

# NOW & NEXT

## Government Investigations & White-Collar Alert

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### DOJ announces new policy to incentivize voluntary self-disclosure of corporate misconduct

By Timothy Sini and Michal Cantor

Companies that voluntarily self-disclose corporate misconduct to their U.S. Attorney's Office could receive significant benefits.



#### What's the Impact

- / This new protocol identifies the circumstances under which the DOJ will deem that a company has made a voluntary self-disclosure.
- / The DOJ seeks to incentivize both the early disclosure of corporate misconduct and the company's full cooperation throughout any ensuing government investigation.
- / Companies should act now to ensure that their internal compliance programs are functioning appropriately and in a way that encourages good corporate citizenship.

On February 22, 2023, the U.S. Department of Justice ("DOJ") announced the implementation of a new nationwide [policy](#) standardizing the definition and treatment of voluntary self-disclosures ("VSDs") of corporate misconduct. Bottom line: companies that voluntarily self-disclose misconduct to their U.S. Attorney's Office "pursuant to this policy will receive resolutions under more favorable terms than if the government had learned of the misconduct through other

means,” though the DOJ made clear that “[a] disclosure will not be deemed a VSD under this policy where there is a preexisting obligation to disclose, such as pursuant to regulation, contract, or a prior Department resolution (e.g., non-prosecution agreement or deferred prosecution agreement).”

Effective immediately, this new protocol identifies the circumstances under which the DOJ will deem that a company has made a VSD, and the material benefits of making such a disclosure. Specifically, a corporate entity has made a VSD if it timely discloses to the DOJ all relevant facts known about misconduct by an employee or agent, “prior to an imminent threat of disclosure or government investigation.” In connection with the VSD, the company must fully cooperate with any ensuing government investigation, and must also timely and appropriately remediate the misconduct, such as pay all disgorgement, forfeiture, and restitution resulting from the misconduct at issue, to satisfy policy guidelines and qualify to reap the benefits. Depending on the circumstances, these benefits may include that the U.S. Attorney’s Office (“USAO”):

- / Will not seek a guilty plea;
- / May choose to forgo a criminal penalty;
- / Will not impose a criminal penalty that is greater than 50% below the low end of the United States Sentencing Guidelines (“USSG”) fine range; and
- / Will not implement a monitoring program, provided the company demonstrates that it maintains an effective compliance program.

These advantages may not be available in the presence of specific aggravating factors, which may warrant the USAO seeking a guilty plea even after the VSD. These include if the misconduct is (1) “deeply pervasive throughout the company”; (2) involves current company executives; or (3) poses a “grave threat” to national security, public health, or the environment. However, even if one of these aggravating factors leads the USAO to seek a guilty plea, the company that made the VSD would still be exempt from the imposition of an independent compliance monitor if the company has a proven effective compliance program, and the company would also still benefit from a reduced criminal penalty (50–75% reduction off the low end of the USSG fine range).

In implementing this new VSD policy, which stems from a directive in the September 2022 [Monaco Memo](#),<sup>1</sup> the DOJ seeks to incentivize both the early disclosure of corporate misconduct and the company’s full cooperation throughout the government’s investigation of the same. Considering the VSD policy, companies should implement and maintain an effective compliance program capable of timely identifying (and preventing) misconduct.

Of note, is the following excerpt from the written policy:

The USAO recognizes that a company may not be in a position to know all relevant facts at the time of a VSD because the company disclosed reasonably promptly after becoming

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<sup>1</sup> Prior to the rollout of this new policy, Nixon Peabody [reported](#) on the DOJ’s early preview of the VSD protocol.

aware of the misconduct. Therefore, a company should make clear that its disclosure is based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at the time. The USAO further expects that the company will move in a timely fashion to preserve, collect, and produce relevant documents and/or information, and provide timely factual updates to the USAO. Should the company conduct an internal investigation, the USAO expects appropriate factual updates as that investigation progresses.

In closing, the DOJ also made it a point to emphasize that “[e]ven if companies believe the government may already be aware of the misconduct through other means, companies are encouraged to make disclosures to the Department. Prompt self-disclosures to the government will be considered favorably, even if they do not satisfy all the VSD criteria set forth” in the policy.

Companies that suspect or become aware of misconduct on the part of employees or agents should consult with counsel as soon as possible to seek guidance regarding navigating the VSD process. Similarly, those in charge of internal corporate compliance are encouraged to reassess their company’s compliance monitoring infrastructure to ensure that any potential misconduct is detected as quickly as possible.

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