

CLIENT ALERT

# DOJ Launches Corporate Whistleblower Awards Pilot Program

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On August 1, 2024, the Department of Justice (the “Department” or “DOJ”) launched the Corporate Whistleblower Awards Pilot Program (the “Program”), through which individuals can receive monetary awards for reporting certain corporate misconduct to the Department.<sup>1</sup> The Program, currently scheduled to last for three years, is a part of a larger effort by the DOJ to “incentivize” the reporting of violations, which includes the Department’s Voluntary Self-Disclosure Policies.

The Program applies to individuals, not companies, who voluntarily provide the Department with original, truthful, and complete information about certain types of corporate criminal wrongdoing that results in a civil or criminal forfeiture exceeding \$1 million in net proceeds forfeited. The Department intends for the Program to generate leads for violations of law that are not already covered by the Department’s *qui tam* program or other federal agencies’ whistleblower programs, including the Securities and Exchange Commission (“SEC”), Commodity Futures Trading Commission (“CFTC”), and Financial Crimes Enforcement Network whistleblower programs. Below, we discuss how the Program fits into a larger push by the Department for more voluntary disclosure and then summarize the key elements of the Program. We conclude by discussing some important steps companies should take with respect to their own whistleblower programs in light of the DOJ’s new Program.

<sup>1</sup> Department of Justice Corporate Whistleblower Awards Pilot Program (Aug. 1, 2024) <https://www.justice.gov/criminal/media/1362321/dl?inline> (the “Program Guidance”).

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### I. Intended Purpose of the Program

In launching the Program, the DOJ seeks reports about certain corporate misconduct that is not addressed by existing whistleblower programs. For example, the Department specifically cited the \$1.2 billion settlement with commodities company Glencore, which included resolving Foreign Corrupt Practices Act violations as an example of a type of case previously not covered by a whistleblower program.<sup>2</sup>

Moreover, the Department has said that the Program should be viewed in conjunction with existing DOJ voluntary self-disclosure policies. According to the Department, “the more ways . . . people can report corporate misconduct, the greater the incentive for companies and individuals to report wrongdoing as soon as they learn of it.”<sup>3</sup> The Department clearly hopes, as Deputy Attorney General Lisa Monaco said on a call with reporters, that the Program and the existing voluntary self-disclosure programs will create an environment where “everyone is racing up the front steps [to the Department], all hoping they’re the first to knock.”<sup>4</sup> It must also be viewed as a response to criticism of the Department as to a general overall decline in corporate enforcement.<sup>5</sup>

In keeping with trying to encourage companies to voluntarily self-disclose, the Department has “temporar[ily]” amended the Criminal Division’s Corporate Enforcement and Voluntary Self-Disclosure Policy to allow a company that receives an internal whistleblower report to be eligible for a declination so long as the company reports the misconduct within 120 days of receiving the report and before the DOJ has reached out. The company must also fully meet, in the sole judgment of the Department, the other requirements of the Corporate Enforcement and Voluntary Self-Disclosure Policy.<sup>6</sup>

<sup>2</sup> Dylan Tokar, *Justice Department Trial Program Offers Millions for Tips on Fraud, Bribery*, Wall St. J. (Aug. 1, 2024, 2:45 PM), <https://www.wsj.com/articles/justice-department-trial-program-offers-millions-for-tips-on-fraud-bribery-5e4c710d>.

<sup>3</sup> Department of Justice Fact Sheet: Corporate Whistleblower Awards Pilot Program (Aug. 1, 2024), <https://www.justice.gov/criminal/media/1362326/dl?inline>.

<sup>4</sup> Tokar, *supra* note 2.

<sup>5</sup> Dave Michaels, *For Big Companies, Felony Convictions Are a Mere Footnote*, Wall St. J. (July 30, 2024, 5:30 AM), <https://www.wsj.com/us-news/law/corporate-criminal-convictions-lack-consequences-boeing-28e4e06c>; Tokar, *supra* note 2 (Deputy Attorney General Monaco: “We cannot ignore the data showing overall decline in corporate criminal prosecutions over the last decade . . . We need to do more and move faster.”).

<sup>6</sup> For previous Willkie client alerts discussing voluntary self-disclosure programs and factors to consider in making such a decision, see, e.g., DOJ Again Presses “Benefits” of Self-Disclosure, Willkie Farr & Gallagher LLP (Oct. 2, 2023), available [here](#); DOJ’s Latest Incentives for Self-Disclosure: An Offer You Can’t Refuse?, Willkie Farr & Gallagher LLP (Jan. 31, 2023), available [here](#); U.S. Attorney’s Offices Voluntary Self-Disclosure Policy: 93 Policies in One? Or No Policy At All?, Willkie Farr & Gallagher LLP (Feb. 28, 2023), available [here](#).

### II. Key Elements of the DOJ Whistleblower Program

#### A. Eligible Individuals

A qualifying whistleblower must be an individual, not a company or entity, who voluntarily provides the Department with original information in writing in accordance with specific procedures. Original information is defined as nonpublic information that the individual derives from his or her personal knowledge or independent evaluation that was either previously unknown to the Department or materially adds to existing information the Department possesses. With some exceptions,<sup>7</sup> individuals who *receive* information through a company's internal reporting processes or due to the individual's role as an attorney, compliance officer, or internal auditor are ineligible for whistleblower rewards. However, individuals who *report* information internally at a company are still eligible for an award, although, at least in certain circumstances, they must make such a report to the DOJ within 120 days of the internal report.

Notably, an individual is disqualified if they would be eligible for an award through another government or statutory whistleblower, False Claims Act *qui tam*, or similar program. An individual is also ineligible if they are, or were at the time they acquired the information, an official, employee, or contractor of the DOJ or any other law enforcement organization, or a spouse, parent, child, sibling, or person living in the same household of such individuals.

An eligible whistleblower must also not have been a "meaningful[]" participant in the criminal activity.<sup>8</sup> Reports must not be frivolous or fraudulent, and individuals who submit such claims may be subject to a permanent bar from participating in the Program. Tipsters must be willing to fully cooperate with the Department in its investigation of the reported misconduct and during any ensuing criminal or civil action. They need not be represented by an attorney to participate in the Program, unless they wish to report anonymously.

#### B. Type of Information Reported

The Program awards whistleblowers who provide information pertaining to one of four subject areas:

- (1) violations by financial institutions, their insiders, or agents, including money laundering schemes, anti-money laundering compliance violations, registration of money transmitting business, and fraud statutes, and fraud against or non-compliance with financial institution regulators;
- (2) foreign corruption and bribery involving privately held companies and non-issuers of U.S. securities;
- (3) domestic corruption and bribery committed by or through companies; and

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<sup>7</sup> See Program Guidance at 5.

<sup>8</sup> An individual remains eligible if the Department determines, in its discretion, that the individual's minimal role in the reported misconduct was sufficiently limited such that the individual could be described as "plainly among the least culpable of those involved in the conduct of a group." Program Guidance at 10.

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- (4) health care fraud schemes involving nonpublic programs, fraud against patients, investors or other non-governmental health care entities, and any other federal violations involving health care-related conduct not subject to *qui tam* recovery under the False Claims Act.

The information must have been specific, credible, and timely enough to cause the Department to open or reopen an investigation that leads to a successful forfeiture. If an investigation was already ongoing, the information must have “significantly contributed” to the successful forfeiture.<sup>9</sup> Additionally, the information provided must lead to a forfeiture exceeding \$1 million in net proceeds forfeited.

### C. Award Amounts

The granting of awards and determining the award amount are entirely discretionary and not guaranteed. When awards are granted, the amount will be based on the following calculations: (1) an award of up to 30% of the first \$100 million in net proceeds forfeited; (2) an award of up to 5% of any net proceeds forfeited between \$100 million and \$500 million; and (3) no award on net proceeds forfeited above \$500 million, meaning awards are capped by the size of the forfeiture as well as a hard cap of \$50 million. Where an award is appropriate, there is a presumption that the Department will award a whistleblower the maximum 30% of the first \$10 million in net proceeds forfeited. Awards are drawn from net proceeds of the forfeiture of total assets finally forfeited. Whistleblowers will receive their award after owners, lienholders, and qualifying individual victims are compensated. However, whistleblowers will receive an award before corporate or government agencies who are identified as victims of a criminal scheme receive compensation and prior to any fund-to-fund transfers, international sharing, and equitable sharing. The Department is required to provide notice to Congress of any award payment that exceeds \$500,000, but it will generally not include information that could reveal the identity of the whistleblower.

Certain considerations may increase or decrease the award amount or lead to no award at all. Factors that may increase the award amount include:

- (1) the significance of the provided information to the Department’s prosecution, resolution, and associated forfeiture action;
- (2) the timeliness, extent, and value of the whistleblower’s assistance; and/or
- (3) whether the whistleblower participated in internal reporting systems and assisted with any internal investigation concerning the reported violations.<sup>10</sup>

<sup>9</sup> Program Guidance at 7.

<sup>10</sup> If a whistleblower submits an internal report to the entity, and that entity then voluntarily self-discloses to the Department, the whistleblower must also submit “the same information to the Department within 120 days of providing it to the entity” to remain eligible for a whistleblower award. Program Guidance at 7. The Program Guidance is ambiguous as to whether this 120-day requirement applies to a whistleblower who reports internally and the company does not voluntarily self-disclose.

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A whistleblower's award amount may decrease if the whistleblower:

- (1) unreasonably delayed in reporting the violation or interfered with internal reporting systems by preventing the detection of the violation; and/or
- (2) made materially false or fraudulent representations or withheld material information.

Moreover, the Department may deny an award to a whistleblower who was in a management role over the personnel or offices involved in the misconduct, particularly those who had decision-making authority, contributed to the failures of the compliance system, created a corporate culture that deprioritized compliance, or willfully disregarded information identifying potential misconduct.

### **D. Procedures for Submitting Whistleblower Report**

Whistleblowers must submit a completed and signed Intake Form, along with their original information, via email.<sup>11</sup> Anonymous submissions must be made by the individual's attorney who certifies that they have verified the individual's identity and reviewed the validity of the information in the Intake Form. To file a claim for a whistleblower award, the individual who submitted the tip to the Program must file a signed Claim Form within 90 calendar days of the date that the Department published the successful forfeiture.<sup>12</sup> Following an evaluation, the Department will issue the applicant an award determination.

### **III. Takeaways**

The effects of the Program remain to be seen, but trends with similar programs at other enforcement authorities may provide a preview. Since the SEC's Whistleblower Program was implemented in 2011, the SEC has paid more than \$1.9 billion in 400 awards to whistleblowers. The SEC's Office of the Whistleblower reported that 2023 saw the highest number of whistleblower tips (18,354), the highest annual total in whistleblower awards (nearly \$600 million), and the highest single whistleblower award (almost \$279 million) since the program's inception. The CFTC has also reported that the agency received the highest number of whistleblower tips (1,530) in 2023, a nearly 50% increase over the number received in fiscal years 2020 and 2021.

Regardless of the precise magnitude of the increase in whistleblower tips, it seems likely that the new Program will result in at least some increase in whistleblower reports. Companies should take this opportunity to evaluate their compliance programs to ensure that they provide employees with independent, well-publicized, and easy-to-access and -use reporting channels. Strong non-retaliation policies should also be a part of such programs. Entities should also ensure that relevant

<sup>11</sup> The Intake Form can be found at <https://www.justice.gov/criminal/media/1362356/dl?inline>. Submission should be sent to [CorporateWhistleblower@usdoj.gov](mailto:CorporateWhistleblower@usdoj.gov).

<sup>12</sup> The Department states that claim forms will be available at <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program> soon.

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staff are adequately trained on how to receive whistleblowing complaints, determine a course of action, competently manage and conduct a thorough investigation, and make informed decisions about possible referrals or escalations.

A likely outcome of the new DOJ Program, along with the ever-growing number of whistleblower tips being submitted to other enforcement authorities, is that companies will have to act even more quickly to evaluate complaints they receive, appropriately investigate, and determine what remediation is appropriate, and whether voluntary self-disclosure is advisable. As we have stated in prior client alerts, the decision for a company to self-disclose is not usually cut-and-dried. Although companies can potentially receive greater discounts and more favorable resolutions by voluntarily self-disclosing misconduct, there are no guarantees the Department (or other enforcement authorities) will determine that the companies qualify for the benefits of self-disclosure. And, the decision to self-disclose is not without costs, as even companies who receive a declination are required to disgorge any illicit profits.

Ultimately, the Program does not change the fact that the decision to voluntarily self-disclose should be made carefully, based upon a matter's unique facts and circumstances. What the Program does reinforce is that companies should undertake this analysis promptly.

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