



A Robinson+Cole Legal Update

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Department of Justice Criminal Division Announces Voluntary Self-Disclosure Pilot Program for Culpable Individuals

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Last week, the Department of Justice (DOJ) announced the Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals (the Program). Pursuant to the Program, "an individual who voluntarily self-discloses original information about criminal misconduct, including the complete extent of their own role in the misconduct, fully cooperates, and satisfies the other conditions [in the Program], the reporting individual will receive" a non-prosecution agreement (NPA) as resolution of their criminal exposure. Individuals who fall short of the full criteria for an NPA may still receive that outcome where the Criminal Division exercises its discretion.

The Program rounds out a series of DOJ initiatives to increase the incentives for individuals and entities to report misconduct. In early 2023, various DOJ components issued their voluntary self-disclosure policies to encourage culpable entities to disclose misconduct in exchange for a range of outcomes from a declination to an NPA to a deferred prosecution agreement. In October 2023, the DOJ announced the Mergers & Acquisitions Safe Harbor Policy which incentivizes non-culpable acquiring entities that discover misconduct during due diligence of target companies to make disclosure to the DOJ in exchange for, under certain conditions, a presumptive declination. In January 2024, the U.S. Attorney's Office for the Southern District of New York launched a Whistleblower Pilot Program that offered certain individuals culpable for certain misconduct a pathway to an NPA. (At least one other U.S. Attorney's Office has since adopted a similar pilot program.) And then, in March 2024, Deputy Attorney General Lisa Monaco announced the DOJ's pilot program to provide financial rewards to innocent whistleblowers that report certain corporate and financial misconduct. (We previously wrote about these programs [here](#), [here](#), [here](#), and [here](#).)

In general and with regard to the Program specifically, the DOJ has documented these initiatives to "provide transparency" and "a strong incentive ... to bring to the Criminal Division's and law enforcement's attention actionable, original information about criminal conduct that might otherwise go undetected or be impossible to prove." Last month, Acting Assistant Attorney General Nicole Argentieri shared the DOJ's perspective that these programs were having the desired effect. She told attendees at a government enforcement-focused conference, "These self-disclosures allow us to learn about conduct that maybe we would have never known about. ... When you see these declinations, ... they are just a fraction of the self-reports we are getting. ... [O]ur policies are working."

In addition to this retrospective impact of easing the DOJ's prosecution of misconduct, the DOJ has adopted these policies to have a prospective impact on corporate entities. These policies encouraging self-disclosure "may be a particularly important incentive for companies to create compliance programs that encourage robust internal reporting of complaints, that help prevent, detect, and remediate misconduct before it begins or expands, and that allow companies to report misconduct when it occurs."

Qualifying Criteria

The Program establishes seven criteria for a culpable individual to receive an NPA for making a self-disclosure. These criteria largely mirror elements of the other voluntary self-disclosure programs highlighted above.

1. *Reporting Method.* The reporter must email the disclosure to a specific address set up by the Criminal Division. (This is a unique element of the Program.) To ease the DOJ's processing of disclosures, the DOJ published an intake form for a reporter to use. The intake form requires identifying and contact

information for the reporter and/or their counsel. It also requires a “[b]rief description of the misconduct.” After providing this information, the reporter must execute a declaration under penalty of perjury that they “ha[ve] a reasonable basis” to affirm satisfaction of the following six qualifying criteria.

2. *Original Information Regarding Certain Misconduct.* The reporter must provide information regarding specific violations (discussed below) that is not public and not known to the Criminal Division or other components of the DOJ.
3. *Voluntariness.* The reporter must make their disclosure (i) before receiving a request or demand that relates to the subject matter of the submission, (ii) without a pre-existing obligation to make disclosure pursuant to an agreement in connection with a criminal or civil action, and (iii) in the absence of a government investigation or other threat of imminent disclosure to the government.
4. *Truthfulness and Completeness.* The reporter must share all known information related to misconduct in which they participated or about which they know. This includes the reporter sharing facts about their own culpability.
5. *Cooperation and Substantial Assistance.* The reporter must assist in the investigation and prosecution of an individual or entity more culpable than the reporter. The policy articulates for the individual reporter what cooperation and assistance might involve—testimony, document production, working at the direction of law enforcement.
6. *Forfeiture.* The reporter must disgorge ill-gotten gains from the misconduct and make restitution to victims.
7. *Positional Limitations.* The reporter may not be a chief executive officer, chief financial officer, or equivalent; the organizer or leader of the unlawful scheme; an elected or appointed foreign government official; or a domestic government official of any kind. Additionally, the reporter may not (i) have “engaged in criminal conduct involving violence, use of force, threats, substantial patient harm, any sex offense involving fraud, force, or coercion, or relating to a minor, or any offense involving terrorism” or (ii) have a felony conviction of any kind or any conviction involving fraud or dishonesty.

Like the Whistleblower Pilot Program and the financial-rewards program, the Program applies to only certain offenses, which highlight the DOJ’s enforcement priorities. The reported conduct must involve at least one of the following, with additional considerations not set forth here:

- Violations by financial institutions, involving money laundering, and fraud against or compliance with financial institution regulators;
- Violations related to integrity of financial markets undertaken by financial institutions, investment advisors, or investment funds, or by public companies or private companies;
- Violations related to foreign corruption and bribery by, through, or related to public or private companies;
- Violations related to health care fraud or illegal health care kickbacks;
- Violations related to federally funded contracting; and
- Violations related to domestic corruption schemes involving bribes or kickbacks.

Key Takeaways

- If the other recent voluntary self-disclosure programs have not delivered the renewed message, the Program makes it explicit—the DOJ wants companies to establish robust internal controls to mitigate risks of misconduct and to implement mechanisms to manage reports of misconduct.
- Companies should consider evaluating their controls and their reporting/whistleblowing processes to minimize the risks that individuals will report out to the DOJ before companies have an opportunity to receive, investigate, and remediate internal reports of misconduct.
- Given the original information and voluntariness criteria, the DOJ may reject a report from an individual who is not aware that a government investigation is ongoing.
- When assessing what actions to take upon substantiation of reported misconduct, a company should factor in the increased possibility that innocent or culpable individuals with knowledge of the misconduct will seize the opportunity to receive a financial reward or an NPA, respectively, by being the first reporter, depriving the company of the benefit of similar corporate programs.
- The DOJ clearly perceives whistleblowers—innocent and culpable alike—as strategically important sources of information to DOJ enforcement efforts.
- Considering the aggressive expansion of carrots from the DOJ through these voluntary-self-disclosure programs, companies and individuals should be prepared for a potential increase in sticks used by the DOJ.
- The expansion of voluntary self-disclosure programs at the DOJ may portend similar efforts by other federal entities with civil enforcement authority.
- As with the corporate programs, the Program for individuals is neither cost-free nor publicity-free. An individual interested in seeking the NPA offered by the Program must be willing to accept the strict qualifying criteria and the financial and non-financial impacts of the Program. While this generally may be more of a deterrent, the offer of an NPA may negate the concerns of financial penalties.

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