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The Carrot & The Stick: New Voluntary Self-Disclosure Program for Government Contractor Fraud May Increase Disclosures by Individuals

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Government contractors are no stranger to disclosure obligations. Since it went into effect in December 2008, the Federal Acquisition Regulation (FAR) Mandatory Disclosure Rule has been the stick the Government has used to ensure contractors report credible evidence of certain violations. Now, the Government is announcing a carrot to encourage disclosures from individuals, even if not required under the Mandatory Disclosure Rule. Specifically, on April 15, 2024, the Department of Justice (DOJ) announced a Pilot Program entitled "The Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals" aimed at encouraging greater cooperation related to certain types of corporate crime. Among those offenses are government contract fraud; health care fraud, money laundering; as well as bribery, kickbacks and corruption.[1]

The Pilot Program applies to voluntary disclosures made by individuals on or after April 15, 2024, to the DOJ Criminal Division. Utilizing this Pilot Program, individuals may receive a non-prosecution agreements (NPAs) in return for meeting certain criteria, such as accepting responsibility, forfeiting any ill-gotten gains, paying restitution to the victims and cooperation.

The Pilot Program sets forth standardized criteria for cooperation:

1. Original Information. Individuals must provide "non-public information not previously known to the Criminal Division or to any component of the Department of Justice." Prompt reporting (in advance of disclosure by others) is therefore more likely to result in a NPA under the Pilot Program.
2. Voluntary Cooperation. Only disclosures made in the absence of any government investigation, the threat of imminent disclosure, or any reporting requirement will qualify for the Pilot Program. Reports made in response to any government inquiry or request, such as a subpoena, will not be considered "voluntary" under the new policy.
3. Complete and Truthful Disclosure. Participants must disclose "all information known to the individual related to any misconduct in which the individual has participated and/or of which the individual is aware."In other words, the participant cannot provide information on some

misconduct with the hope the DOJ will not discover the participant's full involvement.

4. Full Cooperation and Substantial Assistance. In addition to fully cooperating with the government, participants must provide "substantial assistance." This generally includes providing evidence, such as documents and information, as well as participating in government interviews so that the government may investigate and prosecute those who are either equally or more culpable than the participants themselves.

5. Forfeiture of Ill-Gotten Gains & Restitution. Finally, participants must agree to forfeit or disgorge any profits received as a result of the misconduct and pay restitution to the victims.

Despite the above, the Pilot Program is not available to Chief Executive Officers ("CEO"), Chief Financial Officers ("CFO"), high-level foreign officials, domestic officials or individuals who organized or led the criminal scheme.

The DOJ Pilot Program is not the only federal mechanism that is targeting individuals to voluntarily disclose potential criminal violations. As we have seen already this year, more DOJ offices will encourage individuals to voluntarily disclose potential criminal violations. For example, the U.S. Attorney's Office for the Southern District of New York (SDNY) and Northern District of California (NDCA) announced their own whistleblower pilot programs in February and March 2024 respectively. There are a couple of distinctions when compared to the DOJ Pilot Program, such as the Pilot Program includes federal or domestic bribery or corruption, while the SDNY program includes criminal conduct involving state or local bribery. Nevertheless, the U.S. law enforcement believes there is a benefit to market to individuals when investigating and prosecuting crimes.

Federal Government Contractor Implications

As noted above, federal government contractors already have several mandatory disclosures obligations. For example, under (FAR) Part 52.203-13, government contractors must timely disclose to the relevant agency Office of Inspector General whenever the contractor has "credible evidence" that a principal, employee, agent, or subcontractor has committed a violation of the Civil False Claims Act or a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity. Another mandatory disclosure is when contractors have credible evidence of a significant overpayment by the Government.

The introduction of this Pilot Program now incentivizes individuals to directly report to the Department of Justice a broader range of fraudulent activities. It should be noted that if an individual utilizes this Pilot Program to report a potential issue, and a government investigation begins into an entity, there may be instances where the contractor will receive less cooperation credit (if any) for any subsequent voluntary self-disclosure. FAR Subpart 9.4 (the Subpart dealing

with suspension and debarment from government contracting) establishes additional grounds for suspension and debarment of contractors for knowing failure to timely disclose such violations or knowing failure to timely disclose significant overpayments. **In essence this new Pilot Program introduces a new risk consideration when a contractor becomes aware of potential wrongdoing. Specifically, contractors will need to consider whether an individual within the organization will try and avail themselves of the benefit of the Pilot Program at the contractor's detriment.** Thus, it is now critical more than ever for entities to consider promptly reporting (in advance of disclosure by others) potential fraudulent violations to the Office of Inspector General and t**he DOJ's Criminal Division** to maximize the potential to receive full credit, and flexibility in remediation and comply with any applicable mandatory disclosure requirements.

What Can You Do?

To ensure prompt reporting, companies need to ensure, they:

- Implement an effective whistleblower and internal reporting mechanism;
- Continuously promote their internal hotline and how personnel can ask questions and raise concerns;
- Promote a "speak up" culture to encourage and reward personnel for raising their constructive concerns;
- Conduct internal investigations consistently and thoroughly and follow-up with the internal whistleblower, when applicable, to establish trust with the personnel that the company also wants to resolve compliance concerns;
- Conduct internal audits into high-risk areas or topics that could lead to potential violations;
- Routinely review and update applicable compliance policies and procedures; and
- Train personnel on these policies and how to mitigate any high-risk compliance topics and the ways to report concerns or raise questions.

Kilpatrick's Government Contracting and Government Enforcement & Investigations teams are available to provide assistance and address any further questions or needs.

Footnotes

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[1] It is important to note that the DOJ for years has encouraged corporate voluntary disclosures through pilot programs, like the FCPA-focused pilot program in 2016, as well as the voluntary disclosure policies promulgated by all of the DOJ components and offices. What sets this new Pilot Program apart is the focus on individuals.