

# Calling (Some but Not All) Whistleblowers: Understanding SDNY's New Whistleblower Pilot Program

## Client Alerts

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On January 10, 2024, US Attorney Damian Williams announced a new Whistleblower Pilot Program for the US Attorney's Office of the Southern District of New York (SDNY). The program is designed to proactively uncover criminal conduct and boost enforcement efforts by encouraging individuals to self-disclose criminal conduct. Provided certain conditions are met, a self-disclosing individual will be eligible for a non-prosecution agreement (NPA), pursuant to which the SDNY would agree not to prosecute that individual for the disclosed conduct. Traditional whistleblower programs, administered by agencies like the Securities Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), Internal Revenue Service (IRS), and Financial Crimes Enforcement Network (FinCEN), encourage individuals to report credible information of illegal activity by offering the opportunity for financial rewards, which can be substantial, for whistleblowers under the right circumstances, as well as strong anti-retaliation protections. Unlike these whistleblower programs, SDNY's new program is not designed to offer financial rewards for self-disclosures, but rather solely offers the possibility of protection from prosecution. In that regard, the policy is more akin to a self-disclosure program, such as the Voluntary Self-Disclosure Program announced by the Department of Justice (DOJ) on February 22, 2023, than a typical whistleblower program. This unique pilot program is the first instance of a US attorney's office establishing and promoting a program styled as a whistleblower program targeted at individuals, but it neither creates new whistleblower rights nor binds the SDNY's discretion.

## What incentives does the program provide?

The program offers the possibility of an NPA to an individual in exchange for their cooperation throughout the investigation and prosecution. An NPA, in which the government agrees to not prosecute the individual for the disclosed conduct, differs from a deferred prosecution agreement (DPA) because under the terms of a DPA, the government files criminal charges but suspends prosecution against the individual or corporation so long as the terms of the DPA are satisfied. Under the program, the express offer of an NPA and the protection it provides may induce individuals who have potential culpability themselves to self-disclose and cooperate against others,

particularly those with the same level or greater culpability. This program thus supplements DOJ's formal voluntary self-disclosure policies, announced October 31, 2023, applicable to all DOJ components and offices that prosecute corporate crime. Unlike the program here, which is applicable only to individuals and specifically offers the possibility of an NPA, the DOJ policies are aimed at corporate self-disclosures by entities, and offer credit for cooperation that may reduce criminal penalties at sentencing (including potentially the possibility of no criminal penalty at all) and/or forbearance from the imposition of an independent compliance monitor.

### **Who is and is not eligible for the program?**

The program seeks to gain relevant information from individuals in both the public and private sectors, including those who may be criminally culpable, through self-reporting of misconduct. However, the program explicitly states that self-reporters may not be an elected or appointed official at any level of government or a CEO, CFO, or equivalent in a private company. Additionally, this program is not available to those persons who are, or may become, of "major public interest," a term undefined by the policy. Determining whether an individual is or may become of major public interest will be determined at the discretion of the SDNY. Finally, individuals who have a history of criminal conduct that involves the use of force or violence, or a previous felony conviction, or a conviction of any kind for conduct involving fraud or dishonesty are automatically disqualified from the program.

### **What criminal misconduct is covered, and what is not?**

The SDNY seeks information from individuals who self-disclose regarding "criminal conduct undertaken by or through public or private companies, exchanges, financial institutions, investment advisers, or investment funds involving fraud or corporate control failures or affecting market integrity, or criminal conduct involving state or local bribery or fraud relating to federal, state, or local funds." The program explicitly excludes information regarding the Foreign Corrupt Practices Act, with respect to which the SEC and DOJ share enforcement responsibilities, or "violations of federal or state campaign financing laws, federal patronage crimes, or corruption of the electoral process, or bribery of federal officials," some of which are enforced by the Federal Election Commission's Office of Inspector General.

### **Program Limitations**

Under the program, the SDNY retains sole discretion to determine whether an individual has met all criteria set forth in the program's policy to qualify for an NPA (and whether to offer an NPA to someone who does not meet the criteria defined in the policy). Importantly, one criterion is that the misconduct reported must neither be public *nor known by the SDNY* for it to be credited - and a potential whistleblower may not know in advance whether the conduct, especially if nonpublic, is already known by the SDNY. Individuals and their counsel will need to closely consider how widely known or available disclosure information may be, as well as the possibility that others may have

made previous disclosures. Further, the information must be voluntarily offered, the individual must be able to substantially assist in the SDNY's investigation and prosecution of at least one other individual who is "equally or more culpable," and all criminal conduct in which the individual has participated and is aware of must be reported to the SDNY. Ensuring awareness and disclosure of the entire scope of criminal conduct the SDNY may attribute to a whistleblower can be a particularly challenging topic to be considered by the self-disclosing individual and their counsel. Moreover, the program only binds the SDNY; even if an individual self-discloses and secures a NPA under this program, there is no guarantee that the individual is insulated from all related criminal or civil charges.

## **Takeaways**

The SDNY's Whistleblower Pilot Program is part of a growing array of whistleblower and self-disclosure programs aimed at incentivizing the proactive reporting of individual and corporate misconduct. The hope of an NPA offers a significant opportunity for an individual who may be participating in potentially problematic conduct to seek protection from prosecution. Given the increased clarity around potential eligibility for an NPA, some individuals, particularly those who are certain they want to self-disclose, may choose to self-report to the SDNY, rather than a different US Attorney's Office without such a program.

For corporate leaders, the existence of another reporting avenue outside of the corporation is another reminder of the importance of both a robust compliance program and effective internal reporting mechanism. It is vitally important that organizations have their own confidential internal whistleblower reporting channels and anti-retaliation policies, along with effective investigative and remedial processes in which employees have confidence. More broadly, corporate compliance programs should be assessed for adequacy in preventing, monitoring for, and rooting out the types of potential misconduct which could be the subject of such a disclosure.

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