

What Cos. Should Note In DOJ's New Whistleblower Pilot

By **Maria Cruz Melendez, James Fredricks and Bora Rawcliffe** (August 7, 2024)

On Aug. 1, the U.S. Department of Justice's Criminal Division launched the Corporate Whistleblower Awards Pilot Program,[1] following up on its March announcement of a plan to offer whistleblower awards.[2]

Under the program, whistleblowers who voluntarily and timely 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 earlier this year that offers nonprosecution agreements to qualifying individuals who voluntarily disclose information about the same kinds of offenses.[3]

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.

Program Criteria

Eligible information must relate to specified crimes.

The program is modeled on the highly successful programs at the U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission and Financial Crimes Enforcement Network.

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 and "pertain to one of the following subject matter areas":

- 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 non-compliance with financial institution regulators";



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- 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"; or
- Healthcare 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 their initial internal report to the company, even if the company has made a disclosure in the meantime.

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, fictitious, or fraudulent statements ... or deliberately with[holding] material or significant information that hinder[s a company's] efforts to detect, investigate, or remediate the reported criminal violations."

However, awards will not be made to individuals who "meaningfully participated in the criminal activity they report[]," including if they "direct[ed], plann[ed], initiate[ed] or knowingly profit[ed] from that ... activity."

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 appears to have also considered the role of management in a company's compliance program. As such, where a whistleblower is a manager or executive with oversight over the employees or offices involved in the misconduct, the DOJ will consider "whether the whistleblower ... had decision-making authority over the misconduct" or ignored red flags, contributed to a compliance failure or had a role in creating a weak compliance culture internally.

The DOJ excludes from eligibility whistleblowers who are "eligible for an award through another U.S. government or statutory whistleblower, qui tam, or similar program."

In addition, the DOJ excludes foreign officials; individuals who obtained the information they

report while they held specific roles, such as an official, employee or contractor of the DOJ or U.S. law enforcement, including any of their family members or people with whom they resided; and individuals who made false or fraudulent statements in their DOJ submission or otherwise interfered with or obstructed the DOJ's investigation.

Lastly, the DOJ will also exclude individuals who obtained the information from any of the above named persons "unless they are providing the [DOJ] with information about possible violations involving that person."^[4]

Information must be original.

"Original" means that the information a whistleblower provides is nonpublic, not previously known to the DOJ, and derived from a whistleblower's "independent knowledge or independent analysis."

The information also needs to be "sufficiently specific, credible, and timely to cause the [DOJ] to open ... [or] reopen an investigation" or look at some different conduct in an ongoing investigation.

A whistleblower may still be eligible for an award if the DOJ has information from other sources as long as the individual's independently known information "materially adds" to what the DOJ already knows.

The DOJ's guidance also explains that the DOJ will not consider information original if it was obtained in the course of certain roles such as those held by attorneys, compliance or internal audit personnel, external advisers and auditors, or directors, officers, trustees or partners of a company who may learn information in connection with the company's internal compliance processes.^[5]

Certain exceptions apply. For example, a whistleblower could still be eligible if the disclosure is "necessary" to prevent violent crime, criminal conduct that may harm national security, or if the whistleblower "has a reasonable basis to believe that" the conduct at issue "will impede an investigation of the misconduct."

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 Aug. 1 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.[6]

Companies must make the disclosure before the DOJ reaches out to them, but they are eligible for potential benefits even if the whistleblower has already submitted information to the DOJ.[7]

Takeaways

As expected, the DOJ continues to take steps to incentivize companies to self-report misconduct by giving (1) whistleblowers significant monetary incentives, and (2) 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, 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 company's 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 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 that its own award program was in the works several months ago, it is likely that many whistleblowers had already prepared reports for immediate submission on the day of the official announcement.

At this stage, companies should do the following:

- Consider how the program may affect 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 whether they come through a hotline, a report to a supervisor or some other way. Effective compliance programs should enable

companies to review, assess and escalate reports appropriately to enable timely and credible investigations and evaluation of potential self-reporting risks and benefits.

- Ensure appropriate whistleblower protections and anti-retaliation policies are in effect and enforced.
- Ensure that separation agreements and similar contracts with employees include an exception to confidentiality clauses that allows government reporting.

Conclusion

The program reflects the DOJ's continuing efforts to incentivize both whistleblowers and companies to report potential misconduct.

Companies should anticipate an increase in whistleblower reports internally and to the DOJ — whether or not they are 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.

With the added 120-day time limits in the program, companies should also expect more time pressure to assess internal reports and decide on self-disclosures.

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[1] <https://www.justice.gov/criminal/media/1362321/dl?inline>.

[2] <https://www.skadden.com/insights/publications/2024/03/doj-announces-plan-to-offer-monetary-rewards>.

[3] <https://www.skadden.com/insights/publications/2024/04/doj-pilot-program-promises-non-prosecution-agreements>.

[4] DOJ Corporate Whistleblower Awards Pilot Program Guidance, August 1, 2024 available at <https://www.justice.gov/criminal/media/1362321/dl?inline>, pp. 2-3.

[5] The DOJ Guidance states that certain exceptions apply such that certain individuals (e.g., officers, directors, trustees, partners of an entity or those in internal compliance and internal audit roles) may still be eligible for an award if "at least 120 days have elapsed since they provided information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or their supervisor, or since they received the information, if they received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or their supervisor was already aware of the information."

[6] <https://www.skadden.com/insights/publications/2023/01/doj-doubles-down>.

[7] For more, see the DOJ's "Temporary Amendment to the Criminal Division Corporate Enforcement and Voluntary Disclosure Policy," <https://www.justice.gov/criminal/media/1362316/dl?inline>.