

DOJ's Corporate Whistleblower Pilot Program Hits the Ground Running: Is Your Compliance Program Ready?

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The U.S. Department of Justice's (DOJ or Department) Corporate Whistleblower Awards Pilot Program (Pilot Program) has hit the ground running, reportedly triggering more than 100 reports since it went live on August 1, 2024. The latest Government initiative creating financial incentives for whistleblowers to come forward with new, actionable information about misconduct, the Pilot Program is designed to fill prior programmatic gaps by targeting information related to "designated program areas" such as money laundering or fraud by financial institutions, violations related to foreign or domestic corruption by companies, and healthcare 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, DOJ will not publicly disclose identifying information unless required in a judicial or administrative proceeding. And DOJ will look to punish companies (including by withholding cooperation credit) that retaliate against whistleblowers or erect hurdles to employees freely communicating with the Department. While DOJ has no whistleblower program-specific rule like SEC Rule 21F-17(a) (which creates an independent violation for impeding whistleblowers), DOJ has stated that hampering whistleblowers could be charged as obstruction of justice in the right circumstances.

Who is a whistleblower?

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Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions

Government Contracts

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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 DOJ. Information will not be considered original if obtained through a 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 DOJ during its investigation and any related criminal, civil, or administrative proceedings, including providing truthful and complete testimony to a grand jury and/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.

Potentially large awards

Awards are completely discretionary and can be up to 30% of the first \$100 million forfeited and 5% for recoveries between \$100 million and \$500 million. 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 DOJ'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 limited 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.

Where do companies go from here?

Given DOJ's new program and the success of the SEC and Commodity Futures Trading Commission (CFTC) programs, Government contractors should review their internal whistleblowing procedures to ensure compliance departments can quickly assess allegations and advise company leadership. With only 120 days after receiving a whistleblower report to conduct investigations and reach critical decisions (most notably: whether to voluntarily disclose and preserve an opportunity for credit under DOJ's Corporate Enforcement and Voluntary Self-Disclosure Policy), companies should review their internal investigation manuals to ensure

efficiency in engaging counsel where necessary, collecting evidence, interviewing witnesses, and producing reports. DOJ leadership recently stated that DOJ is expecting to see an increase in companies voluntarily self-reporting misconduct commensurate with the high number of whistleblower reports already coming in the door.

Additionally, companies should 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. Along those lines, 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 external communications that lack appropriate carveouts for communicating with DOJ or other federal agencies, including the SEC and CFTC.

At bottom, while off to a fast start, we will have to wait and see the full impact of DOJ's 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.