

DOJ Launches New Whistleblower Incentive Program

DOJ's pilot program aims to fill gaps in existing federal whistleblower programs and incentivize prompt corporate self-disclosure alongside individual whistleblower tips.

Following the March 2024 [announcement](#) of its intention to introduce a new corporate whistleblower incentive program, on August 1, 2024, the Department of Justice (DOJ) launched a three-year pilot program for rewarding whistleblowers who alert DOJ to significant corporate misconduct. DOJ's new program, modeled after whistleblower programs run by the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Financial Crimes Enforcement Network (FinCEN), may generate a significant number of tips about potential misconduct and adds an important new dimension for companies' compliance measures and handling of investigations.

Beyond US issuers and participants in the securities and commodities markets (who are already impacted by the pre-existing SEC and CFTC whistleblower programs), DOJ's new program appears to reach potential whistleblowers at a broad array of businesses, including financial institutions and money transmitting businesses, companies that interact with public officials in the US or around the globe (whether or not they are issuers or regulated businesses in the US), and companies that operate within the healthcare and life sciences industry.

Overview of Program Guidance

DOJ's pilot [program](#) offers whistleblower awards to individuals who voluntarily provide original and truthful information about criminal misconduct related to a DOJ "designated program area" that leads to a criminal forfeiture exceeding \$1 million in forfeited assets, net of victim compensation and forfeiture costs.

The report must occur before DOJ makes a request for information, must not be done in response to a pending or imminent investigation, and must not be covered by a pre-existing duty to report. The information subject to the report must not have been obtained in violation of federal or state law (though it is unclear whether DOJ intends that restriction to extend to information obtained in violation of company policies or contractual provisions). The individual making the report may not have "meaningfully" participated in the underlying conduct — any such involvement must have been "minimal"¹ — and must fully report the conduct, without omitting or falsifying information. The individual must also cooperate in DOJ's investigation, including by providing testimony and evidence. DOJ notes that individuals who are ineligible for whistleblower awards because they were involved in the corporate misconduct at issue may nonetheless seek a non-prosecution agreement through other DOJ initiatives, such as the Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals.

Awards are subject to DOJ's discretion, but may reach up to 30% of the first \$100 million in net proceeds, and up to 5% of any net proceeds between \$100 and \$500 million. Qualifying whistleblowers must be individuals; companies or other entities are not eligible for an award. DOJ's program generally aligns with the programs run by the SEC and CFTC, which provide monetary awards for whistleblower tips leading to successful enforcement actions resulting in monetary sanctions over \$1 million. DOJ has not yet announced whether, like other agencies, it will establish a dedicated office to administer its whistleblower program.

Noteworthy Features of the DOJ Whistleblower Program

Designated Program Areas

To be eligible for an award, the information provided **must** relate to one of four program areas:

1. Violations by financial institutions and abuse of the financial system not covered by the FinCEN whistleblower program, including obstruction or defrauding of financial regulators, failure to register money transmitting businesses, and fraud against US financial institutions
2. Foreign corruption not covered by the SEC whistleblower program, including violations of the Foreign Corrupt Practices Act and the Foreign Extortion Prevention Act that do not involve issuers of US securities, and violations of money laundering statutes
3. Domestic corruption involving bribes and kickbacks by companies to domestic public officials and employees
4. Federal health care offenses not covered by the federal False Claims Act (FCA), including offenses involving private insurers, fraud against patients, and other violations that cannot be pursued via *qui tam* actions²

Individuals who report to DOJ conduct falling under another whistleblower or *qui tam* program are ineligible for a DOJ award. In instances where individuals are unsure whether they qualify for another program, DOJ encourages them to submit whistleblower tips to both.

120-Day Reporting Window for Individuals and Companies

While individuals are not required to report misconduct internally in order to be eligible for an award, internal reporting is a factor that may increase the size of an award. Conversely, interfering with a company's internal compliance procedures — including by withholding information necessary to investigate the misconduct — may be a basis to decrease the size of an award.

To maintain award eligibility, an individual who first reports potential misconduct through internal channels **must** also report it to DOJ within 120 days of the initial report. The requirement for individual reporting to DOJ applies even if the company also self-reports. In describing the new program, DOJ asserts that it is authorized to communicate with the reporting individual directly, without seeking the consent of the corporate entity's counsel.

The same 120-day window applies to corporate self-disclosure triggered by an internal whistleblower report. In conjunction with the announcement of its corporate whistleblower program, DOJ issued a temporary [amendment](#) to its Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP). The amendment allows companies receiving internal whistleblower tips to qualify for DOJ's presumption of a declination if the company (1) self-reports the conduct to DOJ within 120 days of receiving the

whistleblower's submission, and (2) meets the other CEP requirements for a declination (including cooperation and remediation). Companies may be eligible for a declination even if the whistleblower reports to DOJ before the company does, but the company must report to DOJ before DOJ reaches out to the company (which could mean the company in fact has less than 120 days to report).

In assessing whether the company meets declination requirements under the CEP, DOJ will consider, among other things, the promptness of self-disclosure and the level of diligence applied by the company to investigate the whistleblower's report.

Reports by Individuals in Special Relationship With the Company

Reports by individuals who learned of misconduct as a result of their leadership position within the company, as a result of the company's internal review (including because they were retained to assist in such a review), or through a communication protected by the attorney-client privilege, are ineligible for whistleblower awards. Such individuals may include officers, directors, and partners of the entity; employees responsible for internal compliance and audit; independent public accountants; and counsel.

That general rule allows for several exceptions. The above restrictions do not apply to individuals who have a reasonable basis to believe that disclosure is necessary to prevent criminal conduct, or that the individual or entity subject to the report will impede an investigation. Moreover, individuals who learn of potential misconduct due to their leadership position or compliance function at the company may nonetheless make a qualifying report to DOJ if 120 days have elapsed since the company's audit committee, chief legal officer, chief compliance officer, or the individual's supervisor learned of the potential misconduct.

Warning Against Retaliation and "Chilling" Communications With DOJ

As part of its "additional guidance for public awareness" on the program, DOJ warns that for any entities or persons who retaliate against whistleblowers or "take any action to impede an individual from communicating directly with the Department about a possible criminal violation," DOJ may consider such action in assessing culpability, cooperation credit, and corporate compliance. DOJ states that it could also bring a separate enforcement action for obstruction or retaliation.

DOJ's guidance echoes Section 21(F)(h)(1) of the Exchange Act and CFTC Rule 165.20, which prohibit retaliation, as well as SEC Rule 21F-17(a) and CFTC Rule 165.19(b), which prohibit actions that impede individuals from communicating directly with those agencies about possible violations of the securities laws or the Commodity Exchange Act. Actions that may impede communications with government agencies include "enforcing, or threatening to enforce, a confidentiality agreement (...) with respect to such communications." The SEC and CFTC have both announced enforcement actions under their "anti-chilling" rules in the past year. DOJ's inclusion of this provision in its program guidance signals the issue may become an area of focus for DOJ as well.

Overlap With Other Whistleblower Programs

DOJ has stated that individuals who report conduct falling under another whistleblower or *qui tam* program are ineligible for a DOJ award. It remains to be seen how and where DOJ will draw those boundaries. As one example, at least one of DOJ's designated program areas — foreign corruption that does not involve US issuers — may overlap with enforcement efforts by another agency, the CFTC, which in recent years has [expanded its enforcement mandate](#) to foreign bribery and corruption relating to the commodities markets. Indeed, a number of matters identified by DOJ as falling within this program area

— cases of bribery involving international commodity trading companies — have also involved parallel CFTC actions.³

Practical Implications

While the practical impact of DOJ's new whistleblower program may take time to emerge, the program guidance issued on August 1 suggests at least the following key initial considerations:

1. Whistleblowing Will Likely Increase

Whistleblowing tips to DOJ are likely to increase as a result of the announced monetary incentives to whistleblowers — but not at the expense of whistleblowing tips to other federal agencies. In view of DOJ's guidance that misconduct falling under other agencies' purview is ineligible for a DOJ award (regardless of whether it was actually reported to another agency) and that when "unsure" whether to report to DOJ or another agency, whistleblowers should report to both, corporate whistleblowers will likely be incentivized to submit the same whistleblowing tips to multiple agencies in order to preserve eligibility for an award. That, in turn, may require companies to report to and engage with multiple regulators regarding the same conduct, particularly where jurisdictional lines may overlap or be unclear.

2. Whistleblowing Will Address New Areas of Interest

DOJ's guidance pertains to a distinct set of program areas, which could expand the government's enforcement activity in certain industries. For example, the government has long used the FCA to solicit and reward whistleblowers who come forward with information about government healthcare benefit programs. DOJ's guidance clarifies the expansion of its focus to include federal healthcare offenses not covered by the FCA, including offenses involving private insurers, fraud against patients, and other violations. This expansion carries significant ramifications for companies involved in the industry and the legal and compliance functions that support those businesses.

3. Heightened Importance of Internal Investigations

DOJ's guidance highlights the importance of prompt, robust, and appropriately conducted internal investigations. Given that internal reporting may lead to a higher award, corporate whistleblowers are incentivized to report any potential misconduct internally. Under DOJ's amendment to the CEP, that triggers a maximum 120-day window for the company to investigate the allegations, consider remedial measures, and (if warranted) self-report to DOJ — all while knowing that the whistleblower is required to report the conduct to DOJ within the same 120 days and that DOJ could contact the company at any time. Paired with DOJ's consideration of the diligence of any investigation and the promptness of self-reporting, the up-to-120-day deadline will put significant pressure on companies to investigate whistleblower allegations both quickly and thoroughly, and make decisions about whether and what to self-report.

Companies should also be cognizant that their internal processes for investigating whistleblower allegations may be subject to heightened scrutiny. DOJ's whistleblower intake form asks the whistleblower to state, among other information (1) whether and when the alleged misconduct was reported internally, to whom it was reported, and the outcome of that report; (2) whether anyone has taken any steps to prevent the whistleblower from reporting the misconduct; and (3) whether any retaliation has occurred.⁴ DOJ's emphasis on chilling and retaliation highlights the importance of being thoughtful about communications with whistleblowers during the course of an investigation.

4. Increased Risk of Disclosure of Privileged Communications

Additional consideration should also be given to protecting attorney-client privilege in the course of investigating whistleblower reports. Whistleblowers are not prohibited from submitting privileged information to DOJ; instead, DOJ's intake form asks them to specifically identify such information and state whether they believe an exception applies (whether or not the individual has expertise or authority to make such privilege determinations). DOJ's guidance does not address the protection of attorney work product, nor does it specify whether it will set up a filter team to screen privileged information submitted by whistleblowers. Those factors, alongside DOJ's authority to communicate directly with whistleblowers without seeking consent from company counsel, suggest companies now face a heightened risk that privileged communications arising in the context of an internal investigation may be disclosed to DOJ. Companies should therefore give careful thought to their communications with whistleblowers, including about the outcome of an investigation.

Now that DOJ has published its program guidance, companies may benefit from assessing their corporate compliance policies to consider, among other things, the timing considerations outlined above and best practices for handling whistleblowers tips.

Latham & Watkins' experienced white collar professionals stand ready to assist clients in evaluating their compliance and whistleblowing programs, assessing potential disclosable conduct, and crafting the best strategy for self-disclosure or responding to inquiries from DOJ and other agencies.

You Might Also Be Interested In

[DOJ Announces New Whistleblower Program](#)

[Navigating New DOJ and SEC Enforcement Norms — Cooperation, Self-Reporting, and Advocacy in Focus](#)

[DOJ Announces Safe Harbor Policy for Voluntary Self-Disclosure of Criminal Misconduct Uncovered in M&A](#)

[US Sanctions and Export Control Agencies Issue “Joint Compliance Note” on Voluntary Self-Disclosure Policies](#)

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Endnotes

¹ Frequently Asked Questions, <https://www.justice.gov/criminal/media/1362331/dl?inline>.

² Factsheet, Corporate Whistleblower Awards Pilot Program, <https://www.justice.gov/criminal/media/1362331/dl?inline>.

³ <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-new>.

⁴ <https://www.justice.gov/criminal/media/1362356/dl?inline>.