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The Prisoner's Dilemma Comes for Corporate Crime

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As part of its continued effort to incentivize the voluntary self-disclosure of corporate crime, the Criminal Division of the Department of Justice (DOJ) **announced a pilot program** in mid-April 2024 that will offer non-prosecution agreements (NPAs) to **individuals** who voluntarily self-disclose information about certain corporate crimes. This program, along with other recently announced incentives to self-report, could spur a type of prisoner's dilemma for corporate misconduct, since the program incentivizes a race to report for everyone from the lowest level employee up to a company board member. In light of the incentives this program and others create, it is more important than ever for corporations to implement and enhance existing compliance programs – and to investigate and address reports of misconduct quickly and decisively.

Although dubbed a pilot, this voluntary self-disclosure program effectively codifies an approach that the DOJ has taken for years, offering agreements to individuals that allow them to avoid prosecution in exchange for full cooperation. The fundamental change in the announced program is that reporting individuals are now **entitled** to NPAs shielding them from criminal prosecution for their own misconduct, rather than such agreements being subject to the DOJ's discretion. Ultimately, this type of certainty is likely to be the defining feature of the program if it is to succeed in changing the calculus for individuals with potential criminal liability who are considering whether to come forward and self-report.

The DOJ has defined the criteria that a reporting individual must meet to be eligible for an NPA under this pilot program:

- An individual must voluntarily (prior to any DOJ request or investigation) self-disclose original – nonpublic and not previously known to the DOJ – information about criminal misconduct.
- The information must relate to one of six types of violations committed by financial institutions or public or private companies, including money laundering, the integrity of financial markets, foreign corruption and bribery, healthcare fraud and illegal kickbacks, fraud related to federally funded contracting, and the payment of bribes or kickbacks to public officials.
- The information must be "truthful and complete," meaning it comprises everything the individual knows related to the misconduct, including the extent of that individual's role in it.
- The individual must fully cooperate with the DOJ in its investigation and prosecution, including by providing testimony and evidence.
- The individual must forfeit or disgorge any profit from the misconduct and pay restitution or victim compensation.
- Certain individuals are ineligible for the pilot, including chief executive officers, chief financial officers and their equivalents.

Note: Separate from the pilot program, Criminal Division prosecutors may still, in their discretion, offer NPAs to individuals in circumstances where the pilot program criteria are not fully satisfied.

Takeaways

1. Be aware of the potential for a 'race to report.'

This pilot follows on the heels of a series of other disclosure incentives the DOJ has introduced. For example, in March 2024, DOJ announced its own **whistleblower rewards program** to financially incentivize individuals to report illegal activity of which they have knowledge. And, in October 2023, DOJ launched a **corporate safe harbor policy** for voluntary self-disclosures made in connection with mergers and acquisitions.

With an increasing variety of incentives to report, individuals and corporations likely will find it necessary to consider the prisoner's dilemma, effectively competing to be the first to provide the DOJ with valuable information about potential criminal activity in exchange for protection from prosecution. This is no accident. As **US Deputy Attorney General Lisa Monaco put it in March 2024**: "When everyone needs to be first in the door, no one wants to be second – regardless of whether they're an innocent whistleblower, a potential defendant looking to minimize criminal exposure, or the audit committee of a company where the misconduct took place." What this means in practice is that companies should assume that **everyone** in the reporting chain and with knowledge of potential criminal activity, including those who engaged in the misconduct, will be incentivized to self-report – and to do so quickly.

2. Understand who is – and is not – eligible under the pilot program.

Individuals and companies should be mindful that the pool of potential government cooperators is vast: Anyone from an entry-level employee to a board member would be eligible for this program. At the same time, the DOJ did make clear that certain individuals, specifically including company CEOs and CFOs (or the equivalent), are **not** eligible. Other ineligible individuals include the leaders or organizers of the crime; those who have engaged in criminal conduct involving violence or terrorism; certain government officials; and those with prior felony convictions or convictions for any crime involving fraud or dishonesty.

3. Act swiftly to resolve issues internally.

Given the potential for this pilot program to create a race to report, companies should focus on building robust compliance programs to detect and resolve issues internally and to be in position to investigate and report misconduct if necessary. Taking workplace complaints seriously and addressing them effectively and efficiently is a critical step in this process – particularly given that prosecutors and regulators continue to offer significant financial rewards to whistleblowers to come forward in an effort to spur corporate enforcement. (To learn more, read our **April 2024 blog post** about how to address workplace complaints.)

4. Be mindful in deciding whether to self-report.

The question of whether to self-report is highly fact-dependent, and corporations and individuals should seek the advice of counsel before moving forward. Corporations should, at a minimum, take whistleblower reports seriously, move to investigate potential misconduct swiftly, be decisive in how they proceed based on the facts and, where the decision is made to self-report, do so promptly.

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