

DOJ Launches Its Corporate Whistleblower Awards Pilot Program

Client Alerts

August 14, 2024

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On August 1, 2024, the Department of Justice (DOJ) officially launched its three-year corporate whistleblower awards pilot program (Whistleblower Program), adding to the growing array of programs designed to incentivize disclosure of corporate wrongdoing. Under the Whistleblower Program, which was first announced by Deputy Attorney General (DAG) Lisa Monaco in March 2024, whistleblowers who voluntarily provide DOJ's Criminal Division with original and truthful information that results in a criminal or civil forfeiture greater than \$1 million may be eligible for a financial award.

DOJ has set forth a range of criteria, described in detail below, that must be met in order for a whistleblower to be eligible for an award under this Whistleblower Program. Like DOJ's Pilot Program on Voluntary Self-Disclosures for Individuals (VSD Program), the Whistleblower Program seeks to motivate individuals to report original information that may help DOJ investigate and prosecute significant corporate misconduct that is not otherwise known to the Department. It also aims to incentivize companies to invest in strong internal reporting channels and to report crime when they learn about it.

As noted in the Department's explanatory materials, the Whistleblower Program is "modeled on successful whistleblower programs" run by other agencies and "seeks original information about corporate misconduct not covered by those programs," namely crimes involving financial institutions, certain forms of foreign and domestic corruption, and health care fraud schemes. In describing the Whistleblower Program, DAG Monaco noted that while other agencies' programs "have proven indispensable, they don't address the full range of corporate and financial misconduct that the Justice Department prosecutes." As such, the Whistleblower Program is intended to "fill the gaps in this patchwork" by "scal[ing] up and broaden[ing] the reach of whistleblower activity."

Below, we provide an overview of DOJ's Whistleblower Program and discuss how it fits into the patchwork of existing federal programs that are designed to incentivize the reporting of wrongdoing. We also highlight key points that companies should bear in mind as these types of programs continue to take root.

Details of DOJ's Corporate Whistleblower Awards Pilot Program

The Whistleblower Program is a three-year pilot under which individuals who provide information related to certain types of corporate or financial misconduct may receive a financial award of up to 30% of the “net assets forfeited” by the corporate wrongdoer. The award is not available to companies or other types of entities; only individuals can be whistleblowers.

There are several requirements that must be met for an individual to be eligible for a whistleblower award:

- **Original Information.** The information provided must be “original”—i.e., it must be non-public, non-privileged, and independently known to the whistleblower or ascertained through their own analysis. Information is not considered original if it was obtained by the individual in the course of certain roles—including officer, director, executive, auditor, accountant, or investigator for the alleged wrongdoer—or if obtained unlawfully.
- **Subject Matter.** To qualify for an award, the information must relate to one of the following areas:
 - Violations by financial institutions, including schemes involving money laundering and fraud against or non-compliance with financial institution regulators;
 - Violations related to foreign corruption and bribery, including violations of the FCPA;
 - Violations related to the payment of bribes or kickbacks to domestic public officials; or
 - Violations related to federal health care offenses not subject to recovery under the False Claims Act.
- **Timing of the Report.** Unlike under DOJ’s VSD Program, whistleblowers do not need to be “first-in-the-door” to receive an award. Rather, per DOJ’s guidance, they may still be eligible if they provide information that “materially adds to” information already known to DOJ. Whistleblowers may also first report the information internally, so long as they bring the information to DOJ within 120 days of the internal report. Importantly, under a temporary amendment to DOJ’s Corporate Enforcement and Voluntary Self-Disclosure Policy announced simultaneously with the Whistleblower Program, companies that self-disclose within 120 days of receiving a whistleblower’s *internal* report remain eligible for a presumption of a declination, even if the whistleblower submits a report to DOJ before the company self-discloses. Likely in response to concerns that whistleblowers might feel incentivized to bypass internal reporting mechanisms and report directly to DOJ, whistleblowers who first report internally may qualify for an increased award.
- **Other Requirements.** The submission of information must be voluntary, the information provided must be truthful and complete, the whistleblower must cooperate with DOJ in its investigation of the information, and the information must lead to criminal or civil forfeiture in excess of \$1 million.^[1]

- **Exclusions.** There are certain scenarios that would render a whistleblower ineligible for an award under the Whistleblower Program.^[2] In particular, whistleblowers are not eligible for an award if they:
 - “Meaningfully participated” in the reported wrongdoing;
 - Provide false information or withhold material information during DOJ’s subsequent investigation;
 - Are, or were at the time they acquired the information, a law enforcement officer or domestic or foreign government official, or are related to or reside in the same household as such an officer or official;
 - Obtain the information from a person who would otherwise be ineligible to receive an award under the Program; or
 - Would be eligible to receive an award through another whistleblower or *qui tam* program if they reported the same information.

DOJ has set forth certain processes for receiving the information and calculating the award:

Whistleblowers report misconduct by filling out an intake form on DOJ’s website and emailing it to DOJ. Whistleblowers who have retained counsel may report anonymously.

Whistleblowers may receive up to 30% of the first \$100 million in “net proceeds forfeited” (the amount forfeited, less victim compensation and costs) and up to 5% of net proceeds forfeited between \$100 million and \$500 million. Whistleblowers may not receive a percentage of proceeds over \$500 million.

DOJ retains sole discretion to issue the award, which is not appealable, and it considers the following when calculating the amount:

- DOJ may increase the award amount depending on the significance of the information provided, the level of assistance provided, and whether the whistleblower first reported the misconduct internally.
- Conversely, DOJ may deny or decrease the award if the whistleblower participated in the criminal activity (in a way that was not so “meaningful” as to prevent them from receiving an award altogether), unreasonably delayed in reporting the criminal activity, interfered with the internal reporting of the criminal activity, or had oversight over the persons involved in the criminal activity. Unless DOJ determines that the award amount should be decreased due to one of these factors, there is a presumption that the whistleblower will receive 30% of the first \$100 million in net proceeds forfeited.

- If there is more than one whistleblower, DOJ determines the percentage award for each individual (and the total percentage cannot be greater than the caps described above).

DOJ has put together detailed information about the Whistleblower Program, including an online repository of explanatory materials.

How DOJ's Whistleblower Program Compares with Other Programs

As noted above, the Whistleblower Program comes on the heels of other whistleblower award efforts introduced by other government agencies and US Attorney's Offices. We offer a brief overview as to how some of these programs compare with each other:

- **SEC.** The SEC's whistleblower program, launched in 2010, incentivizes whistleblowers to report specific, timely, and credible information about possible violations of federal securities laws. DOJ's Whistleblower Program is structured similarly to the SEC's: under both regimes, whistleblowers must provide original information, the information must be provided voluntarily, and the information must lead to a successful enforcement action resulting in sanctions exceeding \$1 million in order for an award to be granted. Moreover, like DOJ's Whistleblower Program, the SEC's program permits, but does not require, whistleblowers to report internally. DOJ's Program covers additional kinds of cases; as Principal Deputy Assistant Attorney General Nicole Argentieri recently remarked, the DOJ Program aims to fill in gaps and, for example, covers FCPA cases that are outside the scope of the SEC's program because they do not involve issuers.
- **SDNY.** In February 2024, the US Attorney's Office for the Southern District of New York (SDNY) launched a Whistleblower Pilot Program designed to encourage voluntary self-disclosure of certain non-violent offenses. It offers the prospect of a non-prosecution agreement to potentially culpable individuals rather than a cash reward. It also excludes information relating to, among other things, FCPA violations and bribery of federal officials, whereas DOJ's Whistleblower and VSD Programs expressly seek information related to such offenses.
- **NDCA.** In March 2024, shortly after the launch of SDNY's whistleblower program, the US Attorney's Office for the Northern District of California (NDCA) launched a Whistleblower Pilot Program that similarly seeks to incentivize disclosure of corporate wrongdoing through the grant of non-prosecution agreements rather than financial compensation. The NDCA program differs from the DOJ and SDNY programs in that it explicitly covers criminal conduct related to "intellectual property theft and related violations." Unlike the SDNY program, the NDCA program does not explicitly exclude any types of conduct.

Key Takeaways for Companies to Consider

The launch of the Whistleblower Program reflects DOJ's (and other agencies') ongoing focus on internal reporting and how to motivate individuals to bring corporate misconduct to the

Department's attention. As these programs continue to develop, there are a number of key points that companies ought to bear in mind:

- The availability of significant financial incentives for individuals to report corporate misconduct directly to DOJ creates risk that those individuals will bypass internal reporting mechanisms, particularly if those mechanisms are not understood or are perceived as ineffective. Although DOJ's Whistleblower Program provides the possibility of increased rewards for whistleblowers who first report internally, the Program does not *require* internal reporting, nor does it specify how significantly internal reporting will factor into the award amount.
- Companies should thus be evaluating—and, where warranted, enhancing—internal reporting processes, as well as internal investigation and whistleblower response processes. This should include assessing and updating internal anti-retaliation policies and related training. Such measures will help companies avoid being caught off-guard by a whistleblower complaint and also help ensure company personnel are well positioned to respond to DOJ should the government follow up on a report.
- Companies should also keep in mind that, in order to qualify for a presumption of a declination, they have only 120 days from receiving an internal report to decide whether to voluntarily self-report to DOJ. Companies will therefore have to act expeditiously to identify credible reports of misconduct and investigate them as appropriate.

Jenner & Block's Investigations, Compliance, and Defense team has extensive experience helping companies navigate whistleblower complaints and respond to government inquiries about misconduct reports, as well as building out internal reporting channels and investigative protocols. We are ready to assist should any of these situations arise, and we are continuing to monitor developments in this area as the government continues to focus on whistleblower programs involving corporate wrongdoing.

Footnotes

[1] A forfeiture is considered successful when DOJ obtains a final order of forfeiture, civil judgment of forfeiture, or administrative declaration of forfeiture, and the forfeited assets are deposited in the Assets Forfeiture Fund.

[2] Individuals who are ineligible for a whistleblower award may sometimes remain eligible for a non-prosecution agreement under DOJ's VSD Program.

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