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Environmental Crimes Section
Environment & Natural Resources Division
Voluntary Self-Disclosure Policy

INTRODUCTION

The Deputy Attorney General's September 15, 2022, memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group" (Monaco Memo), instructed that each Department of Justice (Department or DOJ) component that prosecutes corporate crime review its policies on corporate voluntary self-disclosure. The Environmental Crimes Section (ECS) of the Environment & Natural Resources Division (ENRD) developed and implemented a voluntary disclosure policy in 1991. *See Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991). This revision updates the 1991 policy and sets forth: standards for what constitutes a voluntary self-disclosure (VSD) of misconduct to ECS; a description of benefits ECS prosecutors will confer on companies that complete the VSD process; and exception criteria that may limit the scope of VSD benefits in certain cases. Companies that voluntarily self-disclose misconduct to ECS pursuant to this policy will receive resolutions under more favorable terms than if the government learns of the misconduct through other means.

This policy is designed to provide guidance to ECS prosecutors concerning the exercise of prosecutorial discretion in environmental criminal cases as well as to provide transparency to the regulated community concerning the credit that may be accorded by ECS for voluntary self-disclosure of violations, cooperation with and substantial assistance to the government in investigating criminal violations, and the use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations. Nothing herein is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties.

POLICY GOALS

The VSD Policy is intended to encourage self-auditing, self-policing, and voluntary self-disclosure of criminal conduct by companies[1] by indicating that these activities are viewed as mitigating factors in ECS's exercise of criminal environmental enforcement discretion. Voluntary self-disclosures and meaningful cooperation assist the government to conserve

[1] The terms "company" and "corporation" apply to all types of business organizations, including but not limited to partnerships, sole proprietorships, government entities, and unincorporated associations. *See* Justice Manual § 9-28.200.

resources, conduct more expeditious investigations, and hold responsible individuals accountable. *See* Justice Manual (JM) §§ 9-28.800, 9-28.900. They also help corporations by encouraging ethical and sustainable corporate governance, risk management, and good management practices.

Like ECS's 1991 policy, this document addresses the unique aspects of ENRD's mission and program responsibilities. ECS's mandate is to protect the environment, public health and safety, worker safety, wildlife, and natural resources.[2] Internal audits (and self-imposed external audits) are especially important in the environmental context due to the size and complexity of various industrial processes, the lack of governmental resources to actively monitor the regulated community, the high degree to which existing laws and programs rely on the regulated community to monitor and report its own non-compliance, and the potentially significant environmental harm and public health risks caused by violations. Incentivizing and rewarding responsible corporate governance is a means to achieve this mandate.

ECS VOLUNTARY SELF-DISCLOSURE POLICY

In circumstances where a company becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the government, companies may disclose that misconduct to ECS, and expect beneficial treatment, including reductions in charges, penalties or conditions of probation, referral for civil or administrative enforcement in lieu of criminal prosecution, and, in certain cases, non-prosecution.

Companies are encouraged to make disclosures to the Department even if they believe the government may already be aware of the misconduct through other means. Prompt and complete self-disclosures to the government will be considered favorably, even if they do not satisfy all the VSD criteria set forth below.[3]

A. Standards of Voluntary Self-Disclosure

[2] Environmental crimes implicate special policy concerns, as well as federal law enforcement priorities, that must be considered in determining whether to charge a corporation. *See, e.g.,* Exec. Order No. 14008, *Tackling the Climate Crisis at Home and Abroad* (Jan. 27, 2021); JM §§ 9-27.230 and 9-28.400.

[3] Separate from this formal VSD Policy, the Department continues to encourage corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities. *See* JM § 9-28.900. A corporation's timely and voluntary disclosure of wrongdoing is among the factors prosecutors should consider in reaching a decision as to the proper treatment of a corporate target in investigating conduct, determining whether to bring charges, and negotiating plea or other agreements. *See* JM § 9-28.300. Prosecutors may also consider a corporation's timely and voluntary disclosure both as an independent factor in evaluating the company's overall cooperation and as evidence of the adequacy of the corporation's compliance program and its management's commitment to the compliance program. *See* JM § 9-28.900.

Decisions about whether a disclosure merits leniency will be made based on a careful assessment of the circumstances of the disclosure on a case-by-case basis, at the sole discretion of ECS, in consultation with its enforcement partners.[4] In order to fully qualify as a VSD in accordance with this policy, a disclosure must meet each of the following standards:

1. Voluntary: VSDs only occur when the disclosure of misconduct is made voluntarily by a company about misconduct not previously known or required to be reported to the government. A disclosure will not be deemed a VSD under this policy where there is a preexisting obligation to disclose, such as pursuant to law, regulation, permit, contract, or prior resolution (*e.g.,* plea agreement, non-prosecution or deferred prosecution agreement, court-imposed compliance program, or special condition of probation). This policy also does not apply in situations where disclosure to DOJ is made by a third party, including a competitor, whistleblower, or private party in a *qui tam* action.

2. Timing of the Disclosure: A disclosure will only be deemed a VSD when the disclosure is made to the Department: 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 prompt time of the company becoming aware of the misconduct, with the burden being on the company to demonstrate timeliness. Consideration of whether a disclosure was made in a timely manner will include whether any delay allowed additional violations to occur or financially benefitted the company.

3. Disclosure Made to the Department: In order to qualify as a VSD under this policy, disclosure must be made directly to ECS and/or the U.S. Attorney's Office in the district where the misconduct occurred.[5] Voluntary self-disclosures do not include those that are made to non-DOJ governmental entities (e.g., federal regulatory agencies, state and local governments, or civil authorities).

4. Method of Discovery: This policy seeks to award and encourage corporations that have comprehensive and meaningful ethics and compliance programs that discover and report non-compliance in a timely manner. Accordingly, violations discovered and disclosed to ECS as the result of such a program will be accorded significant benefit.

[4] This includes any U.S. Attorney's Office, Department component, or regulatory agency involved.

[5] The purpose of this requirement is to discourage forum shopping and selective disclosure to what may be perceived as the most lenient governmental entity or those having different authorities. Disclosures made to federal regulatory agencies, state and local governments, or civil enforcement authorities may be considered for leniency, but are not VSDs under this policy. A disclosure made to ECS within seven days of one made to such an entity will be considered simultaneous for purposes of this provision.

5. Substance of the Disclosure and Accompanying Actions: For a disclosure to be deemed a VSD under this policy, the disclosure must include all relevant facts concerning the misconduct and the individuals involved that are known to the company at the time of the disclosure. ECS recognizes that a company may not be in a position to know all relevant facts at the time of a VSD, especially where only preliminary investigative efforts have been possible. In such circumstances, a company should make clear that its disclosure is based upon a preliminary investigation or assessment of information. ECS further expects the company to move in a timely fashion to protect, preserve, collect, and produce all relevant information and records, and provide timely factual updates as that investigation progresses. *See* JM § 9-28.700.

6. Acquisitions: In cases where a previously unrelated company acquires another company and voluntarily and timely self-discloses misconduct as to the acquired entity, it may seek the benefit of VSD status under this policy. The acquiring company must fully and completely cooperate against individuals, as well as disclose information that shows: whether the violations were discovered by the management of either entity prior to the acquisition; whether the violations were discovered or disclosed during the acquisition process; and, whether this discovery was reflected in the terms of purchase and sales agreement. Additionally, the acquiring company must fully and completely disclose all related entities, including but not limited to, its relationship to the acquired or predecessor entity, including through any common ownership (individuals and corporate owners), common officers, or by other means, and the transfer and disposition of assets.

B. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation

Absent the presence of an aggravating factor as set forth below, and where a company has: made a VSD as defined herein; fully cooperated, including cooperation against responsible individuals; and timely and appropriately remediated the criminal conduct, ECS will not seek a guilty plea.[6] Decisions on VSD credit will be made on a case-by-case basis and at the sole discretion of ECS, in consultation with any participating prosecuting office.

[6] Non-prosecution is strictly limited to matters known to the prosecution and cannot include unknown or non-disclosed criminal conduct. ECS's non-prosecution of a company making a VSD does not limit the prosecuting authority of any other section or division of the Department, including the U.S. Attorney of any other judicial district, or any other federal, state, or local regulatory or prosecuting authority. Non-prosecution is concerned with criminal conduct only. It has no bearing on any civil or administrative actions, sanctions, or penalties that a federal or state agency may use to address misconduct. At a company's request, ECS will inform other prosecuting authorities of the nature and extent of a company's cooperation and remedial measures.

If due to the presence of an aggravating factor a guilty plea is warranted for a company that has made a VSD, ECS will consider a reduction in the number and type of charges the company must plead guilty to, and/or recommend to the sentencing court a more lenient criminal fine,[7] period of probation, and/or probation conditions.

C. Aggravating and Disqualifying Factors

Aggravating factors that may warrant prosecution notwithstanding a VSD include, but are not limited to, misconduct that:

1. posed a threat of serious adverse impact to the environment, public health and safety, worker safety, wildlife, or natural resources;[8]

2. involved knowing endangerment of, serious injury, or death to any individual;

3. was deeply pervasive throughout the company;[9]

4. involved concealment or obstruction of justice by senior management of the company;

[7] Because the fine guidelines in § 8C2.2 through § 8C2.9 of the U.S. Sentencing Guidelines (U.S.S.G.) Manual, Chapter 8 (Sentencing of Organizations), do not apply to environmental offenses, a specific percentage reduction of any fine is not part of this policy. The applicable fine for an environmental crime is the greatest of: the amount set forth in the statute charged; up to maximum amount set forth in 18 U.S.C. § 3571(c) (i.e., for a business organization, up to $500,000 per felony count, up to $200,000 per misdemeanor count); or, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, then the greater of twice the gross gain or twice the gross loss. *See* 18 U.S.C. § 3571(d).

[8] In determining the overall seriousness of an offense, the specific offense characteristics set out in the U.S.S.G. Chapter 2, Part Q (Offenses Involving the Environment) provide a non-exhaustive list of factors to consider.

[9] In evaluating the pervasiveness of misconduct in environmental cases, prosecutors should consider the following non-exhaustive list of considerations: the length of time over which misconduct took place; the number of distinct violations; the number of individuals involved and their level within the company; whether company managers or owners were participants or otherwise aware of the misconduct; whether other criminal misconduct took place; the degree to which the company policies or lack thereof contributed to the misconduct; and "*all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, … [its] parent, divisions, affiliates, subsidiaries, and other entities within the corporate family" (citing Memoranda of Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021, at 3). *See generally,* U.S.S.G. § 8C2.5 app. n.4.

5. was followed by lack of full cooperation;[10] or

6. was followed by lack of timely and appropriate remediation.[11]

D. Independent Compliance Monitorship

ECS views environmental compliance programs as a critical part of good corporate governance. In cases where a company has: made a VSD as defined herein; fully cooperated, including cooperation against responsible individuals; and timely and appropriately remediated the criminal conduct, ECS will not require the imposition of an independent compliance monitor, if the company demonstrates at the time of resolution that it has implemented and tested an effective compliance program. Decisions about the need for a monitor will be made on a case-by-case basis and at the sole discretion of ECS, in consultation with any participating prosecuting office. In evaluating whether the company has implemented and tested an effective compliance program, ECS relies on existing Division and Department guidance, including the Justice Manual and the Monaco Memo,[12] as well as cognizant regulatory agencies and experts.

[10] In evaluating whether a company has fully cooperated, ECS will rely on operative provisions of the Justice Manual and Department policy. *See, e.g.*, Monaco Memo; Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021. As set out in Justice Manual 9-28.700 (The Value of Cooperation) to receive any consideration for cooperation a company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide the Department all relevant facts relating to that misconduct. Relevant facts also include those related to corporate ownership and organization. If a company seeking credit declines to learn of such facts or to provide the Department with complete factual information, including records, about the misconduct and the individuals involved in or responsible for the misconduct, then its cooperation will not be considered full.

[11] To meet the standards of this VSD policy, appropriate remediation must include, but is not limited to, the company having funded or carried out remediation, disgorgement of any financial gain, forfeiture, and restitution to any victims resulting from the misconduct at issue. Remedial measures typically include disciplinary action against responsible company personnel.

[12] *See* JM § 28.800 and U.S.S.G. §§ 8B2.1, 8C2.5(f). This evaluation may also consider resources developed by the Department's Criminal Division to assist prosecutors in assessing the effectiveness of a company's compliance program (*see, e.g.*, Criminal Division, Evaluation of Corporate Compliance Programs (last updated June 2020)).