

TO DISCLOSE, OR NOT TO DISCLOSE, DOJ ANSWERS THE QUESTION

On February 22, 2023, the U.S. Department of Justice ("DOJ") Criminal Division [announced](#) the implementation of the new [United States Attorney's Offices' Voluntary Self-Disclosure Policy](#) ("**VSD Policy**"). This was expected, as we had advised in [September 2022](#), Deputy Attorney General Lisa Monaco previously issued a memo ("[Monaco Memo](#)") directing each DOJ component that prosecutes corporate crime to draft and publicly share a self-disclosure policy to incentivize such self-disclosure. The VSD Policy takes effect immediately and creates a nationwide standard for how the U.S. Attorney's Office ("**USAO**") will determine whether a company has made a Voluntary Self-Disclosure ("**VSD**").

The VSD Policy seeks to incentivize companies to voluntarily self-disclose potential misconduct, by providing more transparency and predictability regarding the benefits and potential outcomes. Specifically, the VSD Policy sets forth: (1) the USAO's expectations of what constitutes a VSD; (2) the criteria USAOs use in determining an appropriate resolution for a company that makes a VSD; and (3) the benefits of such VSDs.

Notably, the VSD Policy states that companies that voluntarily self-disclose misconduct to the USAO pursuant to the VSD Policy will be offered resolutions under more favorable settlement terms, such as avoiding a requirement for a guilty plea and reducing monetary penalties, than if the government had learned of the misconduct through other means.

CONFIRMING WHAT CONSTITUTES A VSD

Under the VSD Policy, a disclosure will constitute a VSD if the following standards are satisfied:

- **Voluntary:** A company must disclose misconduct voluntarily. A disclosure is not voluntary when a company has a preexisting obligation to disclose, whether by regulation, contract, or DOJ resolution.

- **Timing of the Disclosure:** A company must disclose to the USAO reasonably after it becomes aware of the misconduct, and it must do so before the "imminent threat of disclosure or government investigation" and before the misconduct has been publicly disclosed or known to the DOJ. The burden is on the company to prove its disclosure is timely.
- **Substance of the Disclosure and Accompanying Actions:** A company must provide a fulsome disclosure of all relevant facts of the misconduct it knows at the time of disclosure. Because a company may not be aware of all the relevant facts at the time it learns of the misconduct, it should clarify that the disclosure is based on a "preliminary investigation or assessment of information." Additionally, the USAO expects companies to preserve, collect, and produce documents in a timely fashion and provide updates if they conduct internal investigations.

CREDIT FOR VOLUNTARY SELF-DISCLOSURE, FULL COOPERATION, AND TIMELY AND APPROPRIATE REMEDIATION

Absent any aggravating factors, the USAO will not seek a guilty plea in settlement, and may not impose criminal penalties, where a company voluntarily self-disclosed, fully cooperated, and remediated its conduct. Significantly, remediation in this context includes more than filling gaps in the compliance policy or disciplining responsible employees, but rather also includes a company paying all disgorgement, forfeiture, and restitution as a result of its conduct.

The VSD Policy provides examples of aggravating factors, including misconduct that: "(1) poses a 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." Importantly, the presence of an aggravating factor does not per se require the settlement to include a guilty plea. However, even if a guilty plea is warranted, the USAO may still award benefits to a company that has fully complied with the VSD Policy. The benefits include recommending a criminal penalty with a reduction of at least a 50%, and up to a 75%, off the low end of the U.S. Sentencing Guidelines and eliminating the requirement of a monitor for a company that has adequately remediated any compliance failings and has tested and confirmed that the remediation is effective.

EFFECTIVE COMPLIANCE AND INDEPENDENT MONITORSHIP

According to the VSD Policy, if a company fully complied with the self-disclosure requirements, appropriately remediated the misconduct, and has implemented and tested an effective compliance program at the time of resolution, then the USAO will not appoint a compliance monitor.

KEY TAKEAWAYS

The VSD Policy highlights the DOJ's efforts to incentivize companies on a consistent nationwide basis to voluntarily and timely self-disclose misconduct and maintain effective compliance programs capable of identifying such misconduct. This is not new, but the nationwide approach reemphasizes DOJ's encouragement to companies to submit VSDs. In addition to providing favorable treatment to

companies that fully comply with the VSD Policy, the DOJ will still offer benefits to companies who do not satisfy all the VSD criteria and may forego seeking a guilty plea where aggravating factors are present. While the VSD Policy specifically highlights the importance of a VSD, a companies' full cooperation and adequate remediation are still relevant considerations during an investigation. This further emphasis on VSDs should be viewed in the context of the proliferation of new whistleblower bounty programs, such as FinCEN's new program for violations of the Bank Secrecy Act, and the new program for violation of OFAC regulations, both of which provide for bounties of up to 30% of the government's recovery.

Companies should review their compliance governance framework to ensure timely escalation of potential issues to the proper parties in order to avail company management adequate time to make an informed decision whether to make a disclosure under the new VSD Policy.

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