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New Self-Disclosure Policy from U.S. Attorneys Has 'Significant Financial Incentives'

By Nina Youngstrom

Voluntary self-disclosure (VSD) has taken a turn with a new policy from the nation's U.S. attorneys, who will now slash fines and forgo criminal charges when companies come forward with misconduct. But they may have to swallow criminal charges if the C-suite was involved, according to the first-ever United States Attorney's Offices' Voluntary Self-Disclosure Policy announced Feb. 22.^[1]

The policy, which was developed by the Attorney General's Advisory Committee and approved by Deputy Attorney General Lisa Monaco, describes "the expectations of what constitutes" voluntary self-disclosures and their "clear and predictable benefits." The benefits include a penalty that's not more than 50% of the low end of the Sentencing Guidelines range for companies without aggravating factors. Companies with aggravating factors also are eligible for sharply reduced fines, but they're not off the hook from a criminal plea.

"This is at least an attempt by the Department of Justice to put its money where its mouth is and demonstrate its sincere desire to treat companies with an effective compliance program better than companies that are not investing in compliance the way that they should," said former federal prosecutor Anthony Burba, with Barnes & Thornburg LLP in Chicago.

The policy came down one month after the criminal division at the Department of Justice (DOJ) announced a corporate enforcement policy spelling out the rewards for companies that self-disclose their involvement in possible criminal wrongdoing.^[2] The corporate enforcement policy, which was added to the Justice Manual, has similar benefits, but the U.S. attorneys' policy "is a little bit of a bigger deal than the one from the criminal division because it's national" and at least intended to be equally applied by all 94 U.S. attorneys' offices, Burba said. "This one is straightforward. The big carrot is to resolve your criminal liability without a criminal disposition if you fully disclose and meet other criteria with no aggravating factors." Even with aggravating factors, companies are eligible for a 50% to 75% penalty reduction. But things potentially could go awry, Burba said. "For a national policy like this where each U.S. attorney's office is its own small fiefdom, where one U.S. attorney gives 75% consistently and another gives 50%, will you end up in a forum shopping situation or will it be simple enough where it can be effectively and evenly applied across the U.S. attorney's offices?"

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