

Report on Medicare Compliance Volume 33, Number 15. April 22, 2024

DOJ Criminal Division Extends Self-Disclosure Benefits to Individuals

By Nina Youngstrom

The rewards of voluntary self-disclosure are now being offered to individuals—not just the corporations they work for—under a new U.S. Department of Justice (DOJ) pilot program.^[1] In a nutshell, individuals who come forward with information about criminal conduct may escape prosecution—if they meet certain conditions. DOJ said it’s hoping the possibility of a non-prosecution agreement (NPA) will entice people to reveal corporate and white-collar offenses and encourage companies to have effective compliance programs.

The pilot program, which was announced April 15, “is part of a larger push that DOJ is making to try to encourage voluntary self-disclosure,” said Matthew Krueger, a former U.S. attorney. In January 2023, DOJ updated its policy to offer tangible rewards to companies when they reveal their involvement in possible criminal misconduct,^[2] and U.S. attorneys followed suit with their own version.^[3] In another policy unveiled in October, DOJ offers companies that self-disclose criminal misconduct related to mergers and acquisitions an escape hatch from criminal prosecution.^[4]

And now there’s a path for people tainted by criminal activity to benefit from self-disclosure. “If individuals come forward with truthful information and meet other criteria outlined in the policy, they will receive a non-prosecution agreement,” said Jacob Foster, principal assistant chief of DOJ’s criminal division, at the HCCA Compliance Institute April 15. “They have to cooperate and provide substantial assistance, but otherwise culpable individuals inside have a clear path to turn the page.”

There’s a separate but related DOJ program under development that will reward white-collar whistleblowers who aren’t implicated in the crime. If a person helps DOJ find corporate or financial misconduct, they could collect a portion of the resulting forfeiture. DOJ will share details over the coming months.

According to the new voluntary self-disclosure pilot program, prosecutors will offer NPAs to people who reveal original (nonpublic) information about criminal misconduct, including their role in it. NPAs are agreements between DOJ and the wrongdoer to forego bringing a prosecution with the stipulation that the wrongdoer agrees to certain terms, such as paying fines and implementing compliance reforms. If the wrongdoer violates the terms of the NPA, they may be prosecuted.

The individual’s disclosure must be “truthful and complete, meaning it must include all information known to the individual related to any misconduct in which the individual has participated and/or of which the individual is aware, including the complete extent of the individual’s own role in the misconduct, and all matters about which the Department may inquire.” They’re also required to cooperate fully and provide DOJ with “substantial assistance” in its investigation.

Also, the individuals can’t keep any ill-gotten gains and must pay restitution or victim compensation. There are certain disqualifiers: “The reporting individual: (1) has not engaged in criminal conduct involving violence, use of force, threats, substantial patient harm, any sex offense involving fraud, force, or coercion, or relating to a minor, or any offense involving terrorism; (2) is not the Chief Executive Officer (or equivalent) or Chief Financial

Officer (or equivalent) of a public or private company or is not the organizer/leader of the scheme; (3) is not an elected or appointed foreign government official; (4) is not a domestic government official at any level, including any employee of a law enforcement agency; and (5) does not have a previous felony conviction or a conviction of any kind for conduct involving fraud or dishonesty.”

It’s Not Easy to Qualify

Krueger said the context for DOJ’s push to encourage voluntary self-disclosures is a long-term drop in white-collar prosecutions. According to a 2018 report in *Today’s General Counsel*, “Monthly comparisons of the number of defendants charged with white collar crime-related offenses are down 6.3 percent from the same period one year ago, and more than 35 percent from 2013.”^[5]

But in a March 7 speech at the American Bar Association’s National Institute on White Collar Crime, Deputy Attorney General Lisa Monaco cited some of DOJ’s recent successes.^[6] They include the convictions of the CEOs of cryptocurrency platforms FTX and Binance, the CEO and chief operating officer of Theranos, two managing directors of Goldman Sachs and dozens of executives from various industries, including investment firms, health care companies and defense contractors, Monaco said. “This is challenging work. As we investigate more complex schemes, in more corners of the globe, with more evidence to gather and disclose, we’re inevitably devoting more resources to each individual case.”

It won’t be easy for individuals to qualify for the voluntary self-disclosure pilot, said Krueger, with Foley & Lardner LLP. Because an individual must be the original source of information, only one is eligible for the NPA. “It’s a high-stakes decision to come forward,” he noted. “It only gives a benefit to someone who would have criminal exposure. You have to be willing to engage fully with the government and share everything you know.” That’s why he’s not sure the policy will generate many new reports of criminal conduct.

Voluntary self-disclosure is different from being a whistleblower in a False Claims Act lawsuit for various reasons, Krueger said. It’s much broader, applying to conduct of any kind, including securities violations and insider trading, in addition to defrauding the federal government.

The new policy is another reason why compliance professionals must be very attentive when people raise concerns internally, Krueger said. If they’re brushed off, people with knowledge of potential criminal activity may be more likely to report it to the government.

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¹ U.S. Department of Justice, Criminal Division, “The Criminal Division’s Pilot Program on Voluntary Self-Disclosures for Individuals,” April 15, 2024, <https://bit.ly/3UlH0mN>.

² Nina Youngstrom, “In New Policy, DOJ Spells Out Rewards for Self-Disclosure, Reinforces Compliance Programs,” *Report on Medicare Compliance* 32, no. 3 (January 23, 2023), <https://bit.ly/3ZyvI9Z>.

³ U.S. Department of Justice, “United States Attorneys’ Offices Voluntary Self-Disclosure Policy,” memorandum, February 22, 2023, <https://bit.ly/3It2amT>.

⁴ Lisa O. Monaco, “Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions,” U.S. Department of Justice, Office of Public Affairs, speech, October 4, 2023, <https://bit.ly/3thbIxz>.

⁵ *Today’s General Counsel*, “White Collar Prosecutions Down More Than 35 Percent,” August 13, 2018, <https://bit.ly/3U2F4cL>.

⁶ Lisa O. Monaco, “Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar

Association's 39th National Institute on White Collar Crime," U.S. Department of Justice, Office of Public Affairs, speech, March 7, 2024, <https://bit.ly/4c91UaG>.

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