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DOJ Criminal Division Announces New Voluntary Self-Disclosure Pilot Program for Individuals

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On April 22, 2024, the Acting Assistant Attorney General for the Department of Justice (“DOJ”) Criminal Division (“Acting AAG”) Nicole M. Argentieri offered commentary in a blog post regarding the Criminal Division’s newest voluntary disclosure pilot program. This program, announced on April 15, extends non-prosecution agreement (“NPA”) eligibility to individuals with potential criminal exposure in connection to corporate misconduct, should they provide “credible and actionable” information to DOJ concerning the same misconduct (“the Individual Voluntary Disclosure Pilot Program”).¹ The Acting AAG noted that this program places DOJ “in the best position to enforce the law and to hold individuals and corporations accountable,” and to “provide predictability and certainty by offering a pathway for potentially culpable individuals to receive an NPA for truthful and complete self-disclosure to the department.” This announcement is the latest in a number of pilot programs announced by DOJ that are clearly directed at encouraging and incentivizing cooperation through voluntary disclosure.²

The Individual Voluntary Disclosure Pilot Program only applies to “culpable individuals,” which expressly *excludes*: “CEOs, CFOs, high-level foreign officials, domestic officials at any level, or individuals who organized or led the criminal scheme.” Individuals can expect to receive an NPA under this new program

¹ Nicole M. Argentieri, U.S. Dep’t of Just., Criminal Division’s Voluntary Self-Disclosures Pilot Program for Individuals (Apr. 22, 2024), <https://www.justice.gov/opa/blog/criminal-divisions-voluntary-self-disclosures-pilot-program-individuals>.

² See *SDNY Whistleblower Pilot Program*, U.S. Atty’s Off., S. Dist. of N.Y. (Jan. 10, 2024), https://www.justice.gov/d9/2024-01/sdny_wbp_1.9.24.pdf; Lisa Monaco, U.S. Dep’t of Just., Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association’s 39th National Institute on White Collar Crime (Mar. 7, 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations>; see also our Client Alerts, “SDNY’s New Policy on Self-Disclosures for Individuals May Be a Game Changer,” dated Jan. 18, 2024, available at <https://www.paulhastings.com/insights/client-alerts/sdnys-new-policy-on-self-disclosures-for-individuals-may-be-a-game-changer>, and “The DOJ’s New Pilot Program Promises to Pay Whistleblowers for Uncovering Corporate Crimes,” dated Mar. 14, 2024, available at <https://www.paulhastings.com/insights/client-alerts/the-dojs-new-pilot-program-promises-to-pay-whistleblowers-for-uncovering>.

if they: “(1) voluntarily, (2) truthfully, and (3) completely self-disclose original information regarding misconduct that was unknown to [DOJ] in certain high-priority enforcement areas, (4) fully cooperate and are able to provide substantial assistance against those equally or more culpable, and (5) forfeit any ill-gotten gains and compensate victims.”

The Acting AAG explained that a “voluntary” disclosure is only made “in the absence of a government investigation, before the department or any federal law enforcement, regulatory, or civil enforcement agency makes a request related to the subject matter of the disclosure, and before the threat of imminent disclosure to the government or the public.” Further, the individual “must not have a preexisting obligation to report the information to DOJ or any other law enforcement agency pursuant to a separate NPA or similar agreement.”

Consistent with recent announcements from DOJ, the Acting AAG noted that “providing incentives to the first person to report misconduct to the government ... puts pressure on everyone—including companies—to *disclose misconduct as soon as they learn about it.*” The Acting AAG also provided specific areas of focus for DOJ under this new program:

- Schemes involving financial institutions—including money laundering and criminal compliance-related schemes;
- Schemes related to the integrity of financial markets involving financial institutions, investment advisors or funds, or public or large private companies;
- Foreign corruption schemes, including violations of the Foreign Corrupt Practices Act, Foreign Extortion Prevention Act, and associated money laundering;
- Healthcare fraud and kickback schemes;
- Federal contract fraud schemes; and
- Domestic corruption schemes involving bribes or kickbacks paid by or through public or private companies.

Potential Implications of the Individual Voluntary Disclosure Pilot Program

The announcement of the Individual Voluntary Disclosure Pilot Program is arguably the most significant development to date with respect to DOJ’s recent efforts to encourage cooperation and voluntary disclosures, as it is the first attempt by DOJ to define which individuals with potential criminal culpability may be eligible for cooperation credit in connection to a voluntary disclosure—of course, excluding individuals “convicted” of criminal conduct under preexisting guidance. It would not be unreasonable to believe that individual whistleblowers, who have been more inclined to step forward than the companies themselves over the years, will be even more incentivized by this program to leave behind any concerns about individual liability, and step forward earlier and more often, while companies may or may not see sufficient benefits in the corporate disclosure protocols to increase voluntary disclosures.

Additionally, while DOJ has explained, in its previous announcements, that it is interested in crimes by financial institutions, crimes affecting the integrity of financial markets, and foreign corruption schemes, this latest announcement is the first (among those recently coming out of DOJ) where DOJ has expressed an interest in healthcare fraud and kickback schemes. This announcement squarely places the life sciences and healthcare industry, long a prime target of government enforcement, within DOJ’s focus

with respect to criminal investigations. Following both difficulties in pursuing cases and maintaining enforcement output during the COVID-19 pandemic and the advent of a new administration, DOJ enforcement activity, as measured by resolution amounts and cases initiated—particularly in the healthcare industry—is increasing.

In the past, companies may have been positioned in some situations in such a way where they could be insulated from external whistleblowing by potentially culpable individuals—due to fears of individual prosecution. A practical effect of the Individual Voluntary Disclosure Pilot Program is that the prospect of an NPA for potentially culpable individuals reduces and, perhaps altogether, eliminates, in many cases, the fear of individual prosecution, should they decide to report misconduct to the government. Companies can expect to see these individuals increasingly decide to go external, maybe in the first instance, as opposed to internally escalating issues.

Key Takeaways

1. Companies should ensure that they are conducting comprehensive risk assessments on a regular basis to meaningfully assess risk on an enterprise-wide basis and calibrate their compliance program accordingly. In view of this new policy, companies should consider more targeted assessments, perhaps even down to the transactional level, to assess the propriety and compliant implementation of arrangements that may be of interest to regulators. It may be the only practical way to get ahead of individual whistleblowers and be in a position to decide on whether to voluntarily disclose any issues identified, or at least remediate them earlier on.
2. Are your reporting channels operating effectively? Are people stepping forward internally (i.e., healthy speak up culture)? As at least one study reflects, approximately 72% of employees who observe misconduct will report their observation³ and the vast majority whistleblowers raise issues internally before going external. Companies should double down on detecting and managing their whistleblower risks to get the number of whistleblowers reporting internally, rather than externally, as high as possible. It is now more important than ever before.
3. Companies should ensure that they are committing resources to, and deploying, effective methods for detecting, investigating, and remediating compliance issues, with a particular focus on foreign corruption, fraud, and bribery schemes. Companies should have a well-defined potential disclosure protocol and the ability to quickly mobilize resources in the event that they identify conduct that they may consider disclosing, and ensure appropriate remediation. Irrespective of whether an issue ends up before the government and the means by which that might be happen, it is imperative that companies have the right compliance record to fall back on.
4. Companies should continue to monitor developments coming out of DOJ, HHS-OIG, SEC, CFTC, and other government enforcement components, as voluntary disclosure programs continue to be a prominent tool for DOJ and others to encourage cooperation with investigations into potential corporate misconduct.

³ See *Global Business Ethics Survey*, ETHICS & COMPLIANCE INITIATIVE (2023), <https://www.ethics.org/gbes-2023/>.



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