

## Time to voluntarily self-disclose? What to know about DOJ's recent policy revisions | White Collar Corner

■ RYAN A. LEMA and LING YAO [SPECIAL TO THE DAILY RECORD](#)

On Sept. 15, 2022, Deputy Attorney General Lisa Monaco issued a memorandum, “Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group,” instructing each component of the Department of Justice (DOJ) to adopt



Ryan Lema



Ling Yao

policies on corporate voluntary self-disclosure (“VSD”) and publicly share such a policy.

On Jan. 17, 2023, DOJ announced the “first significant changes” to the Criminal Division’s Corporate Enforcement Policy (“Criminal Division Policy”) since 2017, with VSD being a key focus. The revised Criminal Division Policy offers companies “new, significant, and concrete incentives to self-disclose misconduct,” said Assistant Attorney General Kenneth Polite Jr., and it applies to all corporate matters prosecuted by the Criminal Division, not just Foreign Corrupt Practices Act (FCPA) cases.

And last month, on Feb. 22, DOJ issued a new policy establishing uniform national standards for VSD credit in corporate criminal enforcement actions brought by U.S. Attorneys’ Offices (USAOs) around the country. The new USAO policy “sets a nationwide standard” and “makes transparent the specific, tangible benefits to a company for making a voluntary self-disclosure,” according to U.S. Attorney for the Eastern District of New York Breon Peace, who chaired the committee that developed the policy.

DOJ’s concerted efforts to incentivize VSDs and clarify the benefits raise important questions for corporate executives and the white-collar defense bar. How, and to whom, can you make an effective VSD? What benefits does it bring? And perhaps most importantly—should a company self-disclose and when?

### How to Meet the VSD Requirements?

Not every self-disclosure entitles a company to credit. To start, a company must voluntarily disclose all relevant, non-privileged facts in a timely fashion before that misconduct is known to the DOJ and before an imminent threat of disclosure or government investigation. The self-disclosure must be (1) voluntary, i.e., without any preexist-

ing obligation to disclose the misconduct, such as pursuant to regulation, contract or a prior non-prosecution agreement; (2) timely, i.e., within a reasonably prompt time after becoming aware of the misconduct; and (3) made to the correct agency under the applicable VSD policy.

To obtain the full benefits of a VSD, both policies require a company to voluntarily self-disclose the misconduct, fully cooperate with the government’s investigation (including preserving and producing relevant documents), and appropriately remediate the misconduct (which would include paying all disgorgement, forfeiture and restitution resulting from the misconduct at issue).

### What Are the Benefits of VSDs?

Both policies make clear that in absence of aggravating circumstances, if a company fully meets the VSD requirements, the company can avoid criminal charges altogether—the Criminal Division Policy provides that the Criminal Division will presumptively decline to prosecute, while the USAO promises not to seek a guilty plea. Rather than imposing a criminal penalty, prosecutors may instead offer a declination, a deferred prosecution agreement, or a non-prosecution agreement. The USAO may choose not to impose a

criminal penalty and, in any event, will not impose a criminal penalty greater than 50% below the low end of the U.S. Sentencing Guidelines (“USSG”) fine range.

What constitutes an aggravating circumstance is a matter of the DOJ’s discretion, but both policies provide some examples: criminal recidivism; misconduct that is deeply pervasive throughout the company; involvement by executive management; a significant profit to the company from the wrongdoing; and misconduct that poses a grave threat to national security, public health or the environment.

Where aggravating circumstances exist, the Criminal Division may nonetheless decline prosecution, if a company (a) made the VSD immediately upon becoming aware of the allegation of misconduct; (b) had an effective compliance program and system of internal accounting controls at the time of the misconduct and the VSD, which enabled the identification of the misconduct and led to the VSD; and (c) provided extraordinary cooperation and remediation.

Even if aggravating circumstances warrant a criminal resolution, prosecutors will accord or recommend a 50%-75% reduction off the low end of the USSG fine range (except for criminal recidivists in the Criminal Division). The Criminal Division may still not require a corporate guilty plea—including for criminal recidivists—absent multiple or particularly egregious aggravating circumstances. Additionally, prosecutors will not seek to impose an independent compliance monitor if the company can demonstrate that it has implemented and tested an effective compliance program at the time of the resolution.

### **But Wait, What About Drawbacks?**

With the policies in mind, companies should weigh the benefits of a VSD carefully against its costs. Below are some common factors to consider.

**Timeliness.** A VSD must be made within a “reasonably prompt time after becoming aware of the misconduct.” Under the Criminal Division Policy, companies with aggravating factors must self-disclose “immediately upon ... becoming aware of the alleged misconduct” to qualify for a discretionary declination. These requirements create uncertainty as to how soon a company should make a VSD. It takes time to conduct an internal investigation and evaluate the credibility of the report to avoid triggering a false alarm. While delay could render a VSD untimely, moving too quickly may expose a company to unnecessary expenses and burdens associated with a DOJ investigation.

**Internal investigation.** The Criminal Division “encourages self-disclosure ... at the earliest possible time, even when a company has not yet completed an internal investigation.” That said, not knowing the scope and extent of the misconduct puts a company at an informational disadvantage and impedes its ability to make prompt decisions, such as in personnel management. Once the DOJ gets involved, it may request a company to defer investigative steps, such as the interview of its employees or third parties, until the government has had an opportunity to do so. Those so-called “deconfliction” requests can substantially delay an internal investigation and cause employees to retain their own counsel.

**Aggravating factors.** Under the Criminal Division Policy, companies with aggravating circumstances are

not entitled to a presumed declination and, if the circumstances are so egregious or pervasive, could be subject to a guilty plea even after meeting all the VSD requirements. The USAO has the sole discretion to determine the appropriate resolution, including a guilty plea, based on an assessment of “the relevant facts and circumstances” if an aggravating factor exists. It remains to be seen how, in practice, the policies will be applied when aggravating circumstances exist (or arguably exist).

**Public disclosure.** A declination pursuant to the Criminal Division Policy will be made public. For instance, when the DOJ declined prosecution of Safran SA in December 2022, it also included in the announcement the nature and scope of the underlying misconduct.

**Applicable rules.** Despite the DOJ’s efforts to promote predictability, a company making a VSD is still subject to different requirements and given slightly different benefits under different policies. And despite DOJ’s laudable effort to promote a national standard, it remains to be seen whether the VSD policy will be implemented differently in various districts around the country.

Whether or when to make a VSD is never an easy decision. Upon becoming aware of a report of potential misconduct, business leaders should carefully consider the benefits and drawbacks of a VSD with their counsel.

*Ryan A. Lema is a partner at Phillips Lytle LLP and co-leader of the firm’s White Collar Criminal Defense & Government Investigations Practice Team. He can be reached at (716) 504-5790 or rlema@phillipslytle.com.*

*Ling Yao is an attorney at Phillips Lytle LLP and a member of the firm’s White Collar Criminal Defense & Government Investigations Practice Team. She can be reached (716) 504-5777 or lyao@phillipslytle.com.*