

DOJ's New Whistleblower Program Incentivizes Individuals and Corporations to Disclose Wrongdoing

by Nicole Engisch and Andrew Stone

New DOJ Whistleblower Pilot Program

The U.S. Department of Justice (DOJ) just launched the new corporate whistleblower awards pilot program that it previewed this past March.^[1] Effective August 1, 2024, the program aims to help DOJ prosecute the full range of corporate and financial misconduct under DOJ's jurisdiction and to fill in gaps from other whistleblower programs, such as those offered under the False Claims Act *qui tam* program, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the Financial Crimes Enforcement Network. DOJ hopes its whistleblower program will not only incentivize individuals to report corporate criminal wrongdoing but that it will also incentivize corporations to self-disclose their own misconduct and cooperate with DOJ even before whistleblowers come forward. DOJ also hopes the program will push corporations to create effective compliance programs that include provisions that encourage internal reporting of wrongdoing. While the program is a three-year pilot, at the end of the three-year period, DOJ will determine whether to modify or extend the program.

DOJ Criminal Division's Money Laundering and Asset Recovery Section will manage the whistleblower pilot program. DOJ stresses that all awards are discretionary, but it will only allow awards that lead to successful forfeiture exceeding \$1 million in net proceeds. For forfeitures that are \$100 million or less, the whistleblower may receive up to 30% of net proceeds forfeited. For forfeitures that are between \$100 million and \$500 million, the whistleblower may receive up to 5% of net proceeds forfeited. DOJ will make no award on net proceeds forfeited above \$500 million. DOJ may increase awards based on the significance of the whistleblower's information, the extent of the whistleblower's assistance, and whether the whistleblower participated in corporate internal compliance and reporting systems. DOJ may decrease awards based on a whistleblower's minimal role in the criminal activity, their unreasonable delay in reporting wrongdoing, interference with corporate internal compliance and reporting systems, or whether the whistleblower played a management role over those involved in the wrongdoing. In the latter case, DOJ may deny an award altogether.

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- Nicole Engisch
- Andrew Stone

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Companies should act now to evaluate their compliance programs to ensure that they address the new whistleblower reporting incentives and time pressures created by DOJ's corporate whistleblower program. Of note, non-U.S. issuers, *i.e.*, foreign corporations and privately held U.S. companies whose shares are not traded on U.S. exchanges, should be aware that the whistleblower program subjects them to new risks in areas such as foreign corruption that were not previously covered by existing federal whistleblower programs.

Core Requirements

To be eligible for this program, an individual whistleblower must present information that is:

- Original, independently acquired, non-privileged, non-public, and not already known to DOJ or that materially adds to what DOJ knows;
- Related to certain crimes involving financial institutions, including cryptocurrency businesses; foreign or domestic corruption involving corporate misconduct; and health care fraud and crimes involving private and non-public health care benefit programs including private insurance plans; and
- Voluntary, truthful, complete, and supported by the individual's cooperation with DOJ.

The inclusion of awards to whistleblowers for health care fraud involving private insurers represents a potential expansion in DOJ's efforts in this area. Historically, DOJ has targeted fraud involving federal health care programs like Medicare and Medicaid, including through the False Claims Act *qui tam* program. With this new incentive, DOJ may be signaling a new-found focus on alleged health care fraud affecting private insurers.

Additionally, an individual whistleblower will not be eligible for this program if they:

- Are eligible for an award through any other whistleblower program;
- Are a government official or they work for DOJ or a law enforcement agency or are closely related to someone who does;
- Have meaningfully participated in the underlying criminal activity (beyond a minimal role);
- Have made any false or misleading statements to the government in their submission or in related matters; and
- Are an employee whose principal duties involve compliance or audit responsibilities or they work for a firm retained to conduct an internal investigation and the information relates to that retention.

Other Policy Provisions

DOJ's new whistleblower pilot program also provides that:

- DOJ will endeavor to maintain the confidentiality of the whistleblower's report and identity, and whistleblowers may submit information anonymously through an attorney, but DOJ acknowledges it may have to disclose the information to a defendant in a criminal case or otherwise.

- Whistleblowers must go through a DOJ website or email address to complete an intake form and to submit whistleblower reports.

Interrelationship with Corporate Cooperation

The new whistleblower pilot program provides that if a company retaliates against a whistleblower or impedes an individual from whistleblowing to DOJ, DOJ may decline to award the company any cooperation credit and may institute an enforcement action in response to the retaliatory or obstructive conduct.

Additionally, on the same day DOJ announced the new whistleblower pilot program, DOJ also announced an amendment to its Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP).^[2] That amendment provides that a company that voluntarily self-discloses criminal wrongdoing to DOJ within 120 days of receiving an internal whistleblower report may be eligible for a presumption of a declination, provided the company reports to DOJ before DOJ contacts the company. This amendment dovetails with a requirement in the whistleblower pilot program providing that any whistleblower who comes forward with information first reported through a corporate internal compliance and reporting system must also report the information to DOJ within 120 days of their internal report to be eligible for an award.

Final Points and Key Takeaways

Looking ahead, companies should expect an increase in whistleblower reports including in certain areas and for non-U.S. issuers that were not previously covered by existing federal whistleblower programs. Moreover, DOJ's 120-day period for companies to self-report information provided by an internal whistleblower in order to qualify for a presumption of a declination under the CEP intensifies the time pressure on companies to identify and investigate whistleblower reports and to make complicated strategic decisions regarding whether and when to self-report the information learned, perhaps without even a full understanding of the potential misconduct alleged. While this new program is part of DOJ's long-standing policy push to incentivize companies to voluntarily self-report wrongdoing, the decision whether and when to do so is a complex one that should be undertaken only after weighing all appropriate risks and benefits. Companies, however, should take action now to evaluate their compliance programs in light of the increasing need to quickly and proactively respond to internal whistleblower reports. This may include:

- Reviewing compliance programs, including compliance hotlines, internal monitoring and audit functions, and employee training on these programs, to ensure that any potential misconduct is timely identified and addressed;
- Reviewing and updating whistleblower policies, and strengthening communications around corporate commitment to anti-retaliation, among other steps to incentivize whistleblowers to come forward internally;
- Reviewing internal reporting mechanisms to ensure that whistleblower reports are assessed using a risk-based approach and appropriately and timely escalated to Legal and Compliance personnel;
- Reviewing confidentiality, non-disclosure, employment, separation, and other

agreements with employees to ensure that they contain appropriate language advising employees of their ability to report information to government authorities and, conversely, that they do not contain language that may be viewed as discouraging whistleblower reports; and

- Reviewing protocols for reporting of information regarding whistleblower reports to the Board of Directors, as appropriate, to enable the Board to make timely decisions regarding investigating and self-reporting of information to DOJ and other government authorities, if needed.

[1] For more on DOJ's March 2024 announcement of the whistleblower pilot, see [DOJ to Develop New Whistleblower Program to Augment Existing Federal Whistleblower Programs | News & Resources | Dorsey](#). For more on DOJ's April 2024 announcement of its new self-disclosure pilot programs for individuals, see [DOJ's Criminal Division Launches New Self-Disclosure Pilot Program for Individuals | News & Resources | Dorsey](#).

[2] For more on DOJ's other recent amendments to the CEP, see [DOJ Announces Additional Incentives for Corporate Cooperation in Criminal Enforcement | News & Resources | Dorsey](#); [Department of Justice Announces First-Ever Pilot Program on Compensation Incentives and Clawbacks, Revisions to Corporate Guidance Regarding Electronic Communications, and Resource Commitments for Corporate Compliance with Sanctions and Export Control Laws | News & Resources | Dorsey](#); and [Department of Justice Seeks to Reward Due Diligence and Timely Self-Disclosures in Mergers & Acquisitions Through New Safe Harbor Policy | News & Resources | Dorsey](#).