

Criminal Division of U.S. Department of Justice Announces Pilot Program on Voluntary Self-Disclosure for Individuals

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“Part of the idea here is that by incentivizing either whistleblowers or people who have criminal exposure to come forward to the Criminal Division, that ratchets up the pressure on companies to come forward as soon as they find out about potential misconduct in their ranks.” - An unnamed senior Department of Justice official as told to Fortune magazine.

In the U.S. Department of Justice’s (DOJ) latest policy in furtherance of its “carrots and sticks” approach to corporate criminal enforcement, senior leadership of its Criminal Division announced a new Pilot Program on Voluntary Self-Disclosures for *Individuals*. The program is designed to aid in the investigation and prosecution of “criminal conduct that might otherwise go undetected or be impossible to prove, and will, in turn, further encourage companies to create compliance programs that help prevent, detect, and remediate misconduct and to report misconduct when it occurs.”

To qualify for a Non-Prosecution Agreement (“NPA”), an individual must voluntarily self-disclose original information about criminal misconduct, including the complete extent of their own role in it, fully cooperate with investigators, and satisfy the following conditions:

1. The disclosure must be made to the Criminal Division on or after April 15, 2024.
2. The reporting individual must disclose original information, meaning non-public information not previously known to the Criminal Division or to any component of the Department of Justice. The information supplied must relate to at least one of the following categories of violations:
 - Violations by **financial institutions**, their insiders, or agents, including schemes involving money laundering, anti-money laundering, registration of money transmitting businesses, and fraud statutes, as well as fraud against or compliance with financial

institution regulators;

- Violations related to the **integrity of financial markets** undertaken: (1) by financial institutions, investment advisors, or investment funds, (2) by or through public companies or private companies with 50 or more employees, or (3) by any insiders or agents of any such entities;
 - Violations related to **foreign corruption and bribery** by, through, or related to public or private companies, including violations of the Foreign Corrupt Practices Act, the Foreign Extortion Prevention Act, and **money laundering** statutes;
 - Violations related to **healthcare fraud or illegal healthcare kickbacks** committed by or through public companies or private companies with 50 or more employees;
 - Violations by or through public or private companies with 50 or more employees related to **fraud** against, or the deception of, the United States in connection with **federally funded contracting**, where such fraud does not involve healthcare or illegal healthcare kickbacks; and
 - Violations committed by or through public or private companies related to the payment of **bribes or kickbacks** to domestic public officials.
3. Voluntary disclosures mean: Before any request, inquiry, or demand that relates to the subject matter of the submission is directed to the individual or anyone.
 4. The disclosure must be truthful and complete, meaning it must include all information known to the individual related to any misconduct in which the individual has taken part and/or of which the individual is aware. This includes the complete extent of the individual's own role in the misconduct, and all matters about which the Department may inquire.
 5. The reporting individual must agree to fully cooperate with and be willing and able to provide substantial assistance to the Department in its investigation of related conduct and prosecution of equally or more culpable individuals or entities including, but not limited to, providing truthful and complete testimony and evidence, whether in interviews, before a grand jury, or at any trial or other court proceeding; producing documents, records, and other evidence when called upon by the Criminal Division; and, if requested, working in a proactive manner under the supervision of, and in compliance with, United States law enforcement officers and agents.
 6. The reporting individual must agree to forfeit or disgorge any profit from the criminal wrongdoing and pay restitution or victim compensation.
 7. The reporting individual: (1) has not 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; (2) is not the Chief Executive Officer (or equivalent) or Chief Financial Officer (or equivalent) of a public or private company or is not the organizer/leader of the scheme; (3) is not an elected or appointed foreign government official; (4) is not a domestic government official at any level, including any employee of a law enforcement agency; and (5) does not have a previous felony conviction or a conviction of any kind for conduct involving fraud or dishonesty.

Takeaways

- In exchange for self-reporting and comprehensive cooperation, individuals with potential criminal liability may be eligible for a NPA with the Criminal Division where all conditions are met, but *only* for certain categories of offenses, and only for disclosures made on or after April 15, 2024.
- CEOs, CFOs, of public or private companies and organizer/leader of the scheme are ineligible. But prosecutors may still offer NPAs to individuals in appropriate circumstances, including where individuals come forward pursuant to the Pilot Program, but the criteria above are not met in full.
- In exchange for an NPA, individuals must pay any applicable victim compensation, restitution, forfeiture, or disgorgement, including returning any ill-gotten gains.
- The Criminal Division cannot offer an NPA for conduct that other DOJ components have charging approval authority, such as tax or sanctions offenses, without coordinating with and receiving required approval from the responsible component on the relevant charges.
- The pilot program is designed to incentivize companies to create compliance programs that encourage robust internal reporting of complaints, which help prevent, detect, and remediate misconduct before it begins or expands, and that allow companies to report misconduct when it occurs.
- Federal Prosecutors in Manhattan and San Francisco have implemented whistleblower pilot programs for individuals already and DOJ leadership announced a forthcoming pilot whistleblower monetary rewards program in early March.

DOJ has stated that “[i]ndividuals reporting misconduct through the Criminal Division Pilot Program are not required to be represented by counsel.” While these new incentives may provide attractive ways to resolve potential criminal exposure for qualifying individuals who may otherwise be in harm's way, they are not risk-free. Retaining counsel who is respected by the DOJ, is familiar with its operations, and knows how to approach the DOJ to successfully negotiate the desired disposition is something to strongly consider along with the concomitant ancillary risks such as civil liability, loss of licenses, and other domestic and international regulatory or enforcement exposure.

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