

## DOJ ISSUES NEW VOLUNTARY SELF-DISCLOSURE POLICY WITH CONCRETE REQUIREMENTS AND BENEFITS

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What does a company do if it discovers that an employee has engaged in misconduct that could create criminal liability for the company? The company faces difficult decisions and if the government does not know about the misconduct, the company may consider mitigating criminal exposure by making a voluntary disclosure to the United States Department of Justice (“DOJ”). A self-disclosure has risks and benefits, and the decision to make a self-disclosure is particularly thorny when the benefits are opaque. The DOJ has now made the analysis one step easier by issuing a Voluntary Self-Disclosure Policy (the “VSD” or “Policy”), available [here](#).

The VSD was designed to increase “transparency and predictability to companies and the defense bar concerning the concrete benefits” of self-disclosure to a United States Attorney’s Office (“USAO”). While self-disclosure opportunities are not new, the VSD announces concrete benefits for making a self-disclosure, clarifies the requirements to qualify for benefits, and standardizes the self-disclosure policy across the country’s ninety-four USAOs. In Virginia, companies should be aware of the VSD because the United States Attorney for the Eastern District of Virginia, Jessica Aber, and the United States Attorney for the Western District of Virginia, Christopher Kavanaugh, were both involved in developing the Policy. This means that while a USAO has flexibility with the requirements and benefits, a prosecuting AUSA in EDVA and WDVA is more likely to strictly comply with Policy, so a company seeking benefits under the Policy should understand the requirements and be prepared from the beginning to show compliance. This guidance distills the VSD so that a company faced with a self-disclosure opportunity can understand the potential benefits and the requirements to qualify for them.

### THE BENEFITS

The VSD allows a company to “receive resolutions under more favorable terms than if the government had learned of the misconduct through other means.” The “clear and predictable benefits” of making a qualifying self-disclosure are these:

1. The USAO will not seek a guilty plea and will instead either issue a declination, or enter into a non-prosecution or a deferred prosecution agreement;
2. The USAO may not recommend any criminal fine, and if it does, the recommendation would be a reduced fine (“50% below the low end of the U.S. Sentencing Guidelines fine range”); and

3. The USAO may not seek the imposition of an independent compliance monitor.

## THE REQUIREMENTS

To qualify for VSD benefits a company must make a qualifying disclosure, cooperate with the government's investigation and remediate the misconduct, have no aggravating circumstances, and demonstrate a strong corporate compliance program.

**Disclosure.** The VSD requires a company to make a disclosure that is both complete and timely. It must include "all relevant facts concerning the misconduct that are known to the company at the time of the disclosure." The government's goal is to "ensure individual accountability for misconduct," so the disclosure must provide "all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue." In addition, the disclosure must be voluntary and benefits are unavailable if the disclosure was compelled by a regulation, contractual obligation, or prior agreement with the government (non-prosecution agreement, deferred prosecution agreement, etc.). The timeliness of the disclosure is also important. The disclosure must be made in a "reasonably prompt time after the company becoming aware of the misconduct" and before the misconduct is publicly reported or otherwise known to the government.

**Full Cooperation and Remediating Efforts.** After the self-disclosure, the government will investigate the misconduct, and the company will need to cooperate with the investigation by readily providing access to documents and communications. The VSD does not specify the criteria for determining whether a company has fully cooperated with an investigation, but instead incorporated the operative provisions of the Justice Manual and other DOJ policies. In addition, the company must remediate the effects of the misconduct, and those efforts must be "timely and appropriate." Specifically, the company must agree "to pay all disgorgement, forfeiture, and restitution resulting from the misconduct."

**No Aggravating Factors.** While the VSD divests the USAO of authority to seek a guilty plea under certain circumstances, the USAO retains the discretion to seek a guilty plea if the misconduct is particularly aggravating such that it: poses a grave threat to national security, public health, or the environment; is deeply pervasive throughout the company; or involves current executive management of the company. In that situation, the company may be required to enter a guilty plea but the USAO may still allow the company to benefit from the reduced sentencing recommendation and may not require a monitor.

**Effective Compliance Program.** The third benefit, where the USAO will not seek the imposition of an independent compliance monitor, has an additional requirement. It is only available if the company demonstrates that it has implemented and tested an effective compliance program. This requirement applies at the time of resolution, so an imperfect compliance program should not be a barrier to making a self-disclosure.

## KEY TAKEAWAYS

Compliance Officers should keep the VSD in mind. The Policy "encourage(s) corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities." A company should have a compliance program with policies and training that maximize the opportunities to discover employee misconduct at an early stage and emphasize internal reporting of employee misconduct. Address all reports of misconduct and keep in mind the benefits of self-disclosure where appropriate. The government's goal is to "ensure

individual accountability for misconduct,” so be prepared to show that the company has imposed consequences on the individual for the misconduct. Include legal counsel in investigations to ensure compliance with the VSD requirements. The company must “move in a timely fashion to preserve, collect, and produce relevant documents and/or information,” so it would be prudent to impose the equivalent of a litigation hold on email and other communication systems, and produce the litigation hold as part of the self-disclosure package.

The company carries the burden of proving it complied with the VSD and is entitled to the resulting benefits. It must be prepared to produce contemporaneous documentation showing timely disclosure and full cooperation. When investigating suspected misconduct, thoroughly document the process and be prepared to share the results in the self-disclosure. Remember that the AUSA will look to the company to document entitlement to the VSD requirements. Be aware that several other DOJ divisions have their own self-disclosure policies and the VSD does not prevent the USAO from applying these other policies: the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Criminal Division); the Leniency Policy and Procedures (Antitrust Division); the NSD Enforcement Policy for Business Organizations (National Security Division); the Environmental Crimes Section Voluntary Self-Disclosure Policy (Environment and Natural Resources Division); the Consumer Protection Branch Voluntary Self-Disclosure Policy for Business Organizations (Consumer Protection Branch); and/or the Corporate Voluntary Self-Disclosure Policy of the Tax Division (Tax Division).

Keep timeliness requirements in mind. The company is required to disclose all information about the misconduct, but the disclosure does not need to wait until a full investigation is complete. If a company chooses to make an early self-disclosure, it should make very clear that the “disclosure is based upon a preliminary investigation or assessment of information.” It must then provide “appropriate factual updates as that investigation progresses.” If a company chooses to complete the investigation before making a self-disclosure it may not meet the timeliness requirements, but the self-disclosures “will be considered favorably” in charging decisions especially if the company fully cooperates in resulting investigations and remediates the misconduct.

Self-disclosure is a difficult decision and the lawyers at Hancock Daniel are here to help. For questions and assistance on government investigations or the government’s use and interpretation of fraud and abuse laws applicable to health care providers, please contact a member of Hancock Daniel’s [Healthcare Investigations and Enforcement Actions](#), [Fraud & Abuse](#), or [Compliance](#) teams.

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