

# Corporate Voluntary Self-Disclosure (VSD) of Criminal Activity: More of the Same or a Real Sea Change?

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On February 22, 2023, the U.S. Department of Justice (DOJ) announced a [new nation-wide policy](#) to incentivize companies to self-report criminal activity. Among the cited benefits of self-reporting are discounts on fines and non-prosecution agreements. This new policy arrives on the heels of the “[Monaco Memo](#),” issued in September 2022 by Deputy Attorney General Lisa Monaco, which directed each prosecutorial DOJ component to review its policies on corporate voluntary self-disclosures and update to reflect the guidance’s core principles. The policy also is in addition to guidance from [Attorney General Merrick Garland](#), who in December 2022 emphasized prosecutorial leniency in criminal cases. Together, these memos show a shift from prior administrations, which emphasized prosecuting the “[most serious, readily provable offense](#),” not leniency for self-disclosures. Notably, the new policy does not impact individual actors, who, since the 2015 [Yates Memo](#), still are a DOJ priority. Indeed, the new policy emphasizes that crediting voluntary self-disclosure by companies will help DOJ “ensure individual accountability” for individual criminal conduct. We break down key elements of the DOJ’s policy below, including our quick thoughts on how this policy may impact corporate decisions going forward.

## What are the requirements for Voluntary Self-Disclosure (VSD)?

1. The disclosure must be **voluntary**.
2. The disclosure must be **timely**, *i.e.*, made prior to an imminent threat of disclosure or government investigation; prior to misconduct being publicly disclosed; and promptly after discovery of the misconduct.
3. The disclosure must include **all relevant facts** (known at that time) concerning the misconduct, and the company must **preserve and produce all relevant documents** and information.

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4. The corporation must **cooperate** and **remediate** the criminal conduct, such as through disgorgement, forfeiture, and/or restitution.

## What are the potential benefits?

- No guilty plea required, *i.e.*, a prosecution declination or entering into a non-prosecution or deferred prosecution agreement.
- No penalty, or at most a penalty that is 50% below the low end of the federal guidelines.
- No corporate monitor.
- If there is an aggravating factor warranting a guilty plea, then a reduced penalty and no requirement of a monitor if there is evidence of a compliance program.

## Is This a Real Sea Change?

There always have been incentives to self-report, including those built into the Sentencing Guidelines, the CMS Voluntary Self-Referral Disclosure Protocol, and the Federal Acquisition Regulations. But the benefits of doing so often may not be worth the risk. The new policy recognizes such disincentives and certainly *attempts* to provide real change. However, corporations should still be cautious of how and when to use voluntary disclosure programs, as there still are many open questions.

For example, this decision still entails a subjective analysis. Different U.S. Attorney's offices may define "timely" or "voluntary" differently, raising the question of whether and when to disclose in the midst of an internal investigation. Further, depending on the breadth of an internal investigation, prosecutors may have different perspectives of whether "all relevant facts" actually were disclosed in the disclosure. There also could be differences in interpretation amongst districts – *e.g.*, those who have a reputation for being aggressive – leading to potential forum shopping. A corporation doing business in multiple districts may try to cherry pick its prosecutor based on the prosecutor's reputation for being more corporate-friendly. Finally, there is no way to know whether the policy will change again with the election of a new administration. A corporation that discloses now, could be treated differently in two years, and, as most white collar lawyers know, corporate criminal matters typically take years to resolve.

Despite these concerns and open questions, corporations still should seriously consider the benefits of a more approachable voluntary disclosure program. The ability to avoid a corporate penalty or come by a 50% reduction of a penalty, corporate monitorship, or even a guilty plea altogether may entice corporations, especially those that would otherwise likely pay a hefty fine – in addition to restitution or forfeiture – to reconsider prior stances on voluntary disclosures.

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