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DOJ Pilot Program Changes the Calculus on Corporate Self-Disclosure



The Criminal Division of the U.S. Department of Justice (DOJ) announced a [Pilot Program on Voluntary Self-Disclosures for Individuals](#) (Pilot Program) on April 15, 2024.

Under the new policy, individuals who were involved in certain types of corporate criminal misconduct, who voluntarily disclose that conduct to the Criminal Division, and who meet certain other criteria will be eligible to receive a non-prosecution agreement (NPA). This pilot program has the potential to change in-house counsel's decision-making on whether and when to voluntarily disclose *corporate* misconduct by incentivizing employees who participated in the misconduct to be first in the door at DOJ.

Overview of the Pilot Program on Voluntary Self-Disclosure for Individuals

The Pilot Program—along with DOJ's existing corporate voluntary self-disclosure program and pending [whistleblower reward program](#)—is aimed at enabling the Criminal Division to better identify and prosecute corporate crime. It does so by offering a meaningful "carrot" to individuals who participated in corporate crime in exchange for their voluntary disclosure of information that enables DOJ to pursue other wrongdoers.

Under the Pilot Program, the Criminal Division will enter into an NPA with any individual who voluntarily self-discloses to the Criminal Division original information about certain criminal misconduct, provided the following conditions are met:

1. **The reporter must provide original information about certain kinds of criminal activity.** The reporting individual must disclose nonpublic information not previously known to any component of the DOJ. Further, the information must relate to the following kinds of corporate criminal activity:
 - Foreign corruption or bribery (including violations of the Foreign Corrupt Practices Act, the Foreign Extortion Prevention Act, and associated money laundering).

- Bribery of domestic public officials.
 - Healthcare fraud and kickback schemes.
 - Federal contract fraud.
 - Schemes committed by financial institutions or related to the integrity of the financial markets, including those involving money laundering, registration of money transmitting businesses, and fraud against or compliance with financial institution regulators.
2. **The disclosure must be voluntary, truthful, and complete.** The reporting individual must not have any preexisting legal obligation to report the misconduct. The disclosure also must be made before any regulatory or enforcement agency makes a request related to the subject of the disclosure and "before the threat of imminent disclosure to the government or the public." Further, the reporting individual must disclose all information known to the individual about any criminal conduct, "including the complete extent of the individual's own role in the misconduct."
 3. **The reporter must fully cooperate with any subsequent investigation.** The reporting individual must be willing and able to provide substantial assistance to DOJ in its investigation and prosecution of other culpable individuals, including by providing truthful testimony, producing documents or other evidence when requested, or working proactively under the supervision of U.S. law enforcement.
 4. **The reporter must forfeit any ill-gotten gains.** The reporting individual must forfeit or disgorge any profit from the criminal wrongdoing and pay restitution or victim compensation.

Finally, only certain individuals are eligible for an NPA under the Pilot Program. Specifically, the program is *not* available to:

1. CEOs, CFOs, or "the organizer/leader of the scheme."
2. Individuals with prior felony convictions or convictions for conduct involving fraud or dishonesty.
3. Individuals who have engaged in criminal conduct involving: (1) violence; (2) use of force; (3) threats; (4) substantial patient harm; (5) sex offenses involving fraud, force, or coercion, or relating to a minor; or (6) any offense involving terrorism.
4. Domestic or foreign government officials.

How the Pilot Program Changes the Analysis for Corporate Self-Disclosure

The Pilot Program offers individuals involved in corporate criminal misconduct a meaningful incentive to self-disclose their actions. However, it also puts employees in direct competition with their employers to be "first in the door" at DOJ, because both the employee and the company must be able to provide DOJ with original information about corporate misconduct in order to avail themselves of the full benefits of self-disclosure (whether under the Pilot Program or DOJ's corporate voluntary self-disclosure program, respectively).

Consider a scenario in which a company, having received a report of misconduct through its internal ethics hotline, initiates an internal investigation to evaluate whether the allegations have any merit before deciding whether to voluntarily self-disclose to DOJ. As an initial investigative step, the company schedules interviews with those accused of wrongdoing. If the allegations are true, the employee witnesses—on notice that the company is investigating their actions and could potentially turn them over to DOJ in the future—now have an incentive to voluntarily self-disclose their conduct to the Criminal Division before their employer completes its investigation. From the company's perspective, then, the Pilot Program increases the risk that another source will alert DOJ to the misconduct before the company has a chance to evaluate whether self-disclosure is warranted.

The number of voluntary self-disclosures by corporations has dropped in recent years as more and more in-house legal teams conclude that the cost savings from taking the time to "pressure test" allegations before determining whether to self-disclose to DOJ outweighs the risk of another party alerting DOJ to the allegations before the company does, therefore losing the benefits of voluntary self-disclosure. The new Pilot Program is poised to shift

the pendulum back in the other direction, and a blog post earlier this week from Principal Deputy Assistant Attorney General Nicole M. Argentieri makes clear that this shift was intentional. In [her April 22 post](#), Argentieri wrote, "We understand that when companies are deciding whether to make a voluntary self-disclosure, they assess not only the benefits of self-reporting laid out in our Corporate Enforcement Policy, but also the risk that the department will learn about the misconduct from other sources. [With this pilot program, t]he department is upping the ante in that calculus by increasing the incentives for individuals to come forward."

Takeaway

The key information for in-house counsel is that the Criminal Division's Pilot Program on Voluntary Self-Disclosure for Individuals will require companies to carefully reassess their procedures for determining whether and when to self-disclose potential corporate wrongdoing to DOJ and, potentially, to further expedite the decision of whether self-disclosure is warranted.

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