



In Wake of DOJ's Emphasis on Corporate Criminal Enforcement, Companies Should Listen Carefully to Whistleblower Complaints

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On February 22, 2023, the U.S. Department of Justice (DOJ) announced updated guidance on the Voluntary Self-Disclosure Policy (VSD Policy). The VSD Policy went into effect immediately in every U.S. Attorney's Office across the country. The Policy offers meaningful incentives to companies satisfying the standards for voluntary self-disclosure of misconduct; however, companies may not receive all the benefits of this VSD Policy if a whistleblower has already informed the DOJ about the alleged misconduct.

The new VSD Policy comes on the heels of DOJ's more aggressive approach to corporate criminal enforcement announced in September.^[1] Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement | OPA | Department of Justice, September 15, 2022.

At that time, the DOJ highlighted the importance of voluntary disclosure or self-reporting as one key component of the corporate criminal enforcement policy. The Department made clear it favors and rewards companies that own up to misconduct rather than attempting to cover up or downplay it. Yet, the DOJ offered little guidance on the actual benefits of self-disclosure. The VSD Policy issued in February sheds light on what companies can expect and sets a standard for how voluntary self-disclosures are measured nationwide.

The VSD Policy establishes the following criteria to qualify as a voluntary self-disclosure:

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1. **Voluntary** – The disclosure must be voluntary. If there is a separate, pre-existing obligation to disclose, then the report will not qualify. The VSD Policy excludes disclosures made “pursuant to regulations, contract, or a prior Department resolution (e.g., non-prosecution agreement or deferred prosecution agreement).”
2. **Timely** – Disclosure will be considered timely where it is made promptly after a company becomes aware of the misconduct. It must be before any public disclosure or otherwise becoming known to the government and is the company's burden to demonstrate timeliness. The VSD Policy does indicate that self-disclosure will still receive favorable treatment if the government was previously aware of the misconduct, but the government is increasingly focused on the disclosure's punctuality once the misconduct is discovered by the company. Thus, the policy reiterates the need to conduct a swift and complete internal investigation into whistleblower complaints.
3. **Substance** – The disclosure must be full and complete and include all relevant facts concerning the misconduct known at the time of the disclosure. The DOJ further expects the company will preserve, collect, and produce all relevant documents and provide timely updates to the DOJ during the process of an internal investigation.

In addition to these three standards for voluntary disclosure, in appropriate circumstances DOJ expects companies to remediate their misconduct. In certain situations, appropriate remediation may include disgorgement, forfeiture, and restitution resulting from the misconduct.

In any event, voluntary self-disclosure will be evaluated on a case-by-case basis to determine what, if any, benefits are appropriate. The potential benefits of self-reporting include:

- **No Guilty Plea** – In the absence of aggravating factors, the DOJ will not seek a guilty plea, but instead resolve the matter with a declination, a non-prosecution agreement, or a deferred prosecution agreement. Aggravating factors may include threats to national security, public health, or the environment, deeply pervasive misconduct throughout the company or misconduct by current executive management. Even despite aggravating factors, companies meeting all VSD Policy standards can expect the DOJ to assess relevant factors and determine what benefits are appropriate.
- **Lessor Criminal Penalties** – Even if a guilty plea is required, a company may be eligible for considerable benefits under the policy including a recommendation of at least 50% and up to 75% below the low end of the fine range under the U.S. Sentencing Guidelines.
- **No Independent Compliance Monitor** – If the company demonstrates at the time of resolution that it has implemented an effective compliance program, then the resolution will not include the imposition of an independent compliance monitor. Federal investigators evaluating misconduct will target the integrity of a company's compliance program to evaluate what, if anything, contributed to the misconduct, how the company could have prevented the misconduct through internal policies and procedures, and what proactive steps have been taken to quickly remediate the situation.

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Time is of the essence to conduct an internal investigation to determine whether there is any merit to a whistleblower complaint. Only after an internal investigation, can a company truly evaluate the pros and cons of voluntary self-disclosure. If a company determines voluntary disclosure is warranted, prompt self-disclosure becomes even more important to secure any potential benefits available under the VSD Policy. Even if all of the standards of the VSD Policy are not satisfied, the government has indicated favoring disclosure rather than non-disclosure. In recent years, financial incentives to blowing the whistle raise the likelihood a whistleblower will (or has already) made a report to a regulatory agency or filed a qui tam action. The government is likely to evaluate the timeliness of disclosure in light of how quickly a company investigates and responds to an internal complaint. All the more reason to take internal complaints or allegations of misconduct seriously and to act swiftly to put you and your company in the best position to evaluate whether to take advantage of VSD Policy benefits.

^[1] Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement | OPA | Department of Justice, September 15, 2022.