSD Policy is intended to standardize the treatment of companies that satisfy the criteria set forth in the Policy across the USAOs.

In this *White Paper*, members of the Jones Day Investigations & White Collar Defense Practice, including our eight former U.S. Attorneys, discuss the VSD Policy and offer key takeaways that companies should bear in mind.

INTRODUCTION

DOJ continues to incentivize self-disclosure by companies that learn of potential criminal misconduct. On February 22, 2023, Damian Williams, U.S. Attorney for the Southern District of New York, and Breon Peace, U.S. Attorney for the Eastern District of New York, announced a new USAO VSD Policy. The VSD Policy provides a national standard for companies to obtain credit for voluntarily self-disclosing potential misconduct to a USAO. A company that self-discloses to a USAO and otherwise meets the VSD Policy's requirements may receive significant benefits, such as the USAO declining to seek a guilty plea against the company. The VSD Policy is effective immediately and applies to all 94 USAOs.

The announcement follows Deputy Attorney General ("DAG") Lisa Monaco's September 2022 memorandum (the "Monaco Memo"), which outlined changes to DOJ's approach to corporate criminal enforcement. Specifically, the DAG directed each DOJ component that prosecutes corporate crime to review its policy on voluntary self-disclosure, and if no such policy exists, to draft and publicly share one. In response, the Attorney General's Advisory Committee ("AGAC"), under the leadership of U.S. Attorney Williams, requested that the White Collar Fraud Subcommittee, under the leadership of U.S. Attorney Peace, develop such a policy. A Corporate Criminal Enforcement Policy Working Group, comprising U.S. Attorneys from several different districts, prepared the VSD Policy, which the Office of the DAG approved.

In January 2023, the Criminal Division also responded to the DAG's direction by announcing revisions to its Corporate Enforcement and Voluntary Self-Disclosure Policy (the "CEP"). Given the Criminal Division's—particularly the Fraud Section's—frequent work alongside USAOs in joint prosecutions, the CEP's guidance is particularly important to consider in evaluating the VSD Policy. The CEP contains incentives and requirements similar to those set forth in the VSD Policy. However, among other differences, the CEP provides greater incentives for compliance than does the VSD Policy, most critically with respect to the likelihood of a declination of prosecution. Under the CEP, a company that voluntarily self-discloses, fully remediates, and fully cooperates will qualify for a presumption of a declination of prosecution, absent certain aggravating factors. Even if aggravating factors are present, a company may still qualify for a declination under certain circumstances. By contrast, the VSD Policy does not provide for any circumstances in which a presumption of declination will apply. Instead, the VSD Policy contemplates the possibility of a non-prosecution agreement ("NPA") or deferred prosecution agreement ("DPA") as alternatives to declination, even for companies that meet the VSD Policy's requirements and absent any aggravating factors. Notably, the VSD Policy expressly states that a USAO may work with other DOJ components with different disclosure policies, or choose to apply another component's voluntary self-disclosure policy in place of the VSD Policy itself.

The VSD Policy, which applies only to USAOs, aims to create further incentives for companies to self-disclose suspected misconduct and to provide "transparency and predictability" for companies contemplating self-disclosure. The VSD Policy specifies companies that voluntarily self-disclose to a USAO will receive resolutions under more favorable terms than if the USAO had learned of the misconduct through other means.

NEW VOLUNTARY SELF-DISCLOSURE POLICY FOR USAOS

Standards of Voluntary Self-Disclosure

Under the VSD Policy, "voluntary self-disclosure" occurs where a company becomes aware of potential misconduct—before it is publicly reported or otherwise known to DOJ—and discloses all relevant facts to a USAO in a "timely fashion" and before an "imminent threat of disclosure or government investigation." In determining an appropriate resolution, prosecutors are instructed to consider whether the conduct at issue came to light as a result of the company's disclosure. Specifically, the voluntary self-disclosure must meet each of the following criteria:

Voluntary. A company's disclosure must be voluntary, which does not include circumstances where there is a preexisting obligation to disclose, such as pursuant to a regulation, contract, or a prior Department resolution (e.g., NPA or DPA). Notably, a disclosure will not be considered voluntary where it was previously reported to the USAO by a third party, such as a whistleblower.

Timing of the Disclosure. A company's disclosure must be made to the USAO:

- 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, with the company having the burden to demonstrate timeliness.

Substance of the Disclosure and Accompanying Actions. A company's disclosure to a USAO must include all relevant facts concerning the misconduct that are known to the company at the time of the disclosure. The VSD Policy notes that a company may not know all relevant facts at the time of the initial disclosure. Therefore, under these circumstances, a company should clearly state that the disclosure is made based on a preliminary investigation or assessment of information—although it still should provide a "fulsome disclosure of the relevant facts known to it at the time." After the initial disclosure, companies are expected to move in a timely fashion to preserve, collect, and produce relevant documents and information, and provide timely factual updates to the USAO. If the company were to conduct an internal investigation, the USAO also would expect factual updates as the investigation progresses.

Benefits of Meeting the Standards for Voluntary Self-Disclosure

Absent aggravating factors, the USAO will not seek a guilty plea against a company that (i) voluntarily self-discloses in accordance with the above-mentioned criteria, (ii) fully cooperates with the USAO investigation, and (iii) timely and appropriately remediates the misconduct, as provided by the VSD Policy. Instead, the USAO may choose to decline to prosecute the company or seek to enter into an NPA or DPA with the company. Further, if a company fully satisfies the VSD Policy, the USAO will not impose a criminal penalty against the company that is greater than 50% below the United States Sentencing Guidelines ("U.S.S.G.") fine range, and may choose not to impose a criminal penalty at all. However, the remediation required by the VSD Policy includes the company's agreement to pay disgorgement, forfeiture, and restitution. In cases involving significant financial losses or unlawful financial transaction values, the requirement to pay both restitution and an undiscounted forfeiture/disgorgement amount may result in major financial penalties that limit the benefit of the discount or elimination of an additional fine-based penalty.

Various "aggravating factors" may warrant a guilty plea by the company, despite self-disclosure to a USAO. Such factors include, but are not limited to, misconduct that: (i) poses a grave threat to national security, public health, or the environment; (ii) is deeply pervasive throughout the company; or (iii) involved current executive management of the company. If the presence of one or more of these factors warrants a guilty plea despite the company's voluntary self-disclosure, full cooperation, and timely and appropriate remediation, the USAO:

- Will recommend a 50% to 75% reduction off the low end of the U.S.S.G. fine range after any applicable reduction under U.S.S.G. § 8C2.5(g), or alternate penalty reduction set forth in an alternate VSD policy—such as the CEP—specific to the misconduct at issue; and
- Will not require appointment of a monitor if, at the time of the resolution, the company has implemented and tested an effective compliance program.

In assessing the effectiveness of a corporate compliance program, the USAO will refer to the Monaco Memo, which calls for the assessment of particular aspects of the program, including whether the company's compensation structure promotes compliance, whether non-disclosure agreements inhibit public disclosure of criminal misconduct, and whether effective policies on the use of personal devices and third-party messaging platforms are in place.

Notably, while the VSD Policy states that "[p]rompt self-disclosures to the government will be considered favorably, even if they do not satisfy all the VSD criteria[,]" the VSD Policy does not specify any benefits for cooperation and remediation without timely self-disclosure. This is consistent with recent DOJ emphasis on timely self-disclosure as the critical element in obtaining leniency, with even exceptional cooperation and full remediation resulting in limited benefits in negotiated corporate resolutions.

Comparison to the Criminal Division's Corporate Enforcement Policy

The standards for "voluntary self-disclosure" under the VSD Policy are generally consistent with the CEP's corresponding standards. The benefits for such self-disclosure under the VSD Policy, by contrast, appear to be less favorable and predictable to companies than the Criminal Division's CEP in significant respects. Specifically, under the CEP, a company must meet the following requirements to receive credit for voluntary self-disclosure:

- The voluntary disclosure must be to DOJ's Criminal Division;
- The company had no preexisting obligation to disclose the misconduct;
- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";
- The company disclosed the conduct to the Criminal Division within a reasonably prompt time after becoming aware of the misconduct (and the company has the burden to demonstrate timeliness); and
- The company discloses all relevant, nonprivileged facts known to it.

Under both the VSD Policy and the CEP, in addition to voluntarily self-disclosing, a company must also fully cooperate and timely and appropriately remediate wrongdoing. Notably, the CEP provides detail on what it means to "fully cooperate" and "timely and appropriately remediate," while the new VSD Policy provides only a minimal description of "remediation." It remains to be seen whether the USAOs and the DOJ Criminal Division will ultimately apply the same or differing standards for cooperation and remediation.

Additionally, both policies provide similar guidance to prosecutors in assessing appropriate resolutions for companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate. If a company fully meets the VSD Policy and aggravating factors are present, the USAO will recommend a 50% to 75% reduction off the low end of the U.S.S.G. fine range after any applicable reduction under U.S.S.G. § 8C2.5(g), or the penalty reduction benefit set forth in the alternate VSD Policy, if any, specific to the misconduct at issue. Similarly, in the circumstances where a criminal resolution is still warranted under the CEP, the Criminal Division will recommend a 50% to 75% reduction off the low end of the U.S.S.G. fine range (except in the case of a criminal recidivist). Under both policies, prosecutors will not require appointment of a monitor if the company has demonstrated that, at the time of the resolution, it has implemented and tested an effective compliance program.

On the other hand, the VSD and CEP policies have several differences, including, among others:

Benefits for Compliance. Under the CEP, DOJ's Criminal Division will apply a presumption of a declination if a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates. If aggravating factors are present, a company may still qualify for a declination if: (i) the company immediately voluntarily self-disclosed the misconduct; (ii) at the time of the misconduct and disclosure, the company had an effective compliance program and internal accounting controls that enabled the identification of the misconduct and led to the company's disclosure; and (iii) the company provided extraordinary cooperation and extraordinary remediation.

In contrast, the VSD Policy only provides that if it is followed, the USAO will not seek a guilty plea, absent aggravating factors. In this circumstance, the USAO may decline to prosecute or, alternatively, seek to enter into an NPA or a DPA with the company. Unlike a declination, NPAs and DPAs routinely provide for financial penalties that may be equivalent to those that would result from a guilty plea, along with other typically burdensome requirements.

Assuming the suspected conduct falls within the Criminal Division's scope of authority, this difference might create a greater incentive to voluntarily self-disclose to the Criminal Division, rather than a USAO—although the VSD Policy leaves open the possibility that the CEP could be applied even where disclosure was made to a USAO. In this regard, the VSD Policy notes that a USAO may choose to apply any provision of an alternate voluntary self-disclosure policy in addition to, or in place of, any provision of the VSD Policy itself. Further, if a company is being jointly prosecuted by a USAO and another Department office or component, or the misconduct is covered by self-disclosure policies administered by

other Department offices or components, the USAO will coordinate with (or obtain approval from) the Department component responsible for the self-disclosure policy specific to the misconduct. Thus, if a company discloses to a USAO, prosecutors could potentially apply a different voluntary self-disclosure policy—including the CEP.

These provisions give USAOs significant discretion in individual cases and may thus tend to diminish predictability—and increase complexity—for companies deciding whether, and to which DOJ component(s), to self-disclose potential corporate misconduct.

Presence of Aggravating Factors. Under the revised CEP, a company may qualify for a presumption of declination, even with aggravating factors present, if stringent criteria are met, as mentioned above. In contrast, under the VSD Policy, if there are aggravating factors, a USAO may seek a guilty plea. The policies also identify slightly different examples of "aggravating factors." Both policies list misconduct that is pervasive and involves executive management. However, the CEP does not include misconduct that "poses a grave threat to national security, public health, or the environment." Further, the CEP also considers aggravating factors to include where a company obtains a significant profit from the misconduct and criminal recidivism.

CEP Provides "Limited Credit" for Cooperation and Remediation, Even Without Voluntary Self-Disclosure. If a company did not voluntarily self-disclose its misconduct, but later cooperated and remediated under the CEP, the Criminal Division will recommend up to a 50% reduction off the low end of the U.S.S.G. fine range (except in the case of a criminal recidivist). As noted above, there is no specified benefit for cooperation and remediation without self-disclosure contained in the VSD Policy.

KEY TAKEAWAYS

The new VSD Policy is effective immediately, applies to all USAOs across the country, and provides standardized formal incentives to companies to voluntarily self-report suspected corporate criminal misconduct to a USAO. The adoption of this Policy is intended to enhance predictability for companies that come to learn of potential corporate misconduct; in this regard, having standardized, generally applicable criteria for USAOs to apply in determining whether and to what extent a company may be afforded leniency upon self-disclosing suspected misconduct is undeniably better than the absence of such criteria.

While the VSD Policy aims to enhance incentives, uniformity, and predictability across the USAO network, uncertainty will remain. This will be the case, in particular, in the short term, as the individual USAOs interpret and apply the provisions of the VSD Policy in their respective cases—some level of variability here can be assumed, especially where other DOJ components are involved.

On its face, the VSD Policy appears to be less favorable and predictable to companies than the Criminal Division's CEP in significant respects. In particular, under the VSD Policy, there is no presumption of a declination, even if all the VSD Policy requirements are met, and no specified benefit for cooperation and remediation absent timely self-disclosure. All other things being equal, therefore, for companies considering self-disclosure these distinctions may weigh in favor of disclosure to the Criminal Division in the wide range of matters where both the Criminal Division and a USAO have jurisdiction. Many other factors will typically affect the most appropriate recipient for a corporate self-disclosure, however, and so companies must continue to carefully consider all relevant factors, including facial differences between the CEP and the VSD Policy, in determining whether to self-disclose and, if so, to whom.

DOJ's ever-increasing emphasis on self-disclosure further heightens the importance of maintaining effective corporate compliance programs that can effectively and timely identify potential misconduct. Companies should review their compliance programs to ensure that they achieve this objective, while also being well designed and implemented to remediate misconduct.

LAWYER CONTACTS

Karen P. Hewitt
San Diego
+1.858.314.1119
kphewitt@jonesday.com

Scott W. Brady
Pittsburgh
+1.412.394.7233
sbrady@jonesday.com

Richard H. Deane Jr.
Atlanta
+1.404.581.8502
rhdeane@jonesday.com

W. Anders Folk
Minneapolis
+1.612.217.8923
afolk@jonesday.com

Justin E. Herdman
Cleveland
+1.216.586.7113
jherdman@jonesday.com

Andrew E. Lelling
Boston
+1.617.449.6856
alelling@jonesday.com

David E. Nahmias
Atlanta
+1.404.581.8241
dnahmias@jonesday.com

Ronald W. Sharpe
Washington
+1.202.879.3618
rsharpe@jonesday.com

Theodore T. Chung
Chicago
+1.312.269.4234
ttchung@jonesday.com

Samir Kaushik
Dallas
+1.214.969.5092
skaushik@jonesday.com

Heather M. O'Shea
Chicago
+1.312.269.4009
hoshea@jonesday.com

Alexander J. Wilson
New York
+1.212.326.8390
alexanderwilson@jonesday.com

Cristina Pérez Soto
Miami/New York
+1.305.714.9733 / +1.212.326.3939
cperezsoto@jonesday.com

Jordan M. Matthews
Chicago
+1.312.269.4169
jmatthews@jonesday.com

James Loonam
New York
+1.212.326.3808
jloonam@jonesday.com

Kayla J. Quigley, an associate in the New York Office, contributed to the preparation of this White Paper.