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"Call Us Before We Call You"—U.S. Attorney for the Southern District of New York Creates New Individual Self-Disclosure Program

By Palmina M. Fava and James G. McGovern*

In this article, the authors examine a pilot program introduced by the U.S. Attorney's Office for the Southern District of New York to encourage individuals to disclose information about specific criminal offenses—including offenses relating to federal funds.

The U.S. Attorney's Office for the Southern District of New York (the Office) has introduced the Office's Whistleblower Pilot Program (Pilot Program), aimed at encouraging individuals to disclose information about specific criminal offenses, particularly urging them to do so early and voluntarily. In return for their cooperation, the Office will enter into a non-prosecution agreement (NPA) if certain conditions are met.

When Damian Williams, the U.S. Attorney for the Office, announced the program, he expressed its purpose as incentivizing individuals and their counsel to provide "actionable and timely information." Williams encouraged those eligible for the Pilot Program to seize the opportunity to "come clean, cooperate, and get on the right side of the law." His message was clear: "Call us before we call you."[1]

CONDUCT COVERED BY THE PILOT PROGRAM

The Pilot Program applies when an individual discloses information about any of the following offenses:

1. Criminal conduct conducted by or through public or private companies, exchanges, financial institutions, investment advisers, or investment funds involving fraud or corporate control failures;
2. Criminal conduct conducted by or through public or private companies, exchanges, financial institutions, investment advisers, or investment funds that impacts market integrity;

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[1] Press Release, United States Attorney's Office for the Southern District of New York, US Attorney Williams Announces Enforcement Priorities And SDNY Whistleblower Pilot Program (Jan. 10, 2024), available at https://www.justice.gov/usao-sdny/pr/us-attorney-williams-announces-enforcement-priorities-and-sdny-whistleblower-pilot.

3. Criminal conduct involving state or local bribery; or
4. Fraud relating to federal, state, or local funds.

CRITERIA FOR NPA ELIGIBILITY UNDER THE PILOT PROGRAM

To qualify for an NPA under the Pilot Program, the following criteria must be met:

1. The individual reports misconduct not previously made public or known to the Office;
2. The individual voluntarily discloses the criminal conduct, not in response to a government inquiry or an obligation to report;
3. The individual provides substantial assistance in investigating and prosecuting at least one equally or more culpable person and commits to full cooperation with the investigation and prosecution;
4. The individual truthfully and completely discloses all known criminal conduct in which he/she participated;
5. The individual is not a federal, state, or local official, a federal investigative or law enforcement agent, a person who is (or is anticipated to become) a major public figure, or a person serving as the chief executive officer, chief financial officer, or equivalent role in a public or private company;
6. The individual was not involved in criminal activities that include force, violence, sex offenses involving fraud, force, coercion, or a minor, or any actions implicating national security, including terrorism; and
7. The individual has no previous felony conviction for conduct involving fraud or dishonesty.

If an individual fails to meet all outlined criteria, prosecutors may still, at their discretion (with supervisory approval and following Justice Manual principles) offer an NPA in exchange for cooperation. In evaluating the necessity and public interest in offering an NPA, prosecutors and supervisors consider the extent to which criteria similar to those mentioned above have been satisfied, along with an assessment of the individual's criminal history and the sufficiency of non-criminal sanctions.

PRACTICAL ISSUES FOR COMPANIES TO CONSIDER

Increased disclosure incentives for employees and consultants, particularly when balanced against the increased pressure on companies to identify all culpable individuals in return for cooperation credit, may impact the manner in which companies conduct internal investigations and evaluate whether to self-disclose:

1. *Race to Self-Disclose*—The Pilot Program, which incentivizes individuals to self-disclose, may pressure companies to disclose earlier in the investigation process to maximize cooperation credit. If an individual self-discloses before the company, it is unclear whether the company will receive voluntary disclosure credit if subject to the Office's jurisdiction.

2. *Pre-Interview Considerations*—Recognizing the incentive for a target or subject of an investigation to self-disclose in order to avoid criminal penalties, including prison, companies should evaluate the manner in which it conducts the interviews of those individuals and discuss disclosure strategy early in the investigation. For example, if an interviewer confronts an implicated employee with "smoking gun" documents or information gleaned from other employees before evaluating its own corporate disclosure strategy, that employee may disclose the conduct to the Office more expeditiously than the company. But, failing to confront the implicated employee may result in delays in fully understanding and addressing the scope of the misconduct. Accordingly, counsel should discuss with the relevant decision-makers the disclosure and remediation strategy in advance of key interviews to ensure the company can act nimbly to remediate the conduct and to disclose it, or to be prepared to respond to questions about the reasons for non-disclosure if the employee races to the Office first.

3. *Accessibility*—Companies may not prevent or restrict employees from disclosing actual or potential misconduct to regulators. Companies should evaluate their training materials, employment contracts, and compliance policies to ensure no language can be interpreted as restricting disclosure to law enforcement or requiring disclosure to the company first.

4. *Conduct at Issue*—The Pilot Program does not apply to self-disclosure of the below violations:

    a. Violations of the Foreign Corrupt Practices Act (FCPA) (i.e., cases involving bribery and corruption of foreign officials);

    b. Violations of Federal or State Campaign Financing Laws, Federal Patronage Crimes, or Corruption of the Electoral Process;

    c. Bribery of Federal Officials, although it does apply to bribery of state and local officials or private parties.

While the Pilot Program does not apply to the FCPA, companies should consult the Justice Department's Corporate Enforcement Policy (CEP).[2] The CEP applies to all Justice Department criminal investigations, and it offers potentially significant incentives for companies that voluntarily self-disclose misconduct and fully cooperate with investigations.

Moreover, the Securities and Exchange Commission's Whistleblower Program applies to the FCPA and offers whistleblowers who meet the qualifications a 10% to 30% share of any fine over $1 million that relates to the conduct disclosed by the whistleblower. While this program is restricted to violations of federal securities laws, individuals who provide information leading to a successful action brought by the Securities and Exchange Commission may also be eligible to receive an award if the same information led to a related action brought by certain other government authorities, such as a parallel criminal prosecution or an NPA from the Justice Department. Accordingly, individuals remain incentivized to disclose information about conduct where the SEC Whistleblower Program would provide potential remuneration.

CONCLUSION

The Pilot Program provides yet another manner and incentive for self-reporting violative conduct to government authorities. The Office is the only U.S. Attorney's Office to implement this type of self-reporting program but time will tell whether other offices follow suit. Therefore, companies should remain vigilant and maintain an effective compliance program to detect and rectify potential misconduct before it is reported to the government.

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[2] See Kenneth A. Polite, Jr., Assistant Attorney General, U.S. Dep't of Just., Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.