Clients&FriendsMemo

DOJ Announces Corporate Whistleblower Awards Pilot Program

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On August 1, 2024, the U.S. Department of Justice ("DOJ") officially unveiled its Corporate Whistleblower Awards Pilot Program (the "Program"). The three-year pilot program aims to broaden the range of corporate misconduct that may lead to rewards for individuals who report to the government. Like other government whistleblower rewards programs, the Program is designed to incentivize both the reporting of corporate criminal wrongdoing by individuals seeking monetary rewards and the voluntary disclosure of information by companies seeking to maximize the potential benefits of voluntary disclosure and cooperation under the DOJ's Corporate Enforcement Policy ("CEP").

In order to be eligible for an award under the Program, an individual must provide the DOJ with original, truthful information in writing about criminal misconduct relating to one or more designated program areas that leads to a criminal or civil forfeiture exceeding $1 million in connection with a successful prosecution, corporate resolution, or forfeiture action. "Original information" is defined in the DOJ's Program guidance and must be, among other criteria, information derived from an individual's independent knowledge or analysis that is non-public and not previously known to the DOJ.

Consistent with prior statements by DOJ officials, the Program is intended to fill gaps in the coverage of existing government rewards programs, including the DOJ's *qui tam* program and the whistleblower rewards programs of the SEC, CFTC, and FinCEN. The Program expressly states that an individual will not be eligible for an award under the Program if they would be eligible under another government program. The Program is also expressly limited to four subject areas: (i) violations by financial institutions or their agents, including violations related to money laundering, money transmitting businesses, fraud, and non-compliance with financial institution regulators; (ii) violations related to foreign corruption, including the Foreign Corrupt Practices Act and the Federal Extortion Prevention Act; (iii) violations related to domestic bribery; and (iv) federal healthcare offenses related to private health care benefit programs, fraud against patients, investors, or other non-governmental entities in the health care industry, and other health care-related offenses not covered by the Federal False Claims Act.

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The Program includes certain limitations on award eligibility and amounts that are not present in other, existing whistleblower programs.

> *First*, unlike the SEC whistleblower program, where the SEC must pay a whistleblower reward where the submission of qualifying information leads to a successful enforcement action, the DOJ Program expressly states that "[a]wards are entirely discretionary and an award is not guaranteed."
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> *Second*, under the DOJ Program, an individual is not eligible for an award if they "meaningfully participated in the criminal activity they reported, including by directing, planning, initiating, or knowingly profiting from that criminal activity." The Program contains an exception to this under which an individual who had only a "minimal role" in the reported criminal activity may, at the DOJ's discretion, be eligible for an award.
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> *Third*, the DOJ Program has guard rails designed to limit or eliminate the types of astronomical awards that have been made in other whistleblower programs. The DOJ may award up to 30% of the first $100 million forfeited; up to 5% of forfeiture amounts between $100 million and $500 million; and nothing based on forfeiture amounts over $500 million. This means, for example, that if the amount forfeited is $500 million, the whistleblower reward would be capped at $50 million ($30 million on the first $100 million forfeited and $20 million, or 5%, on the amount between $100 million and $500 million)—still an extraordinary sum but far short of whistleblower awards in the hundreds of millions of dollars as has happened under the SEC's program and the DOJ's *qui tam* program. Under the DOJ Program, assuming none of the enumerated factors which may decrease an award are present, there is a presumption that the DOJ will award the maximum 30% on the first $10 million forfeited.

In an apparent attempt to address criticisms that government whistleblower rewards programs disincentivize internal reporting, thereby undermining corporate compliance programs, the DOJ Program permits a whistleblower to report internally first and still be eligible for an award, provided the whistleblower provides the information to the DOJ within 120 days of reporting internally. This is true even if the corporation first reports the individual's information, or the results of an investigation undertaken in response to the individual's information, to the DOJ. Relatedly, the DOJ amended the CEP to enable a company to remain eligible for the benefits of voluntary self-disclosure under the CEP when it self-discloses a whistleblower's allegations to the DOJ within 120 days, even if the whistleblower already has disclosed the information to the DOJ.

Finally, the DOJ Program contains an express warning to companies about taking actions to "impede" an individual from communicating with the DOJ about possible criminal violations in the enumerated program areas, including "enforcing, or threatening to enforce, a confidentiality

agreement . . . .” The DOJ Program guidance states that the DOJ may consider such actions in assessing the corporation’s cooperation credit and compliance program and the entity’s or individual’s culpability, “including for obstruction.” This warning is in line with recent SEC enforcement actions against companies for including confidentiality provisions in separation or employment agreements that the SEC viewed as intended to prevent or chill communications by the current or former employee with the SEC about potential violations of securities laws.

Key Takeaways

The DOJ Program, expected since its framework was announced by the DOJ in March 2024, is yet another development in an evolving landscape of corporate enforcement that seeks to incentivize and reward the voluntary disclosure of corporate wrongdoing to enforcement authorities. While the merits of this approach from a policy perspective may be debatable, their impact is clear: employees are more likely than ever to report misconduct to government enforcers. In light of this, there are a number of steps that companies should consider in order to adapt:

- It is more important than ever that companies maintain and publicize internal hotlines and other reporting channels. Although companies cannot compete with government programs offering substantial monetary rewards, they can make internal whistleblowing easy, top-of-mind, and, in the eyes of a potential reporter, effective. This may include ensuring that a whistleblower is made aware that the company has taken a report seriously and investigated and remediated as necessary. As has been said, “whistleblowers are not born, they are made.” Companies should do whatever they can to make employees not feel the need to report externally.
- Similarly, companies would be well-served to redouble their efforts to establish and communicate to employees more generally their culture of compliance, where there is a genuine desire and effort to conduct business in an ethical and compliant manner and employee feedback, including the reporting of potential misconduct, is valued and respected.
- Consistent with DOJ compliance guidance, companies should seek to proactively identify and address potential misconduct, including through risk assessments, internal audits, investigations, and remedial measures.
- Companies should be mindful of the potential impact of whistleblower rewards programs in assessing whether to make a voluntary disclosure of alleged misconduct to the DOJ and/or SEC. While it remains true, in our view, that most alleged corporate misconduct can be dealt with internally by investigating and remediating as necessary and not voluntarily disclosing to the government, the incentives created by the DOJ and other government whistleblower programs should be considered by companies in assessing whether a voluntary disclosure to enforcement authorities is in the company’s best interest.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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