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WHITE-COLLAR CRIME

SDNY Outreach to 'Whistleblowers' Takes Page from Main Justice Playbook

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The U.S. Attorney for the Southern District of New York (SDNY), Damian Williams, began the year by announcing a call for individuals with knowledge of certain criminal conduct to join Team America. The district's latest tool in white-collar criminal enforcement, SDNY's Whistleblower Pilot Program, is the first of its kind, offering a non-prosecution agreement (NPA) to individuals in exchange for working with SDNY prosecutors to "figure out what [they] don't know." *See* SDNY Whistleblower Pilot Program.

Williams hopes the program will alert his office to "the next Madoff case" before extensive damage occurs. The promise of an NPA under the program provides significant benefits compared with SDNY's stringent approach to negotiating cooperation agreements. SDNY intends for its program, which applies only to individuals, to "provid[e] clarity on the requirements and the benefits of [ ] self-disclosure" to motivate individuals to provide valuable information. With the program's greater potential for leniency, however, may also come the potential to justify imposing harsher consequences on individuals aware of criminal activity who fail to come forward.

Although SDNY's program is novel for a U.S. Attorney's Office, the program dovetails with Department of Justice (DOJ) policies announced last year to incentivize corporations to self-disclose white-collar misconduct.

By **Robert J. Anello**

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In 2023, DOJ implemented a Corporate Enforcement and Voluntary Self-Disclosure Policy applicable to its Criminal Division, a Voluntary Self-Disclosure Policy applicable to criminal corporate enforcement actions brought by any U.S. Attorney's Office, and a Mergers and Acquisitions Safe Harbor Policy.

Williams, who also acts as chair of the Attorney General's Advisory Committee, has taken the DOJ's approach a step further to offer leniency incentives to individuals in white-collar enforcement matters within his District. Such an approach in many ways mirrors whistleblower laws applied by regulators such as the U.S. Securities and Exchange Commission and Commodity Futures Trading Commission, but the DOJ's and SDNY's approach is prosecutorial guidance rather than legislation that would create enforceable protections and rewards.

These limitations, along with fairly stringent eligibility requirements and program language that leaves some key issues open to interpretation, are

among the important considerations for individuals contemplating whether to answer SDNY's call for whistleblowers to join the government's team.

'Call Us Before We Call You'

On Jan. 10, 2024, Williams announced SDNY's enforcement priorities for 2024—rooting out public corruption and financial fraud—and the creation of a "Whistleblower Pilot Program" to boost disclosure of information to accomplish these priorities. Williams explained that the program is intended to underscore the message that individuals should "[c]all us before we call you."

For those who do step up, and meet certain guidelines, the program promises an NPA, an agreement that legally binds SDNY prosecutors from filing charges against an individual related to a specified set of facts. A typical NPA in SDNY includes an immunity provision—the promise of no prosecution (with the usual exclusion for possible tax prosecutions)—in exchange for an individual's agreement to truthfully disclose all information to the government, cooperate with any requests for evidence, testify if called upon, and not commit any additional crimes. So long as individuals fulfill these obligations, they avoid prosecution for their role in the disclosed criminal activity.

In contrast to the obligations required for an NPA, SDNY's typical approach to cooperation agreements in exchange for a Section 5K1.1 letter leaves individuals much more beholden to the government. Section 5K1.1 of the Sentencing Guidelines permits the government to file a motion requesting that the sentencing court impose a sentence below the guideline range where the individual provided substantial assistance in an investigation or prosecution. Unlike an NPA, in ordinary cooperation agreements, a defendant agrees to plead guilty in exchange for the promise of the government's motion at the time of sentencing.

In SDNY, prosecutors' approach typically has been to require cooperators to plead to the highest count charged, and if not yet charged, plead to the most severe conduct able to be charged. Then, with the threat of a harsh sentence under the Sentencing Guidelines, prosecutors hold significant sway over cooperators up until sentencing.

Under an NPA, rather than appealing to the government before facing a sentencing judge, the individual's obligations consist only of remaining truthful, cooperative, and abiding by the law. The program's promise of an avenue to avoid a guilty plea to any crime is a significant reward for eligible individuals.

Compared with the factors the Justice Manual sets forth for NPAs, *see* Justice Manual 9-27.620, SDNY's program establishes narrower and more rigorous standards for eligibility.

First, eligible information is limited to that regarding criminal conduct "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 "involving state or local bribery or fraud relating to federal, state, or local funds." The program explicitly excludes information regarding violations of the Foreign Corrupt Practices Act, federal or state campaign financing laws, federal patronage crimes, corruption of the electoral process, and bribery of federal officials.

Second, the information must not have been previously known to SDNY and the disclosure must be "voluntary," meaning that the individual came forward before receiving a government inquiry and was not otherwise under an obligation to report misconduct. The individual also must "truthfully and completely" disclose all criminal conduct in which he or she has participated and of which the individual is aware, as well as provide "substantial assistance" to the investigation and prosecution, including full cooperation if requested by prosecutors. As part of the decision whether to accept an applicant, prosecutors are instructed to consider the adequacy of non-criminal sanctions, such as those that could be imposed by civil regulators. Accordingly, a successful application for participation in the SDNY program will likely require a suggestion of the types of civil sanctions the individual may face and willingly accept.

SDNY's program excludes certain individuals from eligibility, such as those who are expected to

become persons of "major public interest," like an elected or appointed and confirmed federal, state, or local level official, or official or agent of a federal investigative or federal law enforcement agency. In the corporate context the program does not apply to the chief executive officer or chief financial officer of a public or private company.

Even if an individual fulfills all these requirements, the individual may still be disqualified from receiving an NPA if he or she is a convicted felon, has a conviction for an offense involving fraud or dishonesty, or has otherwise engaged in certain criminal conduct. Specifically, engaging in criminal conduct involving 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 concerns makes an individual ineligible. If an individual does not meet all requirements but otherwise offers truthful and complete information, the program instructs prosecutors to determine if an NPA is nonetheless appropriate.

Ultimately, the fate of those individuals remains subject to the broad discretion of prosecutors. A footnote to the program states the disclaimer that "[n]othing in this policy is intended to create any substantive or procedural rights, privileges or benefits," and whether an individual has satisfied each condition to receive an NPA "remains at all times in the sole discretion of the U.S. Attorney's Office."

SDNY's Program Dovetails with DOJ's Approach

SDNY's program is the first of its kind, but the program is in accord with recent trends. In line with the Biden Administration's push to focus on deterring corporate misconduct, the DOJ announced three internal guidance policies last year that incentivize companies to self-disclose misconduct in exchange for greater leniency.

SDNY's program substantively aligns with DOJ's January 2023 revisions to the Criminal Division's Corporate Enforcement Policy (CEP), described as the "first significant changes to the Criminal Division's [CEP] since 2017." The CEP encourages companies to voluntarily self-disclose misconduct and timely and appropriately remediate in exchange for a presumption of declination. Prior to 2023, DOJ's CEP disfavored declination agreements for companies with aggravating factors and imposed more stringent requirements for cooperation. Additionally, the revisions increase fine reductions for companies that may not qualify for a declination, but otherwise should be treated with leniency because of their assistance.

Unlike SDNY's program, the CEP seeks information related to all types of corporate misconduct and a history of misconduct does not bar eligibility.

One month after the CEP revisions, DOJ announced a national standard applicable to all U.S. Attorneys' Offices for companies to receive voluntary self-disclosure credit (the USAO Policy). Under this policy, corporations may approach any USAO to disclose misconduct.

One important difference is that the USAO Policy states that prosecutors *may* consider a declination absent aggravating factors, while the CEP creates a presumption of declination and the possibility of declination even if aggravating factors exist. Additionally, unlike the CEP, the USAO Policy does not provide companies with the opportunity to receive financial benefits if they do not meet the disclosure requirements.

Although SDNY's program does not provide monetary incentives, the program provides for a presumption of an NPA.

In October, DOJ continued the trend of incentivizing disclosures, this time in the context of merger and acquisition transactions. DOJ's M&A Safe Harbor Policy provides a presumption of declination of criminal charges for acquiring companies that promptly and voluntarily disclose any type of criminal conduct at the acquired entity within six months of the transaction's closing date. The acquiring company must also cooperate and timely and fully remediate the misconduct within one year from the closing date to receive a declination. In contrast, SDNY's Program puts no time limit on when individuals must disclose misconduct.

Each of the leniency policies aims to add transparency and predictability to draw out new

information, but also leaves room for prosecutorial discretion through the use of terms that are subject to interpretation, such as "extraordinary efforts" and "full remediation." SDNY's program seems designed to provide fairly concrete criteria, but one can envision potential disputes over such eligibility questions as, for example, when "misconduct" is "already known" to the USAO or who "is, or is expected to become, of major public interest."

Another key area left open to judgment is what constitutes "substantial assistance." "Substantial assistance" is a phrase very familiar to prosecutors and defense counsel from years of applying the phrase under Guidelines Section 5K1.1, but different SDNY units and individual prosecutors vary in how stringently they apply the term depending on the circumstances. Future cases will define how SDNY prosecutors choose to interpret this term in the context of the new Program.

Possible Limitations to SDNY Program's Success

Although SDNY's program provides clear direction for how to report information—individuals send an email to USANYS.WBP@usdoj.gov—whether individuals will in fact self-disclose information is not as clear. The decision whether an individual meets each requirement under the program is ultimately in SDNY's hands, and without examples of when prosecutors will provide leniency under the program, individuals—at least initially—may be hesitant to come forward.

The uncertainty surrounding the requirements is compounded by the fact that the program does not create enforceable substantive or procedural rights. The program serves only as prosecutorial guidance. Thus, perhaps even more so than in the context of other whistleblower programs, counsel's experience with how the SDNY actually applies its new program in initial cases will likely be critical in determining whether or not the program succeeds.

In addition to the uncertainty of SDNY's interpretation, individuals also may be hesitant to report information given the lack of protections in place. Unlike agencies such as the SEC and CFTC, SDNY has not specified a process or commitment to keep whistleblower tips received pursuant to the program confidential. DOJ is subject to the confidentiality and retaliatory whistleblower provisions of the False Claims Act (FCA) and the Anti-Money Laundering Act of 2020 and its 2022 revisions (AMLA), but this Act pertains only to information related to violations of the Bank Secrecy Act, International Emergency Economic Powers Act, Sections 5 and 12 of the Trading with the Enemy Act, and the Foreign Narcotics Kingpin Designation Act. *See* R. Anello, "Sanctions Whistleblower Program: A Little-Known Tool for Employees Added to DOJ's Anti-Russia Arsenal", Forbes: The Insider (Oct. 18, 2023). Information covered under the SDNY program is unlikely to align with any of these laws.

Additionally, unlike the FCA, AMLA, and the Dodd-Frank Wall Street Reform Act which covers whistleblower tips submitted to the SEC and CFTC, SDNY's program does not provide statutorily defined financial rewards. Without the protections or financial incentives of whistleblower programs established by statute, individuals may decide the risks of reporting are not worth the potential reward of an NPA.

Conclusion

SDNY's program is an innovative step by a U.S. Attorney's Office, consistent with the DOJ's recent approach to focus on incentivizing members of the community to come forward with information about white-collar misconduct. With the offer of larger "carrots" under this approach, a bigger "stick" may follow for individuals who have information but do not come forward. Many will be keenly attentive to how SDNY actually applies the program in initial cases.

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