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DOJ Whistleblower Programs: How We Got Here

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While law enforcement uses a variety of tools to identify and disrupt fraud and public corruption schemes, no tool is more important than identifying people with knowledge of such schemes and incentivizing them to report on them. For many years, law enforcement did not make any concerted effort to convince sources to come forward, largely depending instead on good Samaritans who reported improper conduct because it was the right thing to do or individuals who were arrested for a crime reporting other crimes of which they were aware to try to gain more favorable treatment.

Good Samaritans and arrested individuals trying to decrease their own criminal exposure have been, and will continue to be, an important source of information. But relying on such sources is necessarily a reactive strategy: The government waits to see who comes forward and simply takes what comes to its doorstep.

Whistleblower programs are different. They seek to proactively incentivize people with knowledge of particular kinds of crimes to come forward. While such programs have existed at the DOJ for over 30 years, there has been a proliferation of these programs over the past five years, including a whistleblower program announced in September 2024. (Matt Graves, one of the two authors of this article, announced that program in his capacity as the then-US attorney for the District of Columbia.)

Collectively, these programs have fundamentally altered not just the incentives that individuals who have knowledge of wrongdoing have for coming forward, but they have also fundamentally altered the analysis that business organizations must undertake when deciding whether they should voluntarily self-disclose wrongdoing of which they are aware. To understand this paradigm shift and what leaders within the Department of Justice were trying to accomplish in announcing these programs, it is first necessary to understand the chronology.

ANTITRUST DIVISION'S CORPORATE LENIENCY POLICY: THE FIRST, AND FOR MANY YEARS, ONLY WHISTLEBLOWER-LIKE PROGRAM

The DOJ's Antitrust Division is recognized for establishing one of the earliest and most well-known programs for incentivizing those with knowledge of wrongdoing to come forward, a corporate leniency policy whose terms were

fleshed out in the 1990s. To be sure, there are important distinctions between programs directed at encouraging individuals to report wrongdoing and those directed at business organizations, and, colloquially speaking, one would not typically refer to a business organization as a "whistleblower." But both kinds of programs have at their core the goal of getting those with knowledge of wrongdoing to report it — that is, to blow the whistle.

To take advantage of the corporate leniency policy, an entity typically contacts the division to begin an application. To be eligible for leniency, the division requires that the company self-report promptly after discovering wrongful conduct. Significantly, only the first company involved in the alleged wrongful conduct that reports the conduct can benefit from it. To qualify for leniency, the company must also undertake remedial measures redressing harm and improving its internal compliance program.

By contacting the division, the company is formally requesting a "marker," which reserves the opportunity for leniency — that is, non-prosecution — if the reporting company satisfies all the requirements of the program. This program is often colloquially referred to as the first-on-the-bus policy and assuredly incentivizes business organizations that have allegedly participated in such crimes to self-report them lest some other organization beat them to the bus.

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