

SDNY Whistleblower Pilot Program Incentivizes Self-Disclosure and Cooperation

January 16, 2024

On Wednesday, January 10, 2024, the U.S. Attorney’s Office for the Southern District of New York (“SDNY”) launched the SDNY Whistleblower Pilot Program (the “Program”).¹ The Program seeks to incentivize individuals to report criminal wrongdoing—including corporate control failures, state and local bribery, and fraudulent dealings involving public funds—before SDNY learns of the conduct and to fully cooperate with any resulting investigations and prosecutions. U.S. Attorney Damian Williams encouraged individuals “to come clean, cooperate, and get on the right side of the law,” cautioning “[c]all us before we call you.”²

If a disclosing individual meets the Program’s conditions, described below, SDNY will offer the individual a non-prosecution agreement (“NPA”), allowing the individual to avoid all criminal charges. Although it remains to be seen how the Program will be implemented in practice, this potentially marks a significant shift in SDNY’s traditional practice of requiring an individual seeking to cooperate in exchange for leniency to plead guilty to all of their criminal conduct.

DOJ’s Efforts to Incentivize Voluntary Disclosure. SDNY’s adoption of the Program’s follows extensive efforts in recent years by the U.S. Department of Justice to encourage companies to self-report misconduct and cooperate with DOJ in exchange for leniency. For example, in 2023, DOJ revised its Corporate Enforcement Policy (the “CEP”), which applies to all “corporate criminal matters handled by the Criminal Division,”³ to broaden eligibility for declinations of prosecution following voluntary disclosure and increase the associated discount to up to 75% under conditions that include voluntary disclosure, cooperation and remediation.

¹ U.S. Attorney’s Office, Southern District of New York, “SDNY Whistleblower Pilot Program” (Jan. 10, 2024), <https://www.justice.gov/usao-sdny/sdny-whistleblower-pilot-program>.

² U.S. Attorney’s Office, Southern District of New York, 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>.

³ U.S. Department of Justice, “Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy” (Jan. 17, 2023), <https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline>.

SDNY's Program seeks to extend similar incentives to individuals, including company employees involved in criminal conduct who previously may not have seen a clear path to becoming whistleblowers. The Program also may be an effort by SDNY to align its practices with other components of DOJ, which more frequently have offered NPAs to cooperating individuals. In contrast, SDNY typically has required cooperating individuals to plead guilty to all of their criminal conduct and rely on judges to grant leniency at sentencing based on prosecutors' recommendations. The Program also could prompt more or different reporting than the SEC's longstanding whistleblower program, which focuses on financial incentives, though SDNY often has received criminal referrals from the SEC.

SDNY's Pilot Program. The Program offers individuals involved in criminal conduct a potentially significant new incentive to cooperate with SDNY: for individuals who voluntarily disclose information about certain criminal offenses and meet other stringent conditions, they can obtain an NPA, in which the government agrees not to prosecute them, rather than a cooperation agreement requiring a guilty plea to criminal charges. This Program applies only to SDNY and only to certain types of criminal conduct. In addition, the Program does not create any enforceable rights, and SDNY retains "sole discretion" to determine if an individual has met the Program's requirements.

Some aspects of the Program raise questions and merit further consideration, including:

- The Program requires that an individual share information SDNY did not previously know, although individuals may not know what SDNY is already aware of. Individuals who self-disclose in order to reap the Program's benefits therefore assume some risk when doing so.
- Relatedly, such a disclosure must be "voluntary" and "not in response to a government inquiry or obligation to report misconduct." Again, some ambiguity exists as to what is truly "voluntary" and what will constitute a "government inquiry."
- The individual must fully cooperate, including providing "substantial assistance in the investigation and prosecution of one or more" individuals.
- Certain types of individuals are not entitled to the Program's benefits: CEOs; CFOs; individuals with a duty to report misconduct; individuals who are or are expected to be "of major public interest"; any "federal, state, or local elected or appointed and confirmed official"; and any "official or agent of a federal investigative or federal law enforcement agency."

- The Program does not include violations of the Foreign Corrupt Practices Act, bribery of federal officials, campaign finance violations and crimes involving violence, terrorism or national security.
- An individual with a prior felony conviction or another conviction implicating fraud or dishonesty is ineligible.

Even an individual who does not meet all the Program’s conditions still may receive an NPA at SDNY’s discretion, and the Program identifies similar factors that prosecutors should consider in making that assessment.

Only time will tell whether the Program evolves from a pilot to a permanent policy and whether it marks, in practice, a significant shift for SDNY.



Helen V. Cantwell
Partner, New York
+1 212 909 6312
hcantwell@debevoise.com



Andrew J. Ceresney
Partner, New York
+1 212 909 6947
aceresney@debevoise.com



Andrew M. Levine
Partner, New York
+1 212 909 6069
amlevine@debevoise.com



David A. O'Neil
Partner, Washington, D.C.
+1 202 383 8040
daoneil@debevoise.com



Winston M. Paes
Partner, New York
+1 212 909 6896
wmpaes@debevoise.com



Jane Shvets
Partner, New York
+1 212 909 6573
jshvets@debevoise.com



Bruce E. Yannett
Partner, New York
+1 212 909 6495
beyannett@debevoise.com



Douglas S. Zolkind
Partner, New York
+1 212 909 6804
dzolkind@debevoise.com



Erich O. Grosz
Counsel, New York
+1 212 909 6808
eogrosz@debevoise.com



Rebecca Maria Urquiola
Associate, New York
+1 212 909 6379
rmurquiola@debevoise.com