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SDNY's New Policy on Self-Disclosures for Individuals May Be a Game Changer

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On January 10, 2024, Damian Williams, the U.S. Attorney for the Southern District of New York ("SDNY"), announced the launch of the SDNY Whistleblower Pilot Program (the "Pilot Program"), a significant new policy that promises immunity from prosecution for certain individuals who voluntarily report criminal misconduct involving financial crimes and corruption.[1] Unlike other Department of Justice ("DOJ") policies governing voluntary self-disclosures applicable by corporations, this policy applies specifically to *individual*s.

The Pilot Program holds the potential to provide invaluable protection to whistleblowers while at the same time significantly increasing incentives to self-report criminal conduct to the SDNY. This, in turn, is likely to increase the number of white-collar prosecutions investigated and brought by the SDNY. Indeed, the DOJ launched a similar immunity program for individuals in 1994 for criminal antitrust violations that was highly successful in dramatically increasing the number of criminal antitrust cases referred to the DOJ. The DOJ's current Antitrust Leniency Policy is widely viewed to have been a "game changer" for the DOJ's antitrust enforcement program.[2] Considering that immunized whistleblowers may also be eligible for substantial financial awards, it is easy to see how the Pilot Program could quickly increase the volume of voluntary reports to SDNY.

As discussed in further detail below, companies should immediately consider certain proactive compliance steps to address—timely and appropriately—potential criminal misconduct, and thereby reduce the risk of whistleblowing.

SDNY's Whistleblower Pilot Program

Under the Pilot Program, if an individual voluntarily discloses certain criminal misconduct to SDNY, and otherwise meets the specific criteria of the program, then SDNY will offer the individual a form of immunity called a "non-prosecution agreement," or an "NPA." An NPA is essentially a contract between an individual and the DOJ, whereby the DOJ agrees not to prosecute the individual for specific criminal conduct in exchange for the individual's cooperation. NPAs typically are not made public, and are not filed with the court. Notably, under the plain terms of the Pilot Program, if prosecutors determine that an individual is found to have met the requirements of the program, the Pilot Program *requires* them to enter into an NPA.

There are three important limitations to the Pilot Program. *First*, it applies only to SDNY and not any other DOJ component. Thus, a whistleblower must make the disclosure to SDNY to receive the potential benefits. *Second*, the Pilot Program does not apply to all crimes, although the range of crimes it does

cover is broad: "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."[3] *Third*, the Pilot Program does not create any enforceable rights. Thus, a whistleblower cannot legally challenge SDNY's refusal to grant an NPA.

The Pilot Program has three basic requirements:

New and Voluntary Disclosure. The disclosure must be both new and voluntary. Thus, an individual must disclose to SDNY misconduct that was not previously made public or known to SDNY. The disclosure must also not have been made in response to a government inquiry or pursuant to a reporting obligation. It is worth noting that the Pilot Program does not require that the information be unknown to other government agencies, but only that it not be previously known by SDNY.

Full and Substantial Cooperation. The individual must provide full and substantial cooperation. This requirement appears to be similar to those needed to qualify for a motion for downward departure for cooperation under Section 5K1.1 of the U.S. Sentencing Guidelines. Specifically, the individual must truthfully and completely disclose all criminal conduct in which the individual has participated and of which the individual is aware. Moreover, the information must result in "substantial assistance" in the investigation and prosecution of one or more equally or more culpable persons. Notably, the Pilot Program does not disqualify individuals who played substantial or leading roles in criminal schemes, so long as their cooperation is not solely against less culpable individuals. This stands in contrast to the Antitrust Division's Leniency Policy, which provides that leniency to whistleblowers is not available where the whistleblower was "the leader or originator of" the illegal activity.[4]

No Disqualifying Factors. Specifically, the whistleblower cannot be: (a) "a federal, state, or local elected or appointed and confirmed official"; (b) "an official or agent of a federal investigative or federal law enforcement agency"; (c) "a person who otherwise is, or is expected to become, of major public interest"; or (d) "the chief executive officer or equivalent or chief financial officer or equivalent of a public or private company." Additionally, the individual cannot previously have "engaged in any criminal conduct that involves the use of force or violence, any sex offense involving fraud, force, or coercion or a minor, or any offense involving terrorism or implicating national security and does not have a previous felony conviction or a conviction of any kind for conduct involving fraud or dishonesty."

The policy provides that SDNY always has "sole discretion" to determine whether an individual whistleblower meets all of these requirements. If SDNY determines that the requirements have been met, the Pilot Program provides that SDNY "*will* enter into a non-prosecution agreement in exchange for the individual's cooperation." Thus, while prosecutors have broad discretion to determine whether an individual meets the requirements of the Pilot Program, once that finding is made, a prosecutor must enter into an NPA. Even if the whistleblower does not meet all the requirements, a prosecutor may exercise discretion and still offer an NPA based on a similar set of factors. Overall, many of the provisions in the Pilot Program are not entirely clear, leaving open important questions as to how SDNY will implement its own policy.

Will SDNY's Whistleblower Pilot Program Increase Whistleblower Reports?

The Dodd-Frank Act—which was enacted in 2010 following the financial crisis—included whistleblower provisions intended to uncover and stop financial misconduct. The financial awards paid to whistleblowers under these programs have grown steadily over the past decade. Perhaps the most successful whistleblower program is run by the Securities and Exchange Commission ("SEC"). Under that program, whistleblowers are eligible for a monetary award ranging from 10 to 30 percent of the

money collected for sanctions greater than $1 million for voluntarily providing original, timely, and credible information that leads to a successful enforcement action. Since the SEC began its program in 2011, enforcement actions from whistleblower tips have led to more than $6 billion in financial remedies, with more than $1 billion awarded to whistleblowers.[5] In 2023, the SEC issued its largest-ever whistleblower award of almost $279 million.[6] Recently, as part of the Anti-Money Laundering Act of 2020 ("AMLA"), Congress amended the Bank Secrecy Act ("BSA") to increase financial incentives for reporting BSA violations, which now also includes other reportable violations, such as U.S. economic sanctions violations.[7]

Notwithstanding the prospect of a big financial payout, a common fear of whistleblowers is that their report may open them up to criminal liability. Indeed, the DOJ has previously charged whistleblowers who were involved in the conduct that they reported. Removing the threat of criminal prosecution for culpable whistleblowers will undoubtedly increase the number whistleblower reports. But by how much? While the answer to that question remains to be seen, the success of the DOJ's Antitrust Leniency Policy may provide some clues.

Under the Antitrust Leniency Policy, the DOJ will provide leniency, i.e., immunity from prosecution, for the "first individual or company to self-report its involvement in an antitrust cartel . . . if it cooperates with the Division's investigation and prosecutions, and meets other conditions."[8] When the program was first adopted in 1978, leniency was up to the discretion of the prosecutor, and the DOJ received on average only one leniency application per year.[9] In 1993, the DOJ substantially revised the policy to make leniency for corporations automatic, and in 1994, the DOJ extended this policy to individuals. The impact was immediate. The rate of applications rose from one per year to one per month, and by 2004, had risen to almost four per month. By 2014, leniency applications gave rise to approximately two-thirds of the Antitrust Division's criminal investigations. In 2020, the Deputy Assistant Attorney General in charge of criminal antitrust enforcement declared that the Leniency Program was the "most important prosecutorial tool over the last 26 years."[10]

What Should Companies Do—Takeaways

It is too early to know how many whistleblower reports will be generated by the SDNY's Pilot Program. But if the program comes anywhere close to matching the success of the Antitrust Leniency Policy, the Pilot Program may be a "game changer" that substantially changes how federal prosecutors detect and investigate white-collar crimes, and may cause other DOJ components to adopt similar whistleblower immunity policies.

Companies should immediately consider the risks associated with increased detection opportunities for SDNY, which is already well-known for its aggressive white-collar enforcement efforts. Given the Pilot Program's focus on financial fraud, public companies and financial institutions in particular should take note. Companies should consider the following actions:

- Now, more than ever, it is critical for companies to build effective compliance programs to ensure that any serious misconduct is detected and remediated quickly. Detecting misconduct early will allow companies to decide the best course of action in advance of potential whistleblower complaints.

- Companies should review their policies, procedures, and protocols to ensure that employees and other agents have clear and accessible communication channels, such as internal hotlines, to report misconduct easily and anonymously. Companies should also ensure that they conduct

training so that employees are not only aware of these channels, but also understand how to make timely reports.

- Companies should also ensure that they take swift and appropriate action to investigate such reports, with escalation where appropriate. Such measures may dissuade whistleblowers from escalation outside of the company. In their absence, outreach to the government, with its attendant collateral consequences, is more likely.

- Where companies do detect serious misconduct that may be criminal, companies should also work with counsel to consider whether a voluntary self-disclosure is appropriate, preempting government notification by a whistleblower and maintaining its eligibility for the benefits offered for such disclosures.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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1 Press Release, U.S. Att'y's Off., S. Dist. of N.Y., 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.

2 *See* Bill J. Baer, U.S. Dep't of Just., Remarks at the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes 2 (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download.

3 The Pilot Program does not apply to Foreign Corrupt Practices Act ("FCPA"). However, the Pilot Program applies to a wide range of public corruption and fraud crimes, including "criminal conduct involving state or local bribery or fraud relating to federal, state, or local funds."

4 U.S. Dep't of Just., Just. Manual § 7-3.330 (2022).

5 *Whistleblower Awards over $1 billion – For Tips Resulting in Enforcement Actions*, U.S Sec. & Exch. Comm'n (June 4, 2020), https://www.sec.gov/page/whistleblower-100million.

6 Press Release, U.S Sec. & Exch. Comm'n, SEC Issues Largest-Ever Whistleblower (May 5, 2023), https://www.sec.gov/news/press-release/2023-89.

7 With respect to public fraud, the False Claims Act authorizes whistleblower rewards for reports that lead to the recovery of fraud involving federal government funds. 31 U.S.C. § 3730.

8 Press Release, U.S. Dep't of Just., Antitrust Division Updates Its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions (April 4, 2022), https://www.justice.gov/opa/pr/antitrust-division-updates-its-leniency-policy-and-issues-revised-plain-language-answers.

9 A summary of the Antitrust Leniency Policy can be found at Leo Tsao, Daniel Kahn, & Eugene Soltes, *Corporate Criminal Investigations and Prosecutions* 403 (1st ed. 2022).

10 Richard A. Powers, U.S. Dep't of Just., Deputy Assistant Attorney General Richard A. Powers Delivers Remarks at the 13th International Cartel Workshop 2 (February 19, 2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international.