

HEAR THE WHISTLE BLOW: DOJ'S NEW WHISTLEBLOWER PILOT PROGRAM TRACKS THE REGULATORY CRESCENDO TOWARDS VOLUNTARY DISCLOSURE

On August 1, 2024, the U.S. Department of Justice ("DOJ") unveiled the details of its much-anticipated [Corporate Whistleblower Awards Pilot Program](#) ("the Pilot Program") intended through individual financial incentives to help root out corporate misconduct and to encourage companies to make prompt, voluntary disclosures. The Pilot Program, designed by the DOJ's Criminal Division, is part of a whole-of-government effort to convince corporations—and also individuals—to be the "first in the door" to notify the appropriate authorities of both civil and criminal violations once discovered, using a mix of carrots and sticks to do so. The Pilot Program, a three-year initiative effective immediately, bolsters the DOJ's crackdown on corporate misconduct.

The Pilot Program seeks to fill some of the gaps left by other whistleblower reward programs and will qualify individuals meeting the criteria that disclose new information regarding four specific types of corporate criminal activity to the DOJ to receive a percentage of any resulting forfeiture as a monetary award.

Alongside the Pilot Program, the DOJ also announced a significant [amendment](#) to its Corporate Enforcement and Voluntary Self-Disclosure Policy ("the Policy"), discussed in our [January 2023 briefing](#). Under the amendment, during the period of the Pilot Program, if a whistleblower reports to both the DOJ and the company, and the company voluntarily discloses within 120 days of receiving the internal whistleblower report and before the DOJ contacts the company, the company may be eligible for a presumption of a declination under the Policy.

The DOJ's complementary disclosure programs send a clear message to both companies and individuals: When you discover misconduct, be the first to report it. Therefore, companies should be proactive in reviewing and strengthening their compliance programs and internal reporting structures to ensure they are poised to be the first to knock on the DOJ's door if misconduct is discovered.

THE RISE OF WHISTLEBLOWER PROGRAMS AND SELF-DISCLOSURES

While the U.S. government surges resources in critical areas such as combatting corporate and financial crime, sanctions, and export controls, it has sought to incentivize companies to voluntarily self-disclose potential misconduct, and now,

to enlist company insiders to blow the whistle on corporate malfeasance. In remarks at the [American Bar Association's 39th National Institute on White Collar Crime](#), Deputy Attorney General Lisa Monaco ("**DAG Monaco**") provided the initial framework for the Pilot Program. DAG Monaco cited the "*indispensable*" whistleblower programs of the SEC, CFTC, IRS, and FinCEN in encouraging individuals to report corporate misconduct in exchange for monetary awards. However, DAG Monaco emphasized that these other whistleblower reward programs leave important gaps that the Pilot Program is designed to fill by addressing the full range of corporate and financial misconduct that the DOJ prosecutes.

The Dodd-Frank Act created whistleblower programs at the SEC and CFTC that have proven immensely successful. The [SEC's whistleblower program](#) resulted in awards of more than \$1.9 billion to 397 individual whistleblowers since its inception in 2011. Also coming out of the Dodd-Frank Act was the [CFTC's whistleblower program](#), which focuses on violations of the Commodity Exchange Act. That program has resulted in 41 orders granting nearly \$350 million in awards (as of FY 2023) since issuing its first award in 2014. The CFTC has ordered over \$3 billion in sanctions in all its whistleblower-related enforcement actions.

In terms of pure dollars, the [IRS's whistleblower program](#) has been one of the most successful. Since its inception in 2007, the program has awarded \$1.2 billion based on the collection of \$6.9 billion in tax proceeds. And although FinCEN's whistleblower program still awaits finalized implementing regulations, the addition of OFAC sanctions violations to FinCEN's original scope of anti-money laundering underscores the increasingly integral role of disclosure and whistleblowing in the U.S. government's compliance and enforcement regime. While most of these whistleblower programs are successful, they by their nature are limited and only cover misconduct within their agencies' jurisdictions.

THE ORIGINS AND CONTEXT OF THE PILOT PROGRAM

The Pilot Program, which the Criminal Division's Money Laundering and Asset Recovery Section will manage, is built on the successes of these largely civil whistleblower programs and mimics some key features, such as emphasis on a first-mover advantage, but will likely require some refining.

Initially, the Pilot Program incentivizes individuals to report on four areas: (1) certain crimes involving financial institutions and their employees; (2) foreign corruption involving privately held companies and others that are not issuers of U.S. securities; (3) domestic corruption involving companies; and (4) health care fraud schemes targeting private insurers not subject to qui tam recovery under the False Claims Act. These areas are intended to fill gaps left by other whistleblower programs, but fall short of capturing all corporate criminal conduct. For example, under the Pilot Program, a non-U.S.-listed company otherwise subject to jurisdiction under the Foreign Corrupt Practices Act ("**FCPA**") as a domestic concern is now covered by a whistleblower bounty program for any FCPA violations. In addition, the Pilot Program arguably adds coverage to certain financial sector entities that do business in the United States without registering as money transmitters and foreign financial institutions that access services from U.S. financial institutions through fraud.

The Pilot Program also sits within the broader context of the U.S. government's push to incentivize voluntary disclosure, be it corporate self-disclosure or whistleblower-directed disclosure. Voluntary self-disclosure ("VSD") programs encourage companies to proactively self-disclose misconduct that may not otherwise have come to light, while providing incentives in the form of reductions or even eliminations of civil and criminal penalties. Similarly, whistleblower programs provide financial incentives to proactively report corporate misconduct. Several VSD programs have recently come into prominence, ranging from the individual department level (e.g., [Bureau of Industry and Security at the U.S. Department of Commerce](#)) to—as we had advised in [August 2023](#)—inter-agency collaborations (e.g., [Tri-Seal Compliance Note: Voluntary Self-Disclosures of Potential Violations at the U.S. Departments of Commerce, Treasury, and Justice](#)). As we had advised in [February 2023](#), the DOJ's own VSD [program](#) applied to foreign corruption has undergone recent modifications, while DOJ Main Justice directed all DOJ components and offices that prosecute corporate crime to make their own VSD programs publicly available for reporting. Such programs—now spanning the alphabet soup of federal enforcement agencies—are becoming progressively more publicized, prominent, and lucrative for those holding the right amount of knowledge.

As DAG Monaco pointed out, VSD and whistleblower programs are intended to *"reinforce each other and create a multiplier effect, encouraging both companies and individuals to tell us what they know as soon as they know it."* As a result, we may see a significant uptick in corporate disclosures taking advantage of VSD programs while trying to pre-empt individuals capitalizing on new (or more publicized) whistleblower programs.

ELIGIBILITY CRITERIA FOR AWARD

Whistleblowers may be eligible for an award pursuant to the Pilot Program, alone or jointly with other individuals, when they provide original, truthful information about criminal misconduct relating to one or more designated program areas that leads to forfeiture exceeding \$1 million in net proceeds forfeited in connection with a successful prosecution, corporate criminal resolution, or civil forfeiture action related to corporate criminal conduct.

The specific eligibility criteria for the Pilot Program include the following:

- *What and How.* An individual must voluntarily submit in writing original, truthful, and complete non-public information derived from the individual's independent knowledge or independent analysis regarding corporate or financial misconduct that violates federal law. The individual must also cooperate with the DOJ in its investigation of related conduct and criminal or civil actions. The Pilot Program also outlines what information is not considered "*origina*l" and maintains that an individual's information must pertain to one of the four following subject matter areas:
 - Violations by financial institutions, their insiders, or agents, including schemes involving money laundering, anti-money laundering compliance violations, registration of money transmitting businesses, and fraud statutes, and fraud against or non-compliance with financial institution regulators.

- Violations related to foreign corruption and bribery by, through, or related to companies, including violations of the Foreign Corrupt Practices Act, violations of the Foreign Extortion Prevention Act, and violations of the money laundering statutes.
- Violations committed by or through companies related to the payment of bribes or kickbacks to domestic public officials, including but not limited to federal, state, territorial, or local elected or appointed officials and officers or employees of any government department or agency.
- Violations related to (a) federal health care offenses and related crimes involving private or other non-public health care benefit programs, where the overwhelming majority of claims are submitted to private or other non-public health care benefit programs, (b) fraud against patients, investors, and other non-governmental entities in the health care industry, where the overwhelming majority of the actual or intended loss was to patients, investors, and other non-governmental entities, and (c) any other federal violations involving conduct related to health care not covered by the False Claims Act.
- *Who*: Any individual who is not involved in the criminal activity itself that helps the DOJ discover "*significant corporate or financial misconduct*"—otherwise unknown to the DOJ—may qualify to receive a portion of the resulting forfeiture that exceeds \$1 million in net proceeds. The Pilot Program will not provide for recovery if a whistleblower is eligible for an award under an existing federal whistleblower program.
- *When*: The individual must be the "*first in the door*" (e.g., before a corporation voluntarily self-discloses) to report the misconduct and will be compensated only after all victims have been compensated fully. In addition, the individual's submission is not eligible if the DOJ directed a request, inquiry, or demand to them or their representative before their submission, even if they respond to such a request voluntarily. However, if an individual voluntarily reported original information to their employer before receiving a request, inquiry, or demand from the DOJ, and they reported to the DOJ or they responded to the DOJ's request within 120 days of reporting the original information to their employer, their submission will still qualify as voluntary.

An individual is not eligible for an award under the Pilot Program if:

- (a) They are a company or another type of entity. A qualifying whistleblower must be an individual.
- (b) They would be eligible for an award through another U.S. government or statutory whistleblower, *qui tam*, or similar program if they had reported the same scheme that they reported under this pilot program.
- (c) They are, or were at the time they acquired the original information provided to the DOJ, an official, employee, or contractor of the DOJ or any law enforcement organization or a spouse, parent, child, or sibling of

an official, employee, or contractor of the DOJ or they resided in the same household as an official, employee, or contractor of the DOJ.

- (d) They are, or were at the time they acquired the original information provided to the DOJ, an elected or appointed foreign government official.
- (e) They meaningfully participated in the criminal activity they reported, including by directing, planning, initiating, or knowingly profiting from that criminal activity.
- (f) In their whistleblower submission, dealings with the DOJ, or dealings with another authority in connection with a related action, the individual knowingly and willfully made or makes any false, fictitious, or fraudulent statement or representation, withheld or withholds material or significant information, or used or uses any writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the DOJ or another authority, or otherwise interfered or interferes with or obstructed or obstructs the DOJ's investigation.
- (g) They acquired the original information from a person: (1) who is ineligible under paragraphs (c) through (f), unless they are providing the DOJ with information about possible violations involving that person; or (2) with the intent to evade any provision in this document.
- (h) They provided information to the DOJ before the effective date of the Pilot Program.

CHALLENGES AND CONSEQUENCES

While the Pilot Program seeks to fill or supplement some of the gaps left by other programs, as developed, it may inadvertently undermine some of the DOJ's overarching efforts to incentivize both VSDs and the strengthening of compliance programs.

Notably, the Pilot Program will **not apply to individuals who participated in the underlying misconduct**—the very individuals often with the best information to assist in prosecuting any other potential significant wrongdoers—whereas the SEC's and other successful whistleblower programs do not exclude such individuals and instead include culpability as a factor in calculating the size of a whistleblower's award. As DOJ Main Justice was developing the details of its own program, it directed all DOJ components and U.S. Attorney's Offices ("**USAOs**") to create whistleblower programs for themselves.

While the Pilot Program does not permit individuals substantively involved in the reported violations to receive a bounty, on April 15, 2024, the Criminal Division announced a [voluntary disclosure program](#) for individuals to report their own and related corporate misconduct that, if the criteria are met, may result in a non-prosecution agreement for that individual. Two prominent USAOs: The [Southern District of New York](#) and the [Northern District of California](#), are piloting similar programs that offer non-prosecution agreements in exchange for eligible individuals' cooperation.

The potential bounty awards under the Pilot Program may be less than under other whistleblower bounty programs. Under the Pilot Program, whistleblowers can receive up to 30% of forfeitures that are \$100 million or less, and up to 5% of forfeitures between \$100 million and \$500 million. Other programs generally provide for a minimum of 10% and maximum of 30%.

The DOJ has stressed that it will continuously assess the terms of the Pilot Program and refine them if needed over the next three years.

TAKEAWAYS

The confluence and proliferation of whistleblower bounty programs designed to financially incentivize individuals to report on company misconduct, and voluntary disclosure programs designed to incentivize both companies and individuals to timely report their own misconduct, heightens the premium for companies to ensure active and adequate risk management and compliance monitoring and assurance. Companies that get it right will have a competitive advantage over those that fail to make the adequate investment.

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