

White Collar Criminal Defense

August 9, 2024

DOJ's New Whistleblower Policies Will Bring Increased Scrutiny to Businesses in the Financial and Health Care Industries and Those That Deal With Foreign, Federal, State, and Local Governments

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Earlier this month, the U.S. Department of Justice (DOJ) announced its Corporate Whistleblower Awards Pilot Program (Program). The Program—which will last for three years—is designed to incentivize, through money awards, individuals with knowledge of nonpublic corporate criminal wrongdoing to report what they know to DOJ. DOJ said it started the Program to fill perceived “gaps” in the whistleblower programs enforced by the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission and the Financial Crimes Enforcement Network. And DOJ hopes to use the Program, along with an amendment to its Corporate Enforcement and Voluntary Self-Disclosure Policy (Disclosure Policy), to “motivate” corporations to adopt “more robust compliance programs.”

The Program and amendments to the Disclosure Policy bring major changes to the compliance landscape for companies within DOJ's focus:

- Whistleblowers now have a strong incentive to report even relatively insignificant perceived misconduct that was not covered under other whistleblower regimes—companies within DOJ's areas of focus are likely to see increased DOJ activity based on whistleblower complaints and an increase in internal whistleblower reporting.
- Upon receiving information from a whistleblower, companies have 120 days to report the information to DOJ to receive credit under the Program and the Disclosure Policy. These policies strongly incentivize companies to report information received from whistleblowers to DOJ.
- Companies must remain watchful over their use of confidentiality and non-disparagement clauses in contracts. In announcing the Program, DOJ specifically warned that the enforcement (or threatened enforcement) of a confidentiality agreement could constitute whistleblower obstruction.

How does the Program incentivize would-be whistleblowers to report suspected misconduct?

To summarize, the Program is set up to award (with money) qualifying individuals who voluntarily provide to DOJ original, truthful, and complete information (and subsequent cooperation) that is relevant to one of the Program's “programmatic areas” and leads to a forfeiture exceeding \$1 million.¹

What types of criminal misconduct does the Program cover?

An important aspect of the Program is that it focuses on four types of criminal violations. These “programmatic areas” are:

- Crimes involving financial institutions
- Foreign corruption and bribery
- Domestic corruption and bribery
- Health care fraud schemes involving private insurance plans

In other words, if your business operates in the financial or health care industry or frequently deals with foreign or U.S. federal, state, or local officials, the Program is specifically targeted at your business. The Program incentivizes would-be whistleblowers to report misconduct that was **not** previously covered under other whistleblower regimes. And the forfeiture amount required to

receive an award (\$1 million) is relatively low, bringing all kinds of conduct within the Program's focus. This means companies within DOJ's areas of focus should expect (1) increased DOJ investigations based on whistleblower complaints and (2) increased internal whistleblower reports (as detailed below).

Those operating within the SEC's target areas should strongly consider reviewing their policies and procedures with counsel for the reasons discussed in this article. If your company does not have policies and procedures in place for receiving, handling, investigating, and reporting whistleblower complaints, now is the time to consider adding such policies. Please contact the authors of this article or your regular Lowenstein Sandler contact if you want help amending or crafting whistleblower policies.

How does the Program incentivize corporate compliance and self-disclosure?

To qualify for an award under the Program, individuals can report qualifying information directly to DOJ without first reporting the matter to the company suspected of misconduct. DOJ, however, added another option to promote the importance of compliance policies and procedures and internal reporting: An individual can also obtain an award under the Program when the qualifying information is reported by the violating company based on information the company received from the whistleblower. Individuals are incentivized, through consideration for an increased award, to use this method of reporting as opposed to the direct report method. The would-be whistleblower, however, must still report their information to DOJ within 120 days of the internal reporting.

To complement the internal reporting option described above, DOJ simultaneously amended its Disclosure Policy. Under the amendment to the Disclosure Policy, a company will qualify for a presumption of a declination² if it self-reports to DOJ information about alleged criminal conduct received from a whistleblower within 120 days after receiving the whistleblower's internal report.

The Program and amendment of the Disclosure Policy create a race to disclosure for both the subject company and the whistleblower. Once a person reports information under the Program internally, both the company and the whistleblower must disclose the information to DOJ or risk losing the benefits afforded under the Program and the Disclosure Policy.

These changes create a very strong incentive for companies operating within the programmatic areas to voluntarily disclose whistleblower information to DOJ. Those that ignore whistleblower information do so at their own peril. Companies should therefore review with counsel and amend, if necessary, their policies and procedures to account for these incentives and the 120-day reporting deadline.

What about confidentiality obligations?

The Program also comes with strong warnings against impeding whistleblowing. DOJ cautioned that any "action to impede an individual from communicating directly with" DOJ about a possible criminal violation in the programmatic areas will be considered in assessing the entity's cooperation credit and the entity's or individual's culpability, **including for obstruction**. DOJ specifically identified the enforcement or threatened enforcement of a confidentiality agreement as an action that could impede whistleblower activity. We previously **warned** about the SEC's enforcement action against J.P. Morgan, which found that confidentiality language in J.P. Morgan's release agreements impeded whistleblowing activity under Exchange Act Rule 21F-17(a). It looks like DOJ is now taking a similar stance with respect to confidentiality agreements that could be construed as inhibiting whistleblowing within the programmatic areas.

Companies operating within the programmatic areas should consult with counsel before including confidentiality language in settlement, severance, and similar agreements to ensure those provisions are not later viewed as impeding whistleblowing.

What are the takeaways?

Whistleblowers now have a strong incentive to report perceived misconduct that was not previously covered under other whistleblower regimes. This incentive extends to matters that could be perceived as insignificant, given that the forfeiture amount required to receive an award (\$1 million) is relatively low. Companies within DOJ's areas of focus are likely to see increased DOJ activity based on whistleblower complaints and increases in internal whistleblower reporting.

Upon receiving information from a whistleblower, companies have 120 days to report the information to DOJ to receive credit under the Program and the Disclosure Policy. Companies that fail to disclose whistleblower information to DOJ do so at their own risk.

Companies must remain watchful over their use of confidentiality and non-disparagement clauses in contracts. In announcing the Program, DOJ specifically warned that the enforcement (or threatened enforcement) of a confidentiality agreement could constitute obstruction of the Program.

For more information about the Program, the Disclosure Policy, and their implications, please contact the authors or reach out directly to your regular Lowenstein Sandler contact.

¹ DOJ's announcement for the Program provides an exhaustive explanation of the specific criteria a person must meet to receive an award under the Program.

² Of course, the company must otherwise qualify for a declination under the elements of the Disclosure Policy.

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