

# EDNY Launches New Whistleblower Non-Prosecution Pilot Program

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On September 17, 2024, the US Attorney's Office for the Eastern District of New York (EDNY) [announced a new pilot program](#) that offers non-prosecution agreements (typically referred to as NPAs) to individuals who voluntarily disclose information about certain corporate crimes to EDNY. Officials explained that the program, which took immediate effect, is "designed to encourage individuals to disclose original and actionable information about previously unknown criminal conduct undertaken by or through public or private entities or organizations." The EDNY Pilot Program aims to "enable the Office to investigate and hold wrongdoers accountable more quickly" while also "encourag companies to create and enforce compliance programs that help prevent, detect, and remediate misconduct and to report misconduct when it occurs."

This program is part of an ongoing effort by the Department of Justice (DOJ) and United States Attorney's Offices across the country to encourage the voluntary disclosure of corporate criminal activity. In April 2024, DOJ launched a [Pilot Program on Voluntary Self-Disclosures for Individuals](#), and in August 2024, it launched the [Corporate Whistleblower Awards Pilot Program](#). (To learn more, check out our [April 2024](#) and [August 2024](#) posts about the announcements.) Most recently, in [remarks made the same day as the EDNY Pilot Program announcement](#), Principal Deputy Assistant Attorney General Nicole M. Argentieri emphasized that these programs are "designed to encourage companies to invest in making their compliance programs effective," and that they "create incentives for companies to step up and own up when misconduct occurs" before law enforcement learns of the conduct from other sources.

## EDNY Pilot Program criteria

Under the EDNY Pilot Program, individuals who voluntarily disclose information about criminal conduct may be eligible for an NPA if they meet [certain conditions](#).

The disclosure must involve one of the enumerated "covered crimes" – including fraud or corporate control failures; intellectual property theft and related violations; market integrity; bribery or fraud related to government funds; obstruction of justice, perjury, or false statements; healthcare fraud; or money laundering related to any of these crimes.

In addition:

- The disclosed misconduct must not have been made public and must not be known to DOJ.
- The disclosure must be voluntary, before there is an imminent threat of disclosure or government investigation, and not in response to a government inquiry or based on any obligation to report.
- The disclosing individual must cooperate fully with the investigation and prosecution, including by providing testimony and evidence.
- The information must be "complete, truthful, and accurate" and disclose "all criminal conduct in which the individual has participated and of which the individual is aware."
- The disclosing individual must not be the highest-ranking person in the organization (i.e., the CEO) or someone who exercises "primary control" over the organization's operations; the head of a public agency; an elected, or appointed and confirmed, federal, state, local or foreign official; or a federal law enforcement official.
- The disclosing individual must not have led or originated the illegal activity.
- The disclosing individual's role in the conduct must not have involved violence, sex offenses or terrorism, and the individual must not have a prior felony conviction involving violence, sex offenses, terrorism, fraud or dishonesty.
- The disclosing individual must forfeit or disgorge any proceeds from the wrongdoing and pay restitution to any victims.

When the above conditions are not met, prosecutors nevertheless may consider exercising discretion to extend an NPA. In exercising that discretion, prosecutors can consider a set of factors, many of which overlap with the factors described above – including, for example, whether the conduct previously was made public or was known to EDNY and DOJ, whether the disclosure was made voluntarily, whether the individual is prepared to substantially assist the prosecution and investigation, and whether the individual fully and truthfully disclosed all criminal conduct they were aware of and participated in. Other considerations include:

- Whether the individual is outside the US and likely to remain there.
- Whether the information concerns a senior officer or board member of a publicly traded company, or a federal elected, or appointed and confirmed, official.
- Whether the individual is an official or in a leadership position or a position of public or private trust.
- The individual's criminal history and the adequacy of noncriminal sanctions.

## Takeaways

### 1. Understand who is eligible under the EDNY Pilot Program

Individuals and companies should understand the broad scope of potential reporters under this program. Employees ranging from entry-level workers to upper-level managers may be eligible. Notably, CEOs or other employees who exercise “primary control over the operations” of the organization are not eligible. But, in contrast with the [Southern District of New York's similar program](#), EDNY's policy does not expressly deem chief financial officers (CFOs) ineligible.

The EDNY Pilot Program also diverges from the DOJ Corporate Whistleblower Award Pilot Program in an important respect: The DOJ program applies only to potential whistleblowers who were no more than “minimal participants” in the criminal activity, while the EDNY program remains open to those who played a larger role in the misconduct, provided they were not a leader or originator. Thus, while individuals who were more than minimally involved in misconduct may not be eligible for a financial award under DOJ's Corporate Whistleblower Award Pilot Program, they still may be eligible for an NPA under either EDNY's Pilot Program or DOJ's Pilot Program on Voluntary Self-Disclosures.

### 2. Recognize incentives to employees for reporting and develop robust internal controls

The EDNY Pilot Program follows a series of disclosure initiatives announced by DOJ and US Attorney's Offices across the country that incentivize employees to be the first to report corporate wrongdoing. Unlike the DOJ's Corporate Whistleblower Award Pilot Program, EDNY's Pilot Program does not account for whether an employee reported internally before approaching law enforcement. This emphasizes the need for companies to maintain strong controls to detect, investigate and respond to internal complaints before an individual is incentivized to report issues to prosecutors.

Moreover, the discretionary factors identified in the EDNY Pilot Program expressly note that even if the program criteria are not satisfied, an NPA still may be available if the information concerns “criminal conduct by a senior officer and/or a member of the board of directors of a publicly traded company.” Public companies therefore should be aware of the possible race to report that can emerge and should take steps internally to evaluate and address concerns when they arise. (To learn more, read our [April 2024 blog post](#) about how to address workplace complaints.)

### 3. Seek counsel in deciding whether to report

Because the conditions for receiving credit after making a report are complicated, both individuals and corporations should be mindful in deciding whether, when and where to report. Potential reporters should seek the advice of counsel in determining whether disclosure is appropriate based on the particular facts and circumstances of their situations.

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