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DOJ Launches New Whistleblower Program Focused on Corporate Misconduct

On August 1, 2024, the U.S. Department of Justice's Criminal Division ("DOJ" or "Department") launched a new Corporate Whistleblower Awards Pilot Program (the "Whistleblower Pilot Program" or the "Pilot Program").¹

Under the Pilot Program, eligible whistleblowers who provide the Criminal Division with original and truthful information about certain types of corporate misconduct are eligible to receive a portion of a criminal or civil forfeiture exceeding \$1 million. The Pilot Program covers certain crimes involving financial institutions, domestic or foreign corruption by companies and health care fraud schemes involving private insurance plans.

In announcing the program, Deputy Attorney General Lisa Monaco highlighted that DOJ's "corporate enforcement program is rooted in the use of both carrots and sticks, and today's announcement builds on our other efforts to incentivize reporting of corporate misconduct to the government."²

DOJ has in recent years offered increased incentives to companies that self-report corporate misconduct. Under a 2022 revision to DOJ's voluntary disclosure policy, absent aggravating factors, "the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct."³ This policy provides considerable benefits to eligible companies that file a Voluntary Self-Disclosure ("VSD"), including a potential declination.⁴

However, DOJ has made clear that it is also seeking to incentivize *individuals* to come forward with original information about corporate misconduct. Under the Individual VSD Program announced in April 2024, certain individuals who were involved in corporate misconduct are eligible to receive a Non-Prosecution Agreement ("NPA") if they report information to DOJ and

¹ The Whistleblower Pilot Program's webpage can be found [here](#). The launch of the Whistleblower Pilot Program follows DOJ's announcement regarding the program in March. Paul, Weiss, *DOJ Announces New Whistleblower Program Aimed at Increasing Corporate Enforcement* (Mar. 18, 2024), available [here](#). The Pilot Program will be managed by the Criminal Division's Money Laundering and Asset Recovery Section. DOJ plans to "regularly assess the design and implementation of the Pilot Program and, at the end of this 3-year pilot period, the Department will determine whether the program will be extended in duration or modified in any respect." Dep't of Justice, *Program Guidance: Criminal Division Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), available [here](#).

² Dep't of Justice, *Deputy Attorney General Lisa Monaco Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), available [here](#).

³ Paul, Weiss, *Deputy Attorney General Lisa Monaco Announces Revisions to DOJ Corporate Criminal Enforcement Policies* (Sept. 16, 2022), available [here](#).

⁴ Paul, Weiss, *DOJ National Security Division Issues First Declination Under Voluntary Self-Disclosure Program* (May 24, 2024), available [here](#).

cooperate in the investigation.⁵ Now, under the Whistleblower Pilot Program, eligible individuals are financially incentivized to report corporate misconduct to DOJ's Criminal Division. While the Individual VSD program applied only to individuals involved in the misconduct, the Whistleblower Pilot Program more broadly offers an incentive to eligible individuals to report corporate misconduct to DOJ.

The Deputy Attorney General noted that there is “a synergy to these disclosure programs: together, they create a multiplier effect that encourages both companies and individuals to tell us what they know — and to tell us as soon as they know it.” In order for the individual to receive an NPA or whistleblower reward, they must generally report original information that DOJ did not have before. As the Deputy Attorney General noted, “to be eligible for the most significant benefits under these disclosure programs — both our corporate voluntary self-disclosure programs and the whistleblower initiative we’re announcing today — you have to tell us something *we didn’t already know*. With very few exceptions, you need to be first in the door.”

Principal Deputy Assistant Attorney General Nicole M. Argentieri made clear that DOJ’s message to employees is that “the tip line is open” and the message to companies is to “[c]all us before we call you.”⁶

Amendment to Corporate VSD Policy

Alongside the Whistleblower Pilot Program, DOJ announced that it was amending its VSD policy for corporations. “Under that amendment, where a company receives an internal report from a whistleblower, if the company comes forward and reports the misconduct to the Department within 120 days and before the Department reaches out to the company, the company will be eligible for the greatest benefit under our policy—a presumption of a declination—so long as they fully cooperate and remediate.” This amendment is designed to incentivize companies to file VSDs where they receive a report from a whistleblower—and they can still receive the “greatest benefits” under the policy if they file the VSD within 120 days and before DOJ has reached out to the company about the issue. This is designed to create an incentive for companies to come forward with whistleblower allegations, rather than deal with them exclusively internally.

Whistleblower Award Eligibility Requirements

To be eligible for an award, the whistleblower must meet requirements including the following:

- ***Ineligible under Other Programs:*** The goal of the Whistleblower Pilot Program is to close “gaps” that are not covered by “other agencies’ whistleblower programs” and DOJ’s *qui tam* program. Accordingly, an individual is ineligible under the Whistleblower Pilot Program if 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.”⁷ See Appendix A (Existing Programs).
- ***Not a Meaningful Participant:*** An individual is presumptively ineligible if they “meaningfully participated in the criminal activity they reported, including by directing, planning, initiating, or knowingly profiting from that criminal activity.” However, a footnote in the official Pilot Program guidance explains that DOJ retains discretion to find that the individual is eligible if “the individual’s minimal role in the reported scheme was sufficiently limited that the individual could be described as ‘plainly among the least culpable of those involved in the conduct of a group.’”⁸

⁵ Paul, Weiss, *DOJ Criminal Division Launches Pilot Program Incentivizing Individuals to Report Corporate Criminal Misconduct* (Apr. 17, 2024), available [here](#).

⁶ Dep’t of Justice, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), available [here](#).

⁷ Dep’t of Justice, *Program Guidance: Criminal Division Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), available [here](#).

⁸ Nonetheless, an individual could be eligible for an NPA under the Individual VSD Program and DOJ will assess their eligibility without requiring that the individual separately submit information to the Individual VSD Program.

- **Not a Government Official:** Government officials are generally not eligible to participate in the Whistleblower Pilot Program. As explained by DOJ, individuals reporting misconduct must not presently be “elected or appointed foreign government officials” or have served in such roles “at the time they acquired the original information provided to the Department.”
- **Original Information:** The individual must provide DOJ with “original information” in writing that is “derived from the individual’s independent knowledge or independent analysis.” The information must be “non-public and previously not known to the Department.”
 - Generally, an officer/director, employee whose principal duties involve compliance or internal audit, an employee of a firm retained to conduct an inquiry or investigation or an employee of a public accounting firm is not considered to be providing “original” information. However, if such persons provide the information to the relevant entity’s audit committee, chief legal officer, chief compliance officer (or their equivalents) or their supervisor, then after 120 days have elapsed they are eligible to provide the information to the DOJ and will be eligible to participate in the Whistleblower Pilot Program.
 - An individual is still considered to have provided “original” information to DOJ if they “first report[] through an entity’s internal whistleblower, legal, or compliance procedures” provided that “the individual also reports their information to the Department within 120 days of reporting internally.” That is true even if, in the interim, the company files a VSD. In that circumstance, DOJ will treat the date of the original internal report as “the date of the individual’s original disclosure to the Department.” This is designed to avoid disincentivizing individuals from making reports internally.⁹
- **Subject Area:** The information provided must pertain to one of these subject matter areas:
 - ***Financial Institutions:*** “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.”
 - FinCEN is in the process of establishing a whistleblower program that would cover anti-money laundering and sanctions violations. It remains to be seen whether the development of that program would lead DOJ to change the scope of this subject area.
 - ***Foreign Corruption:*** “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.”
 - While foreign corruption cases are covered by the SEC’s whistleblower program where the company is an issuer of securities, DOJ emphasized that many of its cases are not covered by the SEC program.¹⁰
 - ***Domestic Corruption:*** “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.”

⁹ This means that there could be circumstances where a company could obtain the benefits of a VSD and DOJ would treat the individual as a whistleblower.

¹⁰ Dep’t of Justice, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks on New Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), available [here](#).

- *Health Care Fraud Involving Private Insurers*: “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 Federal False Claims Act, 31 U.S.C. § 3729, *et seq.*”
- *Voluntary*: The submission must be voluntary. The submission will be deemed voluntary if it is made “before any request, inquiry, or demand that relates to the subject matter” by DOJ, “where the individual has no preexisting obligation pursuant to an agreement in connection with a criminal prosecution or civil enforcement action to report the information to [DOJ],” and is made “in the absence of any government investigation or threat of imminent disclosure to the government or the public.” An individual’s submission is not voluntary if DOJ has “directed a request, inquiry, or demand to them or their representative before their submission, even if they respond to such a request voluntarily.”
- *Truthful and Complete*: The “individual must provide truthful and complete information, meaning they must provide all information of which they have knowledge related to any misconduct, including misconduct in which they participated or of which they are aware, the complete extent of their own role, if any, in the misconduct, and all matters about which the Department may inquire.” An individual’s submission will be deemed “not truthful and complete if the individual is involved in the misconduct but lies about, conceals, or mischaracterizes their role in the misconduct.”
- *Cooperation*: The individual must cooperate with DOJ “in its investigation of related conduct and criminal or civil actions.” Examples of cooperation include, but are not limited to “providing truthful and complete testimony and evidence, whether in interviews, before a grand jury, or at any trial or other court proceeding; producing documents, records, and other evidence when called upon” as well as “if requested, working in a proactive manner under the supervision of, and in compliance with, United States law enforcement officers and agents.”
- *Forfeiture Threshold*: The information provided by the whistleblower “must lead to successful forfeiture exceeding \$1,000,000 in net proceeds forfeited by [DOJ] in connection with a prosecution, corporate criminal resolution, or civil forfeiture action related to corporate criminal conduct in the programmatic areas outlined above.”
 - *Award Calculation*: DOJ has advised that “whistleblowers may receive up to 30 percent of the first \$100 million in net proceeds forfeited, and up to 5 percent of any net proceeds forfeited between \$100 million and \$500 million.”¹¹ The awards and their amounts are “entirely discretionary” and “not guaranteed.” In determining the “appropriate award percentage,” DOJ will “consider the unique facts and circumstances of each case and may increase or decrease the award percentage based on its analysis of” a number of factors.¹²

Confidentiality and Retaliation

Similar to other whistleblower programs, the Pilot Program affords whistleblowers confidentiality protections. Under the program, DOJ will “not publicly disclose any information, including information . . . that could reasonably be expected to reveal

¹¹ For the first \$10 million in net proceeds forfeited, so long as no factors favor decreasing the amount of the award, DOJ “will apply a presumption in favor of awarding a whistleblower the maximum 30 percent of such proceeds.” DOJ will provide “[n]o award on net proceeds forfeited above \$500 million.”

¹² Dep’t of Justice, *Program Guidance: Criminal Division Corporate Whistleblower Awards Pilot Program* (Aug. 1, 2024), available [here](#). DOJ provides “considerations that may increase the award amount” and “considerations that may decrease the award amount.”

the identity of a whistleblower, except as required by law or Department policy as determined by the Department, in its sole discretion, unless and until required to be disclosed to a defendant in connection with a judicial or administrative proceeding.”¹³

While the program does not afford explicit anti-retaliation protections to whistleblowers, DOJ notes that any retaliation would be assessed in terms of whether the company or any individual “cooperated with the Department or obstructed an investigation” and DOJ could “institute appropriate enforcement actions in response to retaliation.”¹⁴

Compliance Considerations

With the adoption of the Whistleblower Pilot Program and the corresponding update to the corporate VSD Policy, it is clear that DOJ is continuing to aggressively incentivize individuals and companies to provide the Department with information about certain corporate misconduct. As a result, there are a number of steps that companies may wish to consider to respond to the increased risk of a whistleblower report to DOJ:

- *First*, companies may wish to review their internal investigation protocols and related statistics, including the average run time for their investigations. They may wish to consider policy or process changes to ensure that going forward, potentially reportable matters are timely triaged and investigated. For example, companies may wish to consider making adjustments to their intake process, such as their risk ranking or prioritization criteria, and/or establish target guidelines for completing certain investigatory phases within the 120-day window.
- *Second*, companies may wish to review their whistleblower and anti-retaliation policies and ensure that their reporting channels are both easily accessible and sufficiently advertised. Companies may also wish to consider developing or revising their guidelines for responding to and communicating with whistleblowers—in accordance with anti-retaliation protections—to address the risk that colleagues may be operating as external whistleblowers.
- *Third*, companies may wish to consider developing a framework for determining when it will report matters to DOJ and who will be involved in those decisions, and at what stage they will consult external counsel.

We will continue to monitor developments related to the Whistleblower Pilot Program.

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¹³ FAQ 14 (Potential Whistleblowers), available [here](#).

¹⁴ FAQ 21 (Potential Whistleblowers), available [here](#). The SEC’s whistleblower program also includes anti-retaliation provisions, which “generally means that employers may not discharge, demote, suspend, harass, or in any way discriminate against an employee in the terms and conditions of employment who has reported conduct.”

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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Appendix A: Existing Programs

- **SEC Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to the SEC related to violations of federal securities laws.¹⁵ Since its inception in 2011, the SEC Whistleblower Program has awarded more than \$1.9 billion to more than 397 individual whistleblowers.¹⁶ The program has been particularly successful recently; in Fiscal Year 2023, the Commission received over 18,000 tips, which was almost 50% more than the previous record set in Fiscal Year 2022.
- **CFTC Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to the CFTC related to violations of the Commodity Exchange Act (CEA).¹⁷
- **IRS Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to the IRS on taxpayers avoiding or underpaying a tax obligation of at least \$2,000,000 (inclusive of interest and penalties). Because the recovery threshold is high, the IRS Whistleblower Program is most successful in large avoidance schemes like corporate tax fraud and fraud by high-net-worth persons.
- **FinCEN Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to FinCEN on violations of the Bank Secrecy Act or economic sanctions. This information can then be used by a number of enforcement agencies (including FinCEN, OFAC and DOJ) to bring enforcement actions. As discussed in our 2023 Year in Review,¹⁸ FinCEN expects to issue regulations this year and in the interim has established an Office of the Whistleblower and is processing tips.
- **Qui Tam lawsuits.** The False Claims Act creates a private right of action that allows private citizens to bring suits on behalf of the government (“*qui tam*” suits) related to fraud against the government.¹⁹

¹⁵ To be eligible for an award, SEC whistleblowers (i) must provide “original information” in writing to the SEC; (ii) that information must lead to a successful SEC enforcement action; and (iii) the successful SEC enforcement action must result in an order of monetary sanctions over \$1 million. SEC, Office of the Whistleblower, Frequently Asked Questions, available [here](#).

¹⁶ SEC, *Securities and Exchange Commission Office of the Whistleblower Annual Report to Congress for Fiscal Year 2023* (Nov. 14, 2023), available [here](#). These data are current as of November 2023.

¹⁷ CFTC, *Part 165—Whistleblower Rules* (amended July 31, 2017), available [here](#). The CFTC will pay an award to whistleblowers who (i) provide a voluntary submission to the Commission; (ii) that contains original information; and (iii) that leads to the successful resolution of a covered judicial or administrative action or successful enforcement of a “Related Action” or both. *Id.* at § 165.5. Under the CFTC’s Whistleblower Rules, a “Related Action” is a judicial or administrative action brought by: (i) DOJ; (ii) an appropriate department or agency of the Federal Government; (iii) a registered entity, registered futures association or self-regulatory organization; (iv) a state criminal or appropriate civil agency; and (v) a foreign futures authority. Since the CFTC issued its first whistleblower award in 2014, it has awarded approximately \$365 million to whistleblowers, and subsequent enforcement actions have resulted in monetary sanctions of more than \$3 billion. CFTC, *Release Number 8806-23: CFTC Awards Whistleblower Over \$18 Million* (Oct. 12, 2023), available [here](#).

¹⁸ Paul, Weiss, *Economic Sanctions and Anti-Money Laundering Developments: 2023 Year in Review* (Jan. 22, 2024), available [here](#).

¹⁹ 31 U.S.C. §§ 3729-3733.