A Tale Of 2 Self-Disclosure Policies: How SDNY, DOJ Differ

By **Jason McCullough and Brandon Moss** (March 3, 2026)

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Last year, the U.S. Department of Justice's Criminal Division revised its Corporate Enforcement and Voluntary Self-Disclosure Policy, or CEP, articulating the standards by which companies that voluntarily disclose misconduct may qualify for a declination or other leniency.

DOJ leadership has since highlighted the CEP as evidence that incentive-based enforcement can work.

Last month, U.S. Attorney Jay Clayton previewed the U.S. Attorney's Office for the Southern District of New York's previewed the office's plans for its own voluntary self-disclosure policy. Clayton described the "big carrot" that would be available to companies that make prompt voluntary disclosures to the office and agree to cooperate — specifically, that the office was prepared to move quickly to offer leniency as a reward for companies that moved quickly to self-report criminal conduct.

At the same time, Clayton warned, "If you do not cooperate and there is criminal activity, you're going to pay for not cooperating. ... There's a big carrot, but there's also going to be a big stick."

For those familiar with the Southern District of New York, the stick needed little further description. But with the formal announcement of the office's voluntary corporate self-disclosure program on Feb. 24, Clayton has now put the carrot on the table in a five-page policy.[1]

While it shares many fundamental similarities with the Criminal Division's CEP, the Southern District of New York's framework reflects a distinct enforcement philosophy — one built around speed, sustained cooperation and disclosures, as well as a narrower subject matter focus.

The Gateway Requirement: Disclosure Before an Imminent Threat

Minor nuances aside, the Southern District of New York's program begins with the same premise as the CEP: Disclosure must occur before the company learns of the existence of a government investigation. In practical terms, this is the gateway to eligibility.

Notably, however, under the office's program, a company can satisfy the voluntary disclosure obligation even if the government has initiated an investigation — so long as the government's investigation is not known to the company.

This is a small but important nuance to a company when weighing a potential disclosure, because the company need not guess whether the government is aware of misconduct — the company is still eligible for leniency based on its knowledge.

Both frameworks are designed to reward a true voluntary disclosure, not an obligatory one. For boards confronting credible allegations, the timing question is therefore not tactical but

existential: Wait too long, and the most powerful incentives in either regime may no longer be available.

As is also the case under the CEP, under the Southern District of New York's approach, a company remains eligible for a declination and leniency after a whistleblower's submission to a government agency, so long as the company meets other criteria.

Counsel considering voluntary disclosure should carefully review the specific requirements under each program, as each sets forth slightly different formulations of the gateway requirement.

The Southern District of New York's Core Bargain

The most consequential difference between the two regimes is structural. Like the CEP, the Southern District of New York offers a clear path to a declination when other requirements of the program are met. The distinct difference is that the Southern District of New York will reward prompt and robust disclosure almost immediately after a company makes the disclosure.

Specifically, under the office's program, "companies that self-report can expect ... a conditional declination letter within two to three weeks of" their self-report.

Skeptics may argue that the self-reporting phase itself could drag out over multiple meetings and weeks, e.g., as the office probes the completeness of the initial disclosure.

Regardless, the Southern District of New York's commitment to make a decision in weeks — and not years — is undeniably meaningful, and stands in sharp contrast to the CEP, under which a declination decision typically comes at the end of the cooperation process that may stretch one year or more, once the facts have been fully developed.

It is a novel approach, and one made possible by the Southern District of New York's way of dealing with aggravating factors, as discussed in the next section. But before signing up, companies must know what they're signing up for.

As under the CEP, the Southern District of New York requires companies to commit to a robust cooperation posture, including:

- "[D]isclosing all relevant, non-privileged information known to the company relating to the illegal activity";
- "[P]roviding ... relevant documents, information [and] other materials";
- Making officers, directors, employees and third parties available for interviews, grand jury and trials; and
- Identifying probative information to the government, particularly as it relates to individual culpability.

The Southern District of New York's program goes a significant step further, requiring that, "for a period of three years," companies must "bring to the Office's attention all credible evidence or allegations of criminal conduct by the company or any of its employees that relates to violations of U.S. laws."

With that requirement, Clayton may have created a kind of white collar flywheel. By its own terms, this requirement is not limited by the subject matter of the initial disclosure; any materiality limitation; or location, i.e., the district might not have jurisdiction over the newly reported crime.

This is a significant requirement — one that companies cannot take lightly, as each instance of subsequent self-reported misconduct will itself be evaluated on a case-by-case basis by the office.

A Different and Arguably More Lenient Approach to Aggravating Factors

The Southern District of New York's prompt decision to offer a conditional declination is enabled by its comparatively categorical approach to aggravating factors. The policy states that "the Office will not treat the seriousness of the offense, the pervasiveness of the misconduct within the company, the severity of harm caused by the misconduct, past criminal adjudications, or the involvement of senior leaders as an aggravating or disqualifying circumstance."

This is a significant departure from the CEP, which does not commit the Criminal Division to grant a declination if there is egregious or pervasive conduct, serious harm, or a history of similar misconduct.

The office's approach makes sense as a practical matter. The Southern District of New York encourages companies to come forward and cooperate before the full scope of misconduct is known, and it offers a prompt conditional declination that is subject to the company's ongoing agreement to cooperate. Many of the aggravating factors will not be known at this stage.

At the same time, and unlike the CEP, the office identifies some categorical exclusions that are based on the character of the offense itself, and not based on corporate character. Under the Southern District of New York's program, conduct tied to terrorism, sanctions evasion, foreign corruption, trafficking, cartels, forced labor or violence will disqualify a company from obtaining a declination.

Southern District's Financial Crimes Focus Versus the Criminal Division's Broad Application

Unlike the CEP, which provides a path to leniency for the voluntary disclosure of a broad assortment of federal crimes, the Southern District of New York's program is limited to voluntary disclosures that report fraud and financial misconduct affecting market integrity.

The office's program specifically includes:

- All "fraud in connection with a securities, commodities, or digital asset offering, or the trading or brokering of securities, commodities, or digital assets";
- "[F]alse statements or fraud upon an auditor or federal regulator of financial markets";
- Willful violations of the securities laws; and
- Fraud by a corporate entity or its officers, directors, employees or agents, including frauds involving "all manner of intentionally deceptive conduct," such as "false

statements, forgery, embezzlement, misappropriation, insider trading, spoofing, and market manipulation."

While the scope of the office's program covers much ground, it is considerably narrower than the CEP, which is also applicable to crimes like corruption.

The program reflects the Southern District of New York's institutional identity as the country's premier financial crimes prosecutor. It is also an area where the office often flexes the broadest jurisdiction — when a dollar clears through Manhattan, the jurisdictional reflex can feel Pavlovian.

The Near-Miss Category

Declination is the headline incentive in both regimes. But both programs preserve flexibility to offer other forms of leniency when a declination is unavailable or inappropriate.

Under the CEP, companies that voluntarily self-disclose yet face aggravating circumstances can still qualify for a deferred or nonprosecution agreement — or even earn a declination subject to prosecutorial discretion — when other factors, such as the strength of a company's compliance program, counteract the aggravating circumstances.

Even companies that do not meet the CEP's formal definition of voluntary self-disclosure or the CEP's other requirements can still earn meaningful cooperation credit, with outcomes calibrated to the quality and timeliness of their assistance.

The CEP's near-miss framework is explicit, including a literal decision tree to achieve other forms of leniency where a declination may be off the table.

The Southern District of New York likewise stops short of an all-or-nothing model, but it places a sharper emphasis on the consequences of failing to self-report. The policy states that, where a company has not self-reported, there will be a strong presumption against a declination.

At the same time, the office retains discretion to determine the appropriate resolution — including form, term, compliance obligations and monetary penalty — where a company is ineligible or elects not to disclose.

Under the office's program, there is less structure around the near-miss category.

Conclusion

Both programs reward voluntary disclosure and cooperation, but they offer clarity in different ways.

The Criminal Division provides a structured, tiered framework with calibrated outcomes that may range from declination to a nonprosecution agreement. The Southern District of New York offers a defined and speedy path to conditional declination within a narrower set of cases.

For companies assessing disclosure, the key is not just the promise of leniency, but the transparency of the path — and the obligations required to secure it.

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[1] https://www.justice.gov/usao-sdny/media/1428811/dl?inline.