

DOJ's New Whistleblower Tip Line Is Open and Companies Should Be Prepared

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The Department of Justice has formally launched a three-year pilot of its Corporate Whistleblower Awards Program (Pilot Program), which is likely to increase the number of government investigations of corporate wrongdoing—and related recoveries—in key areas over the course of the next several years. Under the Pilot Program, whistleblowers who provide DOJ's Criminal Division with truthful information about corporate misconduct may be eligible for significant monetary awards.^[1] In back-to-back statements, Deputy Attorney General Lisa Monaco and Principal Deputy Assistant Attorney Nicole Argentieri announced the launch of the Pilot Program and filled in some of the blanks from prior announcements about the Pilot Program.^[2]

As we discussed in our March 14, 2024, article, *Come See Us Before We See You – DOJ Announces New Whistleblower Program Intensifying Corporate Enforcement Efforts*, on March 7, 2024, Deputy Attorney General Monaco announced a “90-day sprint” to implement a whistleblower pilot program for individuals who help DOJ discover significant corporate or financial misconduct, otherwise unknown to DOJ.^[3] The stated goal was to fill the gaps in the “patchwork quilt” of existing government whistleblower programs.

With the official launch of the Pilot Program on August 1, 2024, DOJ announced to potential whistleblowers that DOJ's “tip line is open, so if you see something, say something.”^[4] This announcement sends a strong message to companies that DOJ is stepping up enforcement in key focus areas and is enlisting the help of whistleblowers to do so. Accordingly, companies should expect a rise in whistleblower submissions and resulting government investigations and should be prepared with robust compliance programs and procedures for promptly addressing allegations of wrongdoing. Companies should also have procedures in place to make significant self-disclosure and cooperation decisions, after thorough consideration of the risks and benefits, within the new self-disclosure deadline announced by DOJ when the Pilot Program was launched. As Principal Deputy Assistant Attorney General Argentieri put it, “Call us before we call you.”^[5]

THE PILOT PROGRAM'S FOCUS

The Pilot Program expands the prospect of whistleblower recoveries to the following four areas of corporate wrongdoing, each of which represents what was noted by DOJ as a gap in the government's existing “patchwork” of whistleblower programs and a “priority for Criminal Division prosecutors.”^[6]

- Crimes involving financial institutions (including cryptocurrency businesses), such as money laundering, fraud, and fraud against or noncompliance with regulators, among others;
- Foreign corruption that would not be covered by the SEC's existing whistleblower program;
- Reports of domestic corruption—specifically the payment of bribes or kickbacks to domestic public officials (for example, to win government contracts); and
- Certain healthcare offenses and related crimes, including those involving (i) private or other non-public healthcare benefit programs; (ii) fraud against patients, investors, and other nongovernmental entities where the overwhelming majority of the loss was to patients, investors, and nongovernmental entities; and (iii) other healthcare-related federal violations not covered by the False Claims Act.

With respect to the Pilot Program's focus on healthcare fraud involving private or non-public programs, Principal Deputy Assistant Attorney General Argentieri noted that fraud on federal healthcare benefit programs is already covered by the Civil Division's "highly successful" civil *qui tam* program, a reference to the program under the False Claims Act.^[7] She also stated that DOJ has been actively pursuing cases in the first two areas for years but intended to expand corporate enforcement efforts in the third and fourth areas.^[8]

POTENTIAL WHISTLEBLOWER AWARDS UNDER THE PILOT PROGRAM

Under the Pilot Program, whistleblowers can be awarded 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.^[9] No additional award is available beyond the \$500 million in net proceeds forfeited. There is a presumption that DOJ will award the maximum 30% of the first \$10 million in net proceeds forfeited, assuming the whistleblower is not subject to other considerations that may decrease the award.

Notably, while DOJ stated its intention to incentivize those with information to come forward, DOJ took pains to make clear that awards are entirely discretionary, and an award is not guaranteed. Further, awards are paid in priority order, after mitigation to owners and lienholders with valid interests in any forfeited property and compensation to financially harmed nongovernmental victims of the underlying schemes.

Award amounts may also be impacted positively or negatively based on certain factors. For example, the significance of the information provided by the whistleblower and the degree to which the information supported successful criminal resolutions and related criminal or civil forfeiture actions will be considered in determining the appropriate award and may lead to an increase in the award amount. On the other hand, unreasonable delay in reporting the violations or interference with internal compliance and reporting systems may lead to a decrease in the award amount.

PILOT PROGRAM ELIGIBILITY REQUIREMENTS

To qualify for an award, the whistleblower's submission must meet several requirements. The submission must be voluntary, truthful, and complete. The whistleblower must also submit "original information," which DOJ defines in great detail. In short, original information is information that (i) is derived from the individual's independent knowledge or independent analysis; (ii) is nonpublic and previously not known to DOJ; or (iii) materially adds to information DOJ already possesses. Finally, the submission must lead to a successful forfeiture exceeding \$1 million in net proceeds.

There are also several requirements related to the whistleblower. Among other things, the whistleblower must be an individual, not a company or other type of entity. The whistleblower must not be eligible for an award through another government or statutory whistleblower, *qui tam*, or similar program. The whistleblower must not have meaningfully participated in the reported activity, including directly planning, initiating, or knowingly profiting from it, although whistleblowers who played a minimal role may still be eligible for an award. The whistleblower must cooperate with the investigation, must not withhold material information or make false statements, and must make the submission after the launch of the Pilot Program.

NEW OPPORTUNITY TO EARN CORPORATE SELF-DISCLOSURE CREDIT

One critical aspect of the Pilot Program is DOJ's accompanying temporary amendment to the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy, which gives companies a new (but limited) opportunity to earn credit for self-reporting misconduct *even after a whistleblower's report to DOJ*.^[10]

The Corporate Enforcement and Voluntary Self-Disclosure Policy allows a company to earn a presumption of declination in a criminal matter, provided it meets certain criteria, including voluntary self-disclosure of misconduct.^[11] Before the temporary amendment, DOJ required such self-disclosures to occur "prior to an imminent threat of disclosure or government investigation," an impossible standard to meet in the wake of a whistleblower allegation.

Pursuant to the temporary amendment, however, if a whistleblower makes a report to both the company and DOJ, the company can still qualify for a presumption of declination, provided the company self-reports the conduct to DOJ within 120 days of receiving the whistleblower's report. The Company must also meet other existing requirements, including remediation and full cooperation, to be eligible for the presumption of declination.

On the other side of this coin, a whistleblower who initially reports through the company's internal reporting procedures is still eligible for an award even if the company also reports the information to DOJ. However, the whistleblower must make a report to DOJ within 120 days of making their report to the company.

OPEN QUESTIONS

Although the launch of the Pilot Program has answered many of the questions raised by Monaco's announcement in March 2024, some questions remain. For example, will the fact that awards are entirely discretionary have a material impact on the number of reports DOJ receives? How will the caps on awards for forfeitures that exceed \$500 million and the restrictions on those who participated in the misconduct limit potential whistleblowers' willingness to come forward? For questions like these, DOJ has left the door open to update the Pilot Program's guidelines, noting that DOJ "will be regularly assessing whether and what refinements may be needed."^[12]

In addition, the 120-day period under the temporary amendment raises a question of whether, as a result of this tight deadline, companies may feel pressured to report potential misconduct before they have had a chance to fully investigate and consider the implications of the alleged wrongdoing and the risks and benefits of self-disclosure and cooperation. However, it is important to note that the Corporate Enforcement and Voluntary Self-Disclosure Policy has long encouraged "self-disclosure of potential wrongdoing at the earliest possible time, even when a company has not yet completed an internal investigation." Thus, companies hoping to earn a presumption of declination should already be considering reporting misconduct as soon as possible, and the 120-day deadline arguably only provides a more concrete timeline for companies to consider. Nonetheless, companies should have robust procedures in place to be able to promptly remediate and make significant self-disclosure and cooperation decisions, including thorough consideration of the attendant risks and benefits, before the 120-day deadline.

KEY TAKEAWAYS

- DOJ's launch of its Corporate Whistleblower Awards Program, which creates significant new incentives for whistleblowers to report corporate wrongdoing, signals that DOJ is focused on increasing its corporate enforcement efforts—especially in the four areas covered by the Program—and wants to enlist the help of whistleblowers to do so. Accordingly, companies should expect an increase in whistleblower submissions and resulting DOJ investigations in each of the four identified focus areas and should be prepared with robust compliance programs and procedures for promptly addressing allegations of wrongdoing.
- The Pilot Program expands the prospect of whistleblower recoveries to four new areas of corporate wrongdoing that are not covered by existing whistleblower programs: certain crimes involving financial institutions, including cryptocurrency businesses; foreign corruption; domestic corruption; and certain healthcare offenses and related crimes against and involving loss to private, non-public, and nongovernmental programs, entities, and individuals.
- DOJ's temporary amendment to the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy gives companies a new opportunity to earn self-disclosure credit even after a whistleblower reports misconduct to DOJ, provided the company self-reports the alleged wrongdoing to DOJ within 120 days of receiving the whistleblower's report and meets existing cooperation and remediation requirements. Companies

must therefore be prepared to make significant self-disclosure and cooperation decisions, considering all the risks and benefits, within the stated deadline, as well as implement prompt remediation.

If you have any questions regarding this or related subjects or if you need assistance, please contact Suzanne Jaffe Bloom (Partner and Co-Chair, Government Investigations, Enforcement, and Compliance Practice) or Patrick Doerr (Associate, Government Investigations, Enforcement, and Compliance Practice) or your Winston & Strawn relationship attorney. You can also visit our Government Investigations, Enforcement, and Compliance Practice webpage for more information on this and related subjects.

[1] DOJ, *Criminal Division Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program>.

[2] DOJ, *Deputy Attorney General Lisa Monaco Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-new-corporate-whistleblower-awards>; DOJ, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/opa/speech/principal-deputy-attorney-general-nicole-m-argentieri-delivers-remarks-new>.

[3] Winston & Strawn, *Come See Us Before We See You – DOJ Announces New Whistleblower Program Intensifying Corporate Enforcement Efforts* (Mar. 14, 2024), <https://www.winston.com/en/blogs-and-podcasts/investigations-enforcement-and-compliance-alerts/come-see-us-before-we-come-see-you-doj-announces-new-whistleblower-program-intensifying-corporate-enforcement-efforts>.

[4] DOJ, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/opa/speech/principal-deputy-attorney-general-nicole-m-argentieri-delivers-remarks-new>.

[5] *Id.*

[6] *Id.*; see also DOJ, *Department of Justice Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/media/1362321/dl?inline>.

[7] DOJ, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/opa/speech/principal-deputy-attorney-general-nicole-m-argentieri-delivers-remarks-new>.

[8] *Id.*

[9] DOJ, *Department of Justice Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/media/1362321/dl?inline>.

[10] See DOJ, *Temporary Amendment to the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy*, <https://www.justice.gov/criminal/media/1362316/dl?inline>.

[11] See U.S. Dep't of Just., Just. Manual § 9-47.120(1) (Mar. 2024), <https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl>.

[12] DOJ, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/opa/speech/principal-deputy-attorney-general-nicole-m-argentieri-delivers-remarks-new>; see also DOJ, *Department of Justice Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), <https://www.justice.gov/media/1362321/dl?inline> (“If the Department modifies any aspect of the pilot program during this three-year period . . . the Department will publish those updates on its website and will evaluate whether an individual qualifies for an award and the size of the award by applying the program policies in effect on the date of submission.”).

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