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SDNY Ramps Up Pressure on Companies to Voluntarily Disclose Wrongdoing

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On February 13, the U.S. Attorney's Office (USAO) for the Southern District of New York (SDNY) announced a pilot program through which whistleblowers who voluntarily self-disclose criminal conduct relating to public or private companies, investment funds, and bribery or fraud involving public funds, will be considered for nonprosecution agreements (NPA) in exchange for their cooperation. While this SDNY pilot program is the first of its kind, it appears to be the next step in the evolution of the Department of Justice's (DOJ) coordinated corporate liability strategy.

DOJ's Focus on Voluntary Self-Disclosure

Voluntary self-disclosure (VSD) has been a top priority for DOJ under the Biden administration. As we reported last year, DOJ's official corporate VSD policy encourages companies to timely and voluntarily self-disclose misconduct and, in return for full cooperation, allows companies to potentially avoid guilty pleas and/or independent compliance monitors. The policy came on the heels of DOJ's creation of the Corporate Crime Advisory Group in 2021, and DOJ's 2022 announcement that prosecutors should examine whether conduct demonstrates "weaknesses in a corporation's compliance culture or practices" in determining appropriate penalties. And, as we reported earlier this month, DOJ continues to credit companies who provide a meaningful VSD and seeks harsher penalties against companies that fail to disclose or cooperate with investigations.

Overview of SDNY's Pilot Whistleblower Program

SDNY's pilot whistleblower program is the latest tactic in DOJ's corporate liability campaign. As we reported previously, DOJ's VSD policy raised a lot of questions, and there was uncertainty as to whether it would have the desired effect of inducing companies to self-report. Now, through the SDNY pilot program, DOJ appears to be trying a new tactic: inducing individual whistleblowers to report corporate misconduct by dangling the potential of nonprosecution for the whistleblowers.

NPAs are certainly a powerful carrot for those that face potential criminal liability. Under the SDNY pilot program, an individual may qualify for an NPA when certain conditions are met. The program applies to information given by an individual "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 does not apply to Foreign Corrupt Practices Act violations, federal or state campaign finance laws, election laws, bribery of federal officials, federal tax offenses, or federal environmental

crimes.

In order to qualify, the information cannot already be known to SDNY or any component of DOJ. Individuals must provide “substantial assistance in the investigation and prosecution of one or more equally culpable persons,” and they must “truthfully and completely disclose[] all criminal conduct in which the individual has participated and of which the individual is aware.” The program is designed “for individuals who are disclosing misconduct in which they had some involvement.”

The program also gives considerable leeway to prosecutors to determine whether the cooperation actually warrants an NPA. Among other factors, prosecutors are directed to consider:

- Whether and to what extent the criminal conduct was already public or known to the government.
- Whether disclosure was voluntary “and prior to imminent threat of disclosure or government investigation.”
- The level of substantial assistance in the investigation or prosecution of “equally or more culpable persons and the individual’s culpability relative to others.”
- Whether the person truthfully and completely disclosed all relevant knowledge.
- The extent to which the person is a leader or has another “position of public or private trust.”
- “The adequacy of non-criminal sanctions.”
- The individual’s criminal history.

The SDNY Program Ramps Up Pressure on Companies to Voluntarily Self-Disclose … Before Their Employees Do

Just like the SDNY’s pilot whistleblower program, under DOJ’s VSD policy, disclosure is only considered “voluntary” — and therefore, eligible for the benefits of the program — if it is made “prior to an imminent threat of disclosure or government investigation” and/or “prior to the misconduct being . . . known to the government.”

These dueling first-to-disclose requirements could create a race between employees and their companies to be the first to disclose misconduct and avail themselves of the benefits of disclosure and cooperation. In fact, these types of “races to disclose” may be exactly what SDNY (and DOJ by extension) is counting on. Under the SDNY pilot program, individuals who could face criminal liability for their involvement in corporate misconduct are incentivized to voluntarily self-disclose before the company (or, another employee) does.

Corporations subject to jurisdiction of the SDNY now face increased risk of their employees making disclosures to DOJ in order to avail themselves of the SDNY pilot program. This could eliminate the ability for companies to make voluntary self-disclosures themselves and take advantage of the DOJ VSD policy, since the government would already know about the alleged misconduct from an individual whistleblower, thereby preventing the

company from making a “voluntarily” disclosure. This additional consideration compounds the already existing risk of nonculpable whistleblowers disclosing corporate liability in the hopes of generating a civil False Claims Act lawsuit. Now more than ever, companies should strongly consider having outside counsel conduct an internal investigation at the first sign of trouble. This will allow a company to gather facts in a privileged setting, assess the appropriate risks (including that individual whistleblowers could make disclosures), and make informed decisions as to the best course of action to pursue.

Ultimately, if SDNY’s pilot whistleblower program is successful in generating additional self-disclosures, it would not be surprising to see other U.S. Attorneys’ Offices emulate the program, and perhaps ultimately to see DOJ incorporate this type of program into a formal policy. While this is not an eventuality, it is certainly a realistic possibility. As such, even companies that have no ties to SDNY need to be mindful of this evolving landscape and the substantial risks they face if they ignore suspected corporate misconduct.

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