

SDNY Announces Whistleblower Pilot Program For Individuals Who Self-Disclose Wrongdoing Involving Business Organizations

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On January 10, 2024, the U.S. Attorney’s Office for the Southern District of New York (“SDNY”) announced the creation of the SDNY Whistleblower Pilot Program (the “Pilot Program”).¹ Under the Pilot Program, individuals who self-disclose certain criminal misconduct that involves business organizations to SDNY and cooperate fully may be eligible for a Non-Prosecution Agreement (“NPA”).²

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¹ See U.S. Attny’s Office SDNY, Press Release, *U.S. Attorney Williams Announces Enforcement Priorities And SDNY Whistleblower Pilot Program* (Jan. 10, 2024), <https://www.justice.gov/usao-sdny/pr/us-attorney-williams-announces-enforcement-priorities-and-sdny-whistleblower-pilot>.

² The Pilot Program policy does not reference any forfeiture or restitution an individual may otherwise be subject to and that therefore will need to be considered separately.

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The Pilot Program appears to be part of the ongoing trend within the Department of Justice (“DOJ”) to encourage self-reporting and full cooperation, and provide greater clarity and transparency around such policies.³ The program is plainly intended to encourage more individuals — even those that may have some criminal liability — to provide “actionable and timely information” that will allow SDNY to investigate corporate misconduct that might otherwise be difficult for prosecutors to uncover.⁴

Background

The announced Pilot Program provides internal guidance to SDNY prosecutors. It specifies that the Pilot Program does not supersede the DOJ’s Justice Manual and does not give rise to any enforceable rights, privileges, or benefits. It makes clear that the U.S. Attorney’s Office “at all times” retains “sole discretion” to determine whether to extend an NPA in exchange for an individual’s reporting and cooperation.⁵ In addition, the Pilot Program applies only to SDNY and not to any other U.S. Attorney’s Offices or other components of DOJ.⁶

What Crimes Apply

The Pilot Program applies only to self-disclosures of certain types of criminal offenses involving certain types of organizations.

First, it is limited to the disclosure of (1) fraud, (2) corporate control failures, (3) criminal offenses affecting market integrity, and (4) state or local bribery

or fraud relating to federal, state, or local funds.⁷ The Pilot Program explicitly excludes self-reporting of violations of the Foreign Corrupt Practices Act, federal or state campaign financing laws, federal patronage crimes, corruption of the electoral process, or bribery of federal officials.⁸

Second, the Pilot Program does not apply to individual misconduct that does not involve an organization. Specifically, it is limited to criminal conduct “by or through public or private companies, exchanges, financial institutions, investment advisers, or investment funds.”

Who is Eligible

The application of the Pilot Program is limited to certain individuals based on their identity and criminal history.

First, to be eligible, the individual cannot be (1) a federal, state, or local official, (2) an official or agent of a federal investigative or law enforcement agency, (3) a person “of major public interest” (or a person who is expected to become one), or (4) the chief executive officer (“CEO”), chief financial officer (“CFO”), or someone of equivalent stature within the relevant organization. The exclusion of these individuals likely reflects the judgment that such leniency should not apply to senior officials and top executives who could benefit from cooperating against lower level employees.

³ See, e.g., U.S. Attny’s Office SDNY, Press Release, *Damian Williams And Breon Peace Announce New Voluntary Self-Disclosure Policy For United States Attorney’s Offices* (Feb. 22, 2023), <https://www.justice.gov/usao-sdny/pr/damian-williams-and-breon-peace-announce-new-voluntary-self-disclosure-policy-united> (highlighting that the Voluntary Self-Disclosure Policy for U.S. Attorney’s Offices “provides transparency and predictability”); Speech, *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote Address at the Global Investigations Review Live: DC Spring Conference* (Mar. 23, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-address-global> (“We are committed to ensuring transparency and being

clear and predictable about our expectations and our policies.”); see also our Alert Memorandum, “U.S. Attorney’s Offices Issue Nationwide Corporate Voluntary Self-Disclosure Policy,” dated Feb. 27, 2023, available at <https://www.clearyenforcementwatch.com/2023/02/u-s-attorneys-offices-issue-nationwide-corporate-voluntary-self-disclosure-policy/>.

⁴ *Id.*

⁵ U.S. Attny’s Office SDNY, SDNY Whistleblower Pilot Program, at 1 (as of Jan. 10, 2024), https://www.justice.gov/d9/2024-01/sdny_wbp_1.9.24.pdf.

⁶ *Id.* at 1 n.1.

⁷ *Id.* at 1.

⁸ *Id.* at 1 n.2.

Second, to be eligible for an NPA under the Pilot Program, an individual cannot have been involved in any (1) use of force or violence, (2) sex offense involving fraud, force, or coercion or a minor, or (3) offense involving terrorism or implicating national security.⁹ In addition, the individual’s criminal record cannot include a conviction for conduct involving fraud, dishonesty, or a prior felony.¹⁰

What Other Conditions Must Be Met

The Pilot Program also includes certain substantive limitations.

First, to be eligible for an NPA under the Pilot Program, the self-disclosure must offer original information and be voluntary. In other words, the misconduct being disclosed cannot have been public or otherwise already known to the U.S. Attorney’s Office. Nor can the self-disclosure be pursuant to a government inquiry or other obligation to report misconduct.¹¹ This is analogous to the definition of a voluntary self-disclosure under the DOJ Criminal Division’s Corporate Enforcement and Voluntary Self-Disclosure Policy, which makes corporations eligible for a declination if they voluntarily self-disclose, fully cooperate, and timely and appropriately remediate misconduct.¹²

⁹ *Id.* at 1.

¹⁰ Pilot Program at 1-2.

¹¹ *Id.* at 1.

¹² See Dep’t of Just., Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy at 3, <https://www.justice.gov/opa/speech/file/1562851/download> (providing, among other things, that disclosure of the misconduct be “voluntary” and that the self-disclosing company “had no preexisting obligation to disclose the misconduct”); see also our Alert Memorandum on this topic, “U.S. Department of Justice Announces Revisions to Corporate Enforcement Policy,” dated Jan. 23, 2023, available at <https://www.clearygottlieb.com/-/media/files/alert-memos-2023/us-department-of-justice-announces-revisions-to-corporate-criminal-enforcement-policy.pdf>. Similarly, the Securities and Exchange Commission’s Whistleblower Program requires that “original information” (*i.e.*, information derived from a whistleblower’s “independent knowledge” or “independent analysis,” “reveals information that is not generally known or available to the public,” and is not already known to the

Second, the Pilot Program requires full and complete cooperation. The individual must “truthfully and completely” disclose all criminal conduct they are aware of and also be able to provide substantial assistance in holding one or more *equally or more culpable* persons accountable.¹³ Such policy is in line with general practices in the SDNY whereby benefits of leniency based on cooperation are reserved for those individuals who not only provide full and complete information about criminal misconduct, but are also in a position to provide substantial assistance in other prosecutions against equally or more culpable people.

While fulfillment of these conditions could lead SDNY prosecutors to extend an NPA to the self-disclosing individual under the Pilot Program,¹⁴ failing to satisfy all conditions does not automatically bar an individual from receiving an NPA. The Pilot Program reserves the discretion SDNY prosecutors have always had to decide to proceed with an NPA if the circumstances warrant it.¹⁵

Key Takeaways

- The recently announced Pilot Program appears to be part of an ongoing trend of creating more incentives and provide greater clarity around self-reporting corporate misconduct. While the

authorities) be provided “voluntarily.” 17 C.F.R. § 240.21F-4.

¹³ Pilot Program at 1.

¹⁴ *Id.* at 2.

¹⁵ The Pilot Program lists the following factors: “1. Whether and to what extent the criminal conduct had previously been made public or was previously known to this Office; 2. Whether the individual disclosed the criminal conduct voluntarily or in response to government inquiry or reporting obligation; 3. The extent to which the individual is able to provide substantial assistance in the investigation and prosecution of one or more equally or more culpable persons and the individual’s culpability relative to others; 4. Whether the individual has truthfully and completely disclosed all criminal conduct in which the individual has participated and of which the individual is aware; 5. The extent to which the individual occupies any official or leadership position or other position of public or private trust; 6. The adequacy of non-criminal sanctions, including but not limited to remedies imposed by civil regulators; and 7. The individual’s criminal history.” *Id.*

practice of granting NPAs to certain types of cooperating witnesses is not new, the Pilot Program — and wide publication of such a program — formalizes this practice and provides would-be whistleblowers with more concrete guidance around the benefits of whistleblowing.

- The Pilot Program’s purpose is plainly to encourage corporate whistleblowers to come forward with allegations of wrongdoing — even if the whistleblower may be implicated — and to bring such misconduct to the attention of SDNY, as opposed to any other government authority.
- The Pilot Program provides yet another avenue and reason for whistleblowers to bring corporate wrongdoing to the attention of government authorities. Thus, it further emphasizes the importance of having a robust and effective compliance program that will help identify and remediate misconduct before it is first raised to government authorities.

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