

DOJ's Much-Anticipated Corporate Whistleblower Awards Pilot Program Is Off to the Races

August 5, 2024

On August 1, 2024, the U.S. Department of Justice (DOJ) released details about its new Corporate Whistleblower Awards Pilot Program. As previewed by Deputy Attorney General Lisa Monaco in March, individuals (not entities) who provide original information to the Department that leads to a civil or criminal forfeiture of \$1,000,000 or more could receive up to 30% of the forfeited amount as an award. Importantly, even if they are not the first in the door to DOJ, whistleblowers can still be considered original information sources if they report to DOJ within 120 days of reporting internally to their employer and can receive an increased award for reporting internally first. DOJ paired that rule with a narrow exception to permit entities to self-report the same information to DOJ within 120 days of receiving an internal complaint to remain eligible for a presumptive declination under DOJ's Corporate Enforcement Policy. While many questions remain about how this three-year Pilot Program will affect employee and company decision-making, companies and DOJ are all but certain to see an increase in whistleblower activity in the "designated program areas," which will accelerate as the first awards are announced. As a corollary to that, entities should review their internal reporting policies and procedures designed to detect and investigate wrongdoing to be in the best position to make the difficult decision about whether to self-report to DOJ.

The Details

DOJ's new program is designed to fill gaps in existing whistleblower programs. Indeed, the Department has gone to great lengths to explain the new program is not intended to supplant current

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whistleblower award programs, such as civil *qui tams* or those administered by other agencies. While whistleblowers under the Pilot Program can report to other agencies, they cannot recover from the new program if they would qualify for another award had they reported there. To avoid doubling up efforts, the Pilot Program only seeks information related to "designated program areas" such as money laundering or fraud by financial institutions, violations related to foreign corruption, domestic corruption by companies, or health care fraud not covered by the False Claims Act.

Much like the U.S. Securities and Exchange Commission's (SEC) whistleblower program, Pilot Program whistleblowers may make anonymous submissions if represented by an attorney. Similarly, the Department will not publicly disclose identifying information unless required in a judicial or administrative proceeding. And DOJ will look to punish companies (including declining cooperation credit) that retaliate against whistleblowers or erect hurdles to employees freely communicating with the Department – though unlike SEC Rule 21F-17(a), DOJ has no whistleblower program-specific rule which creates an independent violation for impeding whistleblowers.

Eligibility

Individuals who provide original information about a qualifying enforcement area that leads to a forfeiture exceeding \$1,000,000 are eligible for an award under the program. To be "original," the information must be independent, non-public, and not previously known to the Department. Information will not be considered original if obtained through privileged communication, if the whistleblower learned of the information because of their compliance or audit responsibilities, or if they work for a firm conducting an internal investigation. Likewise, senior leadership would not qualify if the information was learned through the company's process for identifying and investigating possible misconduct. However, the rules provide narrow exceptions to the above exclusions.

The information must also be voluntary, truthful, and complete. The whistleblower must come forward before any inquiry by the Department or threat of imminent disclosure to the government or public. Whistleblowers must provide complete information, disclose any misconduct they have participated in, and not minimize their role. They must also commit to cooperating with the Department during its investigation and any related criminal, civil, or administrative proceedings, including providing truthful and complete testimony to a grand jury or at trial.

Finally, a whistleblower cannot have "meaningfully participated" in the criminal activity they report. This includes directing, planning, initiating, or knowingly profiting from the misconduct.

Award

Awards are completely discretionary and can be up to 30% of the first \$100 million forfeited and 5% for proceeds between \$100 million and \$500 million. Whistleblowers will not receive a share of any proceeds exceeding \$500 million. Awards are paid from the net proceeds after mandatory transfers, expenses, costs, and victim compensation. Assuming no aggravating circumstances, there is a presumption that the whistleblower will receive 30% of the first \$10 million recovered in forfeiture. The Pilot Program also allows for

payment to multiple whistleblowers in the same matter.

In exercising its award discretion within those limits, DOJ will consider (1) the significance of the information provided by the whistleblower; (2) the degree of assistance the whistleblower provided to the Department's investigation and later actions; and (3) whether the whistleblower or their representative participated in internal compliance or reporting systems. Notably, to both protect internal company reporting channels and encourage whistleblowers to report to DOJ promptly, the potential increase for internal reporting is cabined by the requirement that whistleblowers report to DOJ within 120 days of reporting internally. The Department may also decrease any award based on: (1) an individual's culpability in the misconduct; (2) the whistleblower's managerial relationship to the misconduct; (3) interference with internal compliance or reporting systems; and (4) unreasonable delay in reporting the possible violation.

Takeaways

DOJ's Whistleblower Pilot Program adds another arrow to the Department's quiver in motivating companies to enhance their compliance programs and self-report violations. Below are key points for companies about the program's potential effects and how to mitigate those risks.

- **120-Day Rule:** As with other recent policies, DOJ is holding companies' feet to the fire – encouraging disclosure of wrongdoing within 120 days of receiving an internal complaint to protect the opportunity for a presumptive declination. Given these developments, companies should review their internal whistleblowing procedures to help ensure compliance departments can quickly assess allegations, conduct internal investigations, and advise company leadership so it can decide whether to voluntarily disclose the reported incident. With only 120 days to conduct investigations and reach critical decisions, companies should review their internal investigation manuals to ensure efficiency in engaging counsel where necessary, collecting evidence, interviewing witnesses, and producing reports.
- **No Requirement to Internally Report:** Nothing in DOJ's current policy requires a whistleblower to first report internally before bringing allegations to the Department. Instead, DOJ marginally encouraged internal reporting by considering it as one factor (of many) in potentially increasing a whistleblower award. Given that DOJ is now open for business to whistleblowers, companies need to examine how they handle internal messaging so that whistleblowers feel their concerns are heard and addressed – with the hope that the allure of an award will be offset by the goodwill companies obtain by having a robust internal whistleblower program.
- **Another Whistleblower Enforcement Mechanism?** Like the SEC and Commodity Futures Trading Commission (CFTC), DOJ's Pilot Program threatens to punish companies that impede whistleblowers. While DOJ lacks an affirmative enforcement mechanism in this area (absent criminal-level obstruction), it emphasized that conduct it views as impeding free communication with the Department could result in the denial of cooperation credit. And since the SEC has made it clear that its whistleblower protection regime includes private entities, it remains to be seen whether an increase in whistleblower reports to DOJ under the Pilot Program will result in referrals by DOJ to the SEC for violations of SEC Rule 21F-17 (a), which prevents the impeding of whistleblower communications. Given this increased focus on

protecting whistleblower access across the federal government, now is a good time to review whistleblower policies, codes of conduct, training materials, and confidentiality provisions in employment agreements and elsewhere. Particular attention should be paid to any language that could be deemed to impede communications with the government without appropriate carveouts for communicating with DOJ or other federal agencies, including the SEC and CFTC.

At bottom, we will have to wait and see the full impact of DOJ's new Pilot Program. The exact contours of the program may shift with DOJ promising to continually evaluate its effectiveness and make any needed changes. Even so, companies should use this as an opportunity to invest in compliance to mitigate risk.