

Alert | White Collar Defense & Special Investigations



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DOJ Issues New Corporate Voluntary Self-Disclosure Policy for U.S. Attorneys' Offices

Go-To Guide:

- DOJ has issued the new Corporate Voluntary Self-Disclosure Policy for U.S. Attorneys' Offices
- VSD Policy creates nationwide standard and is effective immediately
- VSD Policy provides greater clarity and predictability on the benefits of self-disclosure
- Timing considerations are critical to eligibility for voluntary self-disclosure credit
- A company that meets all requirements by fully cooperating and timely and appropriately remediating misconduct will – in the absence of any aggravating factors – receive significant benefits

Introduction

On Feb. 22, 2023, the Department of Justice (DOJ) **announced** the implementation, effective immediately, of the new Voluntary Self-Disclosure (VSD) Policy for the United States Attorneys' Offices. The VSD Policy follows Deputy Attorney General Lisa Monaco's Sept. 15, 2022 **memorandum**, which directed each component of the DOJ prosecuting corporate crime to review its policies on corporate voluntary self-disclosure and to draft and publicly share a policy if no formal written policy was in place to incentivize self-disclosure.

Overview of Voluntary Self-Disclosure Policy

Under the new VSD Policy, companies that become aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the DOJ must disclose that conduct to the U.S. Attorney's Office (USAO) with reasonably clear standards for the evaluation of such voluntary self-disclosure and potential outcomes.

In order to satisfy the VSD standards, a company's disclosure of misconduct must be made voluntarily rather than as part of a pre-existing obligation. The disclosure has to be made i) prior to an imminent threat of disclosure or government investigation; ii) prior to the misconduct being publicly discussed or otherwise known to the government; and iii) within a reasonably prompt time after the company becomes aware of the misconduct, with the burden on the company to demonstrate timeliness. In terms of substance, the disclosure must include all relevant facts concerning the misconduct known to the company at the time of the disclosure. The company must also agree to pay appropriate remediation, which must include (but is not necessarily limited to) all disgorgement, forfeiture, and restitution resulting from the misconduct at issue.

Credit and Aggravating Factors

If a company fully meets the standards under the VSD Policy, the USAO will not seek a guilty plea and may choose not to impose a criminal penalty. Moreover, even if a criminal penalty is imposed, the USAO will not impose a criminal penalty greater than 50% below the low end of the fine range under the U.S. Sentencing Guidelines.

When companies adhere to all VSD standards but "an aggravating factor" is present, the USAO may seek the entry of a guilty plea but i) will recommend a 50-75% reduction off the low end of the U.S. Sentencing Guidelines fine range and ii) will not require appointment of a monitor if the company has, at the time of resolution, demonstrated it has implemented and tested an effective compliance program.

Aggravating factors that may cause the USAO to seek a guilty plea 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.

Key Takeaways

In announcing implementation of the new VSD policy, U.S. Attorney for the Eastern District of New York Breon Peace emphasized that the VSD Policy is intended to provide transparency and predictability, declaring that "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." As the VSD Policy demonstrates, companies should now be rewarded on a uniform, consistent basis across the country for voluntarily self-disclosing in a timely manner. Companies may avoid monitorships, costly monetary penalties, or even a guilty plea.

A company assessing circumstances for a potential disclosure to the USAO should be aware that the VSD Policy contains exacting requirements. At the outset, the company bears the burden of demonstrating its timeliness in reporting as being "within a reasonably prompt time after the company learns of the misconduct." Additionally, if a company chooses to disclose it must share all relevant facts then-known and provide "appropriate factual updates." Because the VSD Policy contemplates that a company may be required to continue providing additional facts learned after its initial disclosure, a company may incur significant cost and expense through an internal investigation in providing robust cooperation. A

company also should be wary of the potential aggravating factors that may force a guilty plea despite otherwise adhering to the voluntary self-disclosure standards.

A company that has uncovered misconduct must carefully consider the benefits of a potential voluntary disclosure against the possible consequences, and delay may result in a loss of benefits. Although the VSD Policy seeks to provide clear guidance, certain complicating factors – such as the questionable efficacy of a company’s compliance program and the involvement of other DOJ criminal litigating components – may further increase the risks and uncertainty.

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