

# Clients & Friends Memo

## **US Attorneys' Offices Issue New Voluntary Self-Disclosure Policy As Efforts to Incentivize More Self-Reporting Continue**

**February 24, 2023**

On February 22, 2023, the [United States Attorneys' Offices \(USAO\)](#) issued a new [Voluntary Self-Disclosure \(VSD\) Policy](#), which is effective immediately. The policy follows the revisions [announced last month](#) to the [Department of Justice \(DOJ\) Criminal Division's Corporate Enforcement Policy \(CEP\)](#), which expanded the availability of a full declination with self-reporting, even with the existence of aggravating circumstances. The VSD Policy now provides even broader coverage to incentivize corporate self-reporting.

As set forth in the [Memorandum from Deputy Attorney General Lisa Monaco on September 15, 2022](#), this administration has prioritized encouraging voluntary corporate self-disclosure to promote predictability, transparency, and efficiency in addressing corporate crime. Both policies make clear that the government is seeking more self-reporting, with early and fulsome disclosures. Both also look to expand individual accountability for corporate misconduct with benefits available despite the involvement of senior management in any issue.

While the USAO VSD Policy is not unique in its approach to voluntary self-disclosure, and in fact is consistent with last month's DOJ CEP, its issuance is noteworthy nevertheless. USAOs do not often act with a cohesive voice, and it is rare, if not unheard of, for the USAOs, acting as a single component of DOJ, to collectively issue a policy to guide behavior. Its issuance signals a serious effort by the DOJ to ensure consistency across prosecuting offices and Main Justice, and represents somewhat greater predictability for the likely outcomes of disclosure decisions regardless of a disclosing company's location. The VSD Policy anticipates the involvement of the USAO and components of DOJ in a single case, which is not uncommon, and attempts to offer guidance for VSD application where more than one prosecutor has jurisdiction over a matter.

### **Voluntary Self-Disclosure Program**

Under the VSD Policy, prosecutors are afforded discretion in determining the appropriate criminal resolution for any company, offering significant credit for timely, voluntary self-reporting.

In cases where a company is being jointly prosecuted by the USAO and another DOJ office or component, the VSD Policy requires the USAO to coordinate with that office in considering a potential resolution and before anything is made final. Its intent appears to be to make sure that all offices treat self-disclosure in a more uniform way, so that one office cannot offer a better deal than another. For example, in a case involving another USAO and/or the DOJ Criminal Division, there will not be different treatment in the Eastern District of New York compared to the Southern District of New York.

The VSD Policy also encourages disclosure even if companies believe the government may already be aware of the misconduct through other means. There are opportunities for partial benefits that are still significant, even if all of the VSD criteria are not satisfied.

### **Standards for Voluntary Self-Disclosure**

All of the criteria set forth below do not need to be satisfied in order for companies to receive some credit for self-reporting. Unsurprisingly, the policy does not include any bright-line rules and instead affords significant prosecutorial discretion to the USAO regarding the facts and circumstances of any self-disclosure and whether or how it meets the policy standards.

1. Voluntary Nature of the Disclosure: The benefits for self-disclosure will only apply when the disclosure is made voluntarily by the *company*.
2. Timing of the Disclosure: In order to be considered a VSD, the self-disclosure must be made (a) "prior to an imminent threat of disclosure or government investigation" U.S.S.G. § 8C2.5(g)(1); (b) prior to a public disclosure of the misconduct or before the conduct is otherwise known to the government; and (c) "within a reasonably prompt time" after the misconduct is identified.
3. Substance of the Disclosure and Follow-Up Efforts: The self-disclosure "must include all relevant facts concerning the misconduct that are known to the company at the time of disclosure." Remedial efforts must be implemented following the disclosure, including enhanced compliance programs.

There are qualifications regarding each of these criteria. First, in assessing the "voluntary" nature of the disclosure, there must not be any pre-existing disclosure obligation, such as one required by regulation, contract, or a prior resolution like a non-prosecution agreement or deferred prosecution agreement. Similarly, reporting by a whistleblower is not a voluntary self-disclosure by the company.

Second, in assessing the timeliness, the burden remains on the company to demonstrate its self-disclosure was sufficiently prompt.

Third, in recognizing issues regarding delays in disclosure as companies collect *all relevant facts*, the policy allows for a preliminary reporting of facts known at the time, with opportunities for a more fulsome disclosure and regular factual updates as the company's investigation continues.

### **Credit for Voluntary Self-Disclosure**

The VSD Policy represents that it offers significant benefits to companies that self-disclose. The USAO will not seek a guilty plea where a company has (a) voluntarily self-disclosed pursuant to the listed criteria (and the USAO's evaluation of the satisfaction of those criteria); (b) "fully cooperated"; and (c) timely and appropriately remediated the criminal conduct, including the payment of all disgorgement, forfeiture, and restitution from the misconduct at issue. Where a company is deemed to have satisfied these factors, a resolution could instead include a declination, non-prosecution agreement, or deferred prosecution agreement.

However, where an aggravating factor is present, the USAO has discretion and may or may not seek a guilty plea. The policy provided a non-exhaustive list of aggravating factors, including misconduct that:

1. poses a grave threat to national security, public health, or the environment;
2. is deeply pervasive throughout the company; or
3. involved current executive management of the company.

If a guilty plea is ultimately deemed to be "required" by the USAO, the company will still receive other benefits under the VSD Policy, including that the USAO will recommend a criminal penalty that is *at least* 50 percent and up to 75 percent off the low-end of penalties under the federal sentencing guidelines and not require the appointment of a monitor where the company has implemented and tested an effective compliance program.

### **Practice Points**

- The continued significant encouragement of prompt self-disclosure remains clear with the new VSD Policy, offering more opportunities for credit or partial credit for timely, voluntary self-disclosures. However, the VSD Policy offers significant discretion to prosecutors. The new factors could result in as much uncertainty as they attempt to provide clarity and certainty. Only time will tell whether the VSD Policy actually leads to the predictability and transparency for corporate investigations and prosecutions that it promises.
- There is no indication yet of the weighing or importance of the three criteria in assessing whether the VSD Policy requirements have been met. As the VSD Policy is implemented in practice, it will be interesting to see how influential each component is when the USAO evaluates whether the policy standards are satisfied.

- In particular, the requirement to disclose “all relevant facts. . . that are known” poses a challenge for companies who want to self-report. While the policy contemplates a preliminary report with successive disclosures, companies will naturally face a challenge as to what they actually *know* early in an investigation compared with what they suspect.
- As set forth above, the VSD Policy is unique in how it contemplates investigations by multiple offices and directs a cohesive approach. There is then likely an important consideration as to where the disclosure should be made, for example to an individual U.S. Attorney’s Office, multiple offices at once, or Main Justice. Because voluntary self-disclosure benefits are only available if made “prior to the misconduct being otherwise known to the government,” companies will need to understand how this will be implemented, and whether there is a mechanism in place for one USAO to inform other offices of a voluntary self-disclosure.
- Companies that want to self-report will need to move quickly but fully understand whatever facts they are presenting. The benefits of self-reporting may be outweighed if preliminary disclosures are incorrect as to where the issues lie or who was responsible.
- A critical component to obtaining VSD Policy benefits goes to the implementation of an improved, effective, and tested compliance policy following the self-reporting. There is then a question as to whether companies that already have outstanding compliance policies will qualify for VSD benefits if this threshold criteria cannot be met. The revised CEP accounted for this issue, affording benefits to companies that identify the self-reported misconduct through their existing compliance program. If the goal is, in fact, to have companies strengthen their compliance functions *before* there are any issues, this is likely something that the USAO will have to clarify.
- A significant benefit of meeting the VSD criteria is avoiding an onerous corporate monitorship. The USAO will be less likely to require an independent compliance monitor where a company voluntarily and promptly self-discloses the relevant conduct and appropriately remediates the issue, demonstrating that it has implemented and tested an effective compliance program. This is another issue where the USAO will have sole discretion as to whether a monitor is necessary and assess on a case-by-case basis.
- Where the self-disclosure points to the involvement of senior management in the misconduct, companies should still consider that their self-reporting and cooperation will likely lead to the charging of individuals.
- Where current management is remaining in place despite its involvement in the misconduct (even if the involvement is remote or merely the consequence of reporting chains), or the misconduct is deemed to have been “pervasive” throughout the company, the USAO has discretion to seek a guilty plea even with self-reporting. This should be closely evaluated before any voluntary self-disclosure.

- While the 50 percent floor off the low-end of penalties under the federal sentencing guidelines is substantial, there is always the question about whether the ability to negotiate resolutions is limited if a result can never be better than 50 percent off. There are certainly historical instances of companies that received better deals than that in circumstances that involved, for example, extraordinary cooperation or remedial efforts.
- Companies should also remember that a self-disclosure to the USAO or DOJ is likely to result in disclosures to other regulators, which do not have policies that are as clearly delineated for benefits for voluntary reporting.
- Finally, there are many reasons why a company may not self-report, including where its misconduct is made public or being investigated before it is internally identified, or simply because it has made the affirmative decision not to. The benefits for self-reporting or subsequent cooperation should be weighed carefully with outside counsel.

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