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U.S. Attorney's Office for SDNY announces whistleblower pilot program

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The U.S. Attorney's Office for the Southern District of New York (SDNY) announced the creation of a Whistleblower Pilot Program applying to individuals who provide information regarding criminal conduct undertaken by or through public or private companies. Under the program, the U.S. Attorney's Office (USAO) will enter into a non-prosecution agreement with those who voluntarily disclose criminal conduct meeting specific conditions.

New policy

On January 10, 2024, U.S. Attorney Damian Williams announced SDNY's new Whistleblower Pilot Program for individuals, applying to certain non-violent offenses. The program, which is designed to encourage early, actionable self-disclosure and increased cooperation with the government, allows the USAO to enter into a non-prosecution agreement with those who voluntarily disclose criminal conduct meeting specific conditions. In announcing the policy, U.S. Attorney Damian Williams said, "Our message to the world remains: Call us before we call you." The pilot program applies to individuals who make disclosures regarding:

- criminal conduct undertaken by or through public or private companies, exchanges, financial institutions, investment advisers, or investment funds involving fraud or corporate control failures or affecting market integrity, or
- criminal conduct involving state or local bribery or fraud relating to federal, state, or local funds.

Unlike similar programs run by the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), there is no financial incentive for disclosing misconduct. Individuals who self-report will instead be able to avoid prosecution if they meet certain criteria and conditions.

Key exceptions and carveouts

For the pilot program to apply, several conditions must be satisfied. The misconduct must not have previously been made public or already known to the USAO. The disclosure must be voluntary and not in response to a government inquiry or obligation to report. The individual must be able to provide substantial assistance to an investigation and prosecution of "one or more equally culpable persons" and be prepared to cooperate, and the individual must truthfully and completely disclose all criminal conduct, including his or her own misconduct.

The program also does not apply to those who are elected public officials, appointed and confirmed public officials, federal investigative or law enforcement officials, individuals of major public interest, and chief executive officers or chief financial officers of a private or public company.

Importantly, the policy does not apply to individuals who provide information about Foreign Corrupt Practices Act (FCPA) violations, federal campaign or state financing laws, federal patronage crimes, corruption of the electoral process, or bribery of federal officials.

The offense also cannot involve the use of force or violence; be a sex offense involving fraud, force, or coercion of a minor; or involve terrorism or implicate national security. The reporting individual cannot have a previous felony conviction, nor a conviction relating to any kind of fraud and dishonesty.

Even in circumstances where an individual's disclosure does not meet the above requirements, prosecutors may still consider exercising discretion to extend a non-prosecution agreement in exchange for the individual's cooperation, subject to supervisory approval, based on a number of factors.

Takeaways

There are a number of takeaways from this new policy.

First, as a practical matter, we think it is unlikely that this will significantly increase the number of whistleblowers with actionable information for two main reasons:

- The SDNY policy is the latest in a long list of existing whistleblower programs administered by the SEC, CFTC, Internal Revenue Service, and the Financial Crimes Enforcement Network, all of which offer significant financial incentives for individuals to blow the whistle against a corporate wrongdoer. Thus, this new policy may make a difference for the category of individuals not already covered by existing programs that offer a much juicier carrot to walk in misconduct, but it is unlikely to lead to a flood of new whistleblowers; and
- There are a sufficient number of carveouts and areas of ambiguity that it is not likely to encourage many individuals with firsthand knowledge of misconduct to run into SDNY, as it may lead to their own prosecution.

That said, as the program continues to evolve and non-prosecutions are announced under it, this may provide additional comfort and incentives for individuals to report.

Second, the new policy illustrates the USAO's continued desire to increase the number of white collar cases in SDNY. From one perspective, the policy is consistent with the Department of Justice's (DOJ) and regulators' continued efforts to expand prosecutions and regulatory actions against companies and public officials, something they are attempting to achieve both through the carrot (specifically, the corporate voluntary disclosure programs announced by the Criminal Division and U.S. Attorney's Offices last year) and the stick—increasing the number of new cases without corporate disclosures.

Third, the policy creates a divergence from other USAOs who do not have their own whistleblower program, and perhaps DOJ itself; indeed, as it must, the SDNY policy memorializes that it does not apply to other Offices. Although, it is reasonable to think, that an individual self-reporting who sought to bring their case to a different U.S. Attorney's Office could likely leverage the SDNY policy to seek a similar arrangement, pursuant to the threat of bringing their case to the SDNY in the alternative. The existence and content of such myriad policies—not only between different agencies but within the DOJ itself—adds complexity to the already challenging job of in-house counsel. At bottom, the repeated creation of and promotion of whistleblower programs reinforces the need for all companies to develop and maintain a robust compliance program and an effective system to detect and report potential malfeasance.

In short, while the announcement may not substantially increase cases, in-house counsel must continue to be thoughtful about how they deal with internal complaints, as well as the decision of whether to voluntarily disclose misconduct.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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