



DOJ Launches Corporate Whistleblower Awards Pilot Program

Posted by Maria Cruz Melendez, Andrew M. Good, and Bora P. Rawcliffe, Skadden, Arps, Slate, Meagher & Flom LLP, on Tuesday, August 13, 2024

Editor's note: Maria Cruz Melendez and Andrew M. Good are Partners and Bora P. Rawcliffe is a Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on their Skadden memorandum.

On August 1, 2024, the Department of Justice's Criminal Division launched the [Corporate Whistleblower Awards Pilot Program](#) (the Program), following up on its [announcement in March 2024 of a plan](#) to offer whistleblower awards.

Under the Program, whistleblowers who **voluntarily provide the Criminal Division with original and truthful information about corporate misconduct** that results in a criminal or civil forfeiture greater than \$1 million are now eligible for a financial award. The award may be up to 30% of the first \$100 million in net proceeds forfeited and up to 5% of any net proceeds forfeited between \$100 million and \$500 million.

Any award is subject to specific eligibility criteria, discussed below, and requires, among other things, a whistleblower's cooperation. The Program complements [another pilot program](#) launched early this year that offers nonprosecution agreements to qualifying individuals who voluntarily disclose information about the same kinds of offenses.

Together, the programs reflect the DOJ's continuing efforts to incentivize individual reporting and thus encourage companies to implement effective compliance programs and make their own disclosures of potential misconduct.

Eligible Information Must Relate to Specified Crimes

The Program is modeled on the highly successful programs at the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC) and Financial Crimes Enforcement Network (FinCEN). To be eligible for an award, a whistleblower, alone or jointly with others, must provide information related to crimes that are **not covered by other whistleblower award programs:**

- Certain crimes involving financial institutions, their insiders or agents. This covers entities from traditional banks to cryptocurrency businesses and schemes involving money laundering, anti-money laundering compliance violations, registration of money-

transmitting businesses, fraud statutes, and fraud against and noncompliance with financial institution regulators.

- Foreign corruption involving misconduct by companies, including violations of the Foreign Corrupt Practices Act, Foreign Extortion Prevention Act and violations of money laundering statutes.
- Domestic corruption involving misconduct by companies, including but not limited to federal, state, territorial, or local elected or appointed officials, and officers or employees of any government department or agency.
- Health care fraud schemes involving private insurance plans not subject to *qui tam* recovery under the False Claims Act.

Whistleblowers Must Meet Certain Requirements

Employees who report misconduct through internal company systems are still eligible to obtain an award if they submit information to the DOJ **within 120 days of the initial internal report** to the company. Whether the whistleblower participated in internal compliance systems by reporting the issue internally first may be a factor that increases an award.

The DOJ will also consider whether the whistleblower unreasonably delayed reporting the criminal violations or attempted to interfere or undermine a company's internal compliance or reporting system (e.g., to prevent or delay detection of the reported criminal violation, or by making materially false or fraudulent statements or deliberately withholding information that hinders a company's efforts to detect, investigate or remediate the reported violations).

However, **awards will not be made** to individuals who "meaningfully participated in," directed, planned, initiated or were convicted of the misconduct they report. The DOJ has noted that individuals who face criminal liability for certain misconduct may be able to report previously undetected issues to other DOJ offices that offer the possibility of nonprosecution agreements, subject to certain conditions.

The DOJ may also deny an award where the whistleblower held a management role over the personnel or offices involved in the misconduct, including a role as corporate executive. In these circumstances, the DOJ might take into account whether the whistleblower had decision-making authority over the misconduct, contributed to failures of the compliance system to detect and prevent the misconduct at issue, created a corporate culture that deprioritized compliance programs and systems, or received information regarding red flags identifying potential misconduct but took no steps to address the issues.

A qualifying whistleblower must be an individual, not a company or another type of entity. Individuals are **not eligible for an award if:**

1. They would be eligible for an award through another U.S. government or statutory whistleblower, *qui tam* or similar program.
2. They are, or were at the time they acquired the original information reported, an official, employee, or contractor of the DOJ or any law enforcement organization; or a spouse, parent, child or sibling of an official, employee or contractor of the DOJ; or they resided in the same household as a DOJ official, employee or contractor.
3. They are, or were at the time they acquired the original information reported, an elected or appointed foreign government official.
4. They knowingly and willfully made false or fraudulent statements or representations, or withheld material or significant information, or used false or fraudulent documents in the whistleblower submissions or DOJ interactions, or otherwise interfered with or obstructed the DOJ's investigation.
5. They acquired the original information from a person who is ineligible under points 2 to 4 above, unless they are providing the DOJ with information about possible violations involving that person.

Information Must Be 'Original'

"Original" information is information that is derived from an individual's **independent knowledge or independent analysis**, and that is nonpublic and not previously known to the DOJ, regardless of whether the DOJ already has an investigation open related to the information provided.

Even if the DOJ already has information about a matter from other sources at the time an individual makes their submission, the DOJ will consider the individual an original source of any information if they provide information that is derived from their independent knowledge or analysis and that materially adds to the information the DOJ already has.

Information will **not be considered "original"** if it was obtained:

- through certain communications that are subject to the attorney-client privilege or criminal means,
- in connection with certain legal representations or hearing, or
- as a result of being an officer, director, trustee, partner or a person retained to perform a compliance role, audit or investigatory function, and the information is learned as part of that role.

Certain exceptions apply, such as where an individual has a reasonable basis to believe that disclosure to the DOJ is necessary to prevent criminal conduct that is likely to harm national security or result in violent crimes.

Other Key Points

The DOJ has noted that even if a report leads to a forfeiture greater than \$1 million, a monetary award still remains in the DOJ's discretion and is not guaranteed. The DOJ may increase award amounts depending on the significance of the information provided and the whistleblower's assistance and cooperation.

The DOJ has also emphasized its commitment to protecting whistleblowers' confidentiality. If the DOJ learns that any person or entity has taken action to prevent a whistleblower from sharing information about potential crimes, the DOJ may open a criminal investigation into obstruction of justice.

Over the next three years, the DOJ will assess the Program on an ongoing basis and determine whether to extend the program or modify it.

Voluntary Self-Disclosure Announcement

In addition to the Program, the DOJ announced on August 1, 2024, that companies that **voluntarily self-report within 120 days** (four months) of receiving an internal whistleblower report may be eligible for a presumption of a declination under the [Corporate Enforcement and Voluntary Self-Disclosure Policy](#).

Companies must make the disclosure before the DOJ reaches out to them but are eligible for potential benefits even if the whistleblower has already submitted information to the DOJ. (For more, see the DOJ's "[Temporary Amendment to the Criminal Division Corporate Enforcement and Voluntary Disclosure Policy](#).”)

Takeaways

As expected, the DOJ continues to take steps to incentivize companies to self-report misconduct by giving:

- Significant monetary incentives to whistleblowers.
- Companies 120 days to report potential criminal issues that come through internal reports.

At the same time, the DOJ has gone to significant lengths in the Program to support companies that have strong compliance programs. For example, as noted above, whistleblowers who are in management positions are unlikely to be eligible for awards if they have ignored red flags, failed to uphold an appropriate compliance culture or contributed to failures of the compliance system.

Additionally, companies still have the ability to gain some leniency if they report within 120 days of receiving an internal whistleblower report, regardless of whether or not a whistleblower has already gone to the DOJ with the information.

Since its inception in 2011, the SEC's whistleblower program has awarded over \$2 billion to whistleblowers. As a result, the DOJ's Program is expected to attract significant attention from potential whistleblowers and their attorneys. Given that the DOJ announced its own award program was in the works several months ago, it is likely that many whistleblowers have already prepared reports for immediate submission.

Companies should anticipate an increase in whistleblower reports internally and to the DOJ (whether or not reported internally first), and should be prepared for any matters currently under internal review but not yet self-reported to potentially be making their way to the DOJ via whistleblowers.

At this stage, companies should:

- Consider how the Program may impact ongoing internal investigations. For example, has the company adequately communicated with the whistleblower, and is the internal investigation progressing in a quick, credible and thorough manner?
- Take steps to review ongoing internal investigations and any new whistleblower reports, and, if necessary, reevaluate any recent decisions not to self-report misconduct. The decision whether to self-report is always fraught with risk, and if it appears that a whistleblower has already reported or will soon report to the DOJ, the factors driving the best course of action become increasingly complex.
- Consider whether internal processes are adequately designed to address whistleblower reports quickly. They should escalate reports appropriately to enable proper investigation and evaluation of potential self-reporting risks and benefits.
- Ensure appropriate whistleblower protections and anti-retaliation policies are in effect and enforced.