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Skadden Discusses Manhattan U.S. Attorney’s Office Whistleblower Program for Individuals’ Self-Disclosure

By Maria Cruz Melendez, Alessio D. Evangelista, Andrew M. Good, Christopher J. Gunther and Samuel G. Bieler January 26, 2024

Comment

On January 10, 2024, Damian Williams, U.S. Attorney for the Southern District of New York (SDNY), announced the creation of that office’s [Whistleblower Pilot Program](#) (Program). This initiative provides notice of the requirements for individuals who wish to self-disclose criminal conduct and cooperate with the government in exchange for a non-prosecution agreement.

The announcement comes amid a broader effort by the Department of Justice to motivate the self-disclosure of criminal conduct, particularly in corporate settings. By clarifying the criteria and requirements for individuals seeking non-prosecution agreements, SDNY seeks to encourage “early and voluntary self-disclosure of criminal conduct by individual participants in certain non-violent offenses.”

Unlike whistleblower programs run by agencies like the Securities and Exchange Commission, Commodity Futures Trading Commission and the Financial Crimes Enforcement Network of the Department of the Treasury, the Program does not offer financial incentives for reporting misconduct. Rather, the incentive provided by the Program is the chance to avoid prosecution.

The Whistleblower Pilot Program [applies to two sets of offenses](#):

- Cases of criminal conduct by or through public or private companies, exchanges, financial institutions, investment advisers or investment funds involving fraud, corporate control failures or other acts affecting market integrity.
- Cases involving state and local bribery or fraud involving federal, state or local funds.

The program is inapplicable to Foreign Corrupt Practices Act violations, violations of federal or state campaign finance laws, federal patronage crimes, corruption of the electoral process or bribery of federal officials.

Several conditions must be met for a person to obtain a non-prosecution agreement under the Program. The misconduct being reported must be nonpublic and not already known to SDNY. Disclosure must be voluntary and not in response to a government inquiry or obligation to report misconduct.

In addition, individuals participating in the Program must truthfully and fully disclose all the criminal conduct they have participated in and are aware of (*i.e.*, not limited to the conduct that prompted their self-disclosure). They must also cooperate fully and provide substantial assistance in the investigation or prosecution of one or more “equally culpable” people.

Two classes of individuals are excluded from the Program:

- Federal, state or local elected, or appointed and confirmed officials; agents and officials of federal law enforcement and investigative agencies; CEOs and CFOs of public or private companies; and people who are or are expected to become “of major public interest.”
- Individuals who engaged in crimes involving violence, sex offenses, or terrorism and national security as well as people with prior felony convictions for fraud or dishonesty.

Cooperating individuals who are ineligible may still enter into a non-prosecution agreement at prosecutors' discretion based on the principles set out in the DOJ's Justice Manual. In deciding whether to exercise that discretion, the Justice Manual instructs prosecutors to consider factors that are similar to those outlined in the Program, as well as the degree to which the individual occupies a leadership position or position of trust, the adequacy of non-criminal sanctions and the individual's criminal history.

In February 2023, the DOJ adopted new national standards for voluntary self-disclosure credit in corporate criminal enforcement actions and, in October 2023, Deputy Attorney General Lisa Monaco announced a new safe harbor policy for misconduct discovered during the merger and acquisition process. See our March 3, 2023, alert "[DOJ Implements Voluntary Self-Disclosure Policy for US Attorneys' Offices](#)" and our October 5, 2023, alert "[DOJ Announces Safe Harbor Policy for Voluntary Self-Disclosures Related to Mergers & Acquisitions](#)."

The Program, now in a pilot phase, represents another effort by a DOJ component to encourage self-disclosure.

This memorandum comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "US Attorney for SDNY Launches Whistleblower Program To Encourage Self-Disclosure by Individuals," available [here](#). Steven R. Glaser and Ryan D. Junck contributed to the memorandum.