

DOJ announces new individual disclosure program

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The DOJ Criminal Division announced a new individual self-disclosure pilot program designed to “up the ante” on companies calculating the risk of not disclosing misconduct. The program is meant to provide a “clear and transparent path” to a non-prosecution agreement for certain individuals meeting specified criteria, and has noticeable differences from corporate disclosure programs.

In the latest of a string of announcements aimed at incentivizing companies and individuals to voluntarily self-disclose misconduct to DOJ, on April 15, 2024, Acting Assistant Attorney General for the DOJ Criminal Division (Criminal Division) Nicole Argentieri announced the Criminal Division’s new self-disclosure pilot program for individuals. The program, which is designed to encourage early, actionable self-disclosure and increased cooperation with the government, essentially guarantees a non-prosecution agreement (NPA) for those individuals who voluntarily disclose criminal conduct meeting specific conditions to DOJ’s Criminal Division. The pilot program applies to individuals who make disclosures regarding most corporate crimes, including fraud, corruption and money laundering. This program largely tracks the recently announced [individual disclosure policy by the U.S. Attorney’s Office for the Southern District of New York \(SDNY\)](#), but covers reporting of different criminal conduct including Foreign Corrupt Practices Act (FCPA) violations given the Criminal Division Fraud Section’s primacy over such violations of law. These individual disclosure programs are distinct from the recently announced [“whistleblower pilot program”](#) in which DOJ will be compensating individuals who provide actionable information to DOJ. Taken together, these programs could be read as DOJ treating companies that self-disclose misconduct more harshly than individuals who do so, while incentivizing those very same companies to make timely disclosures.

For the Criminal Division pilot program to apply, several conditions must be satisfied:

- The disclosed information must be “original.” In other words, the information must be non-public and not previously known to the Criminal Division or to any component of DOJ.
- The individual must truthfully and completely disclose all misconduct in which the individual participated as well as all misconduct of which the individual is aware.
- The disclosure must be to the Criminal Division before the threat of imminent disclosure, and the disclosure must be voluntary and not in response to a government inquiry or obligation to report.
- The individual must also fully cooperate and provide substantial assistance to an investigation and prosecution of those who are similarly culpable.
- Forfeiture or disgorgement of profits from the wrongdoing and victim compensation, to the extent applicable, are required.

In addition, the program does not apply to:

- Chief executive officers or chief financial officers of a private or public company.
- Elected or appointed foreign government officials.

- Domestic government officials at any level, including any employee of a law enforcement agency.
- Individuals who spearheaded the misconduct.
- Individuals who have a prior felony conviction or prior conviction relating to any kind of fraud and dishonesty.
- Individuals who engaged in the use of force or violence; a sex offense involving fraud, force or coercion of a minor; or terrorism or violations involving national security.

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.

While the SDNY's program is focused on "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," the Criminal Division's program is focused on money laundering, the integrity of the financial markets, foreign corruption, health care fraud, fraud against the United States (e.g., procurement fraud), and domestic bribery.

Takeaways

The Criminal Division's pilot program is the latest in a now growing list of announcements by DOJ to incentivize companies and individuals to voluntarily self-disclose misconduct, including the Corporate Enforcement Policy (offering declinations for companies that voluntarily self-disclose misconduct), the newly announced whistleblower program (offering financial incentives for individuals who report corporate misconduct to DOJ), and the SDNY individual disclosure program.

Notably, the "baseline criteria" for eligibility under the Criminal Division's new individual self-disclosure pilot program are nearly identical to those under the SDNY's whistleblower program. However, as mentioned above, the Criminal Division and SDNY programs differ in terms of the criminal conduct covered. This means that individuals intent on self-disclosing will likely base their decision on factors other than which office has a more favorable disclosure program.

Ironically, and perhaps paradoxically, the SDNY's and Criminal Division's individual disclosure programs provide more certain and favorable benefits to individuals who self-disclose misconduct in which they have engaged than does the Corporate Enforcement Policy to corporations. Specifically, the Criminal Division's individual disclosure program provides that the reporting individual "will receive an NPA," as compared to companies that, at best, receive a "presumption" of a declination. Moreover, although individuals do not automatically receive an NPA if they (1) committed prior felonies or crimes of fraud/dishonesty; (2) engaged in a violent crime, terrorism or sex offense; (3) spearheaded the misconduct; or (4) are themselves the CEO, CFO or elected official, companies lose the benefit of the presumption of a declination based on a much broader list of non-exclusive aggravating circumstances, including senior executive involvement or significant profit. This disparity means that an individual who engages in, but then reports, a crime that involves a significant profit or senior executive misconduct "will receive" an NPA but a company that voluntarily discloses the exact same misconduct would not even get a presumption of a declination. It will be interesting to see if DOJ chooses to expand its corporate disclosure program to offer similar certainty and benefits, given that companies can only act through their employees and a corporate enforcement action punishes the many innocent employees and shareholders who were not involved in the misconduct.

These new individual disclosure programs may create yet another unintended and detrimental phenomenon. Specifically, a company that has a strong compliance program and the best of intentions could identify red flags and begin investigating potential misconduct, only to have the wrongdoer then decide to run to DOJ, secure an NPA, and potentially even a financial benefit from the SEC or DOJ whistleblower programs, while the company that unearthed the issue, and potentially would have voluntarily self-disclosed it, is now treated less favorably. This highlights the importance of conducting internal investigations cautiously, and, in some cases, quickly.

This also may mean that, for corporations, the decision to self-disclose must now be further expedited, because companies will need to race against individuals to report to DOJ. This will require a more expedited decision-making process and might result in a corporation disclosing conduct that it otherwise would not have – which appears to be the very result DOJ seeks to achieve. And those self-disclosures may also be less developed or fulsome, which benefits neither the company nor DOJ.

As a result of these DOJ whistleblower and individual disclosure programs, it remains important for companies to continue to monitor, assess, and enhance their compliance programs to address risks posed by their operations and maintain and appropriately respond to internal reporting systems.

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