Davis Polk

DOJ adopts new whistleblower policy

March 14, 2024 | Client Update | 5-minute read

DOJ recently announced that it will launch a pilot program to pay individual whistleblowers who report wrongdoing to the DOJ. The initiative supplements existing SEC, CFTC and other such programs, and is the latest in a series of DOJ initiatives to generate reporting and referrals involving corporate criminal misconduct, but may have unintended consequences to companies' internal compliance programs and subsequent prosecutions.

On March 7, 2024, at the ABA's White Collar Institute, Deputy Attorney General Lisa Monaco announced that DOJ will launch a pilot program to pay individual whistleblowers who report wrongdoing to the DOJ, following a 90-day interim period to develop and implement the program. In the announcement, Monaco stated that the premise of the program was simple: if an individual helps DOJ uncover significant corporate or financial misconduct that DOJ does not know about, then the individual could qualify to receive a portion of the forfeiture. The program comes on the heels of an announcement by the U.S. Attorney's Office for the Southern District of New York that it will offer non-prosecution agreements for qualifying individuals who report corporate misconduct. Following the SDNY announcement, the Northern District of California previewed its plans to implement a whistleblower program that will be modeled after the SDNY program.

DOJ's new pilot whistleblower program expands the scope beyond current SEC, CFTC, and FinCEN whistleblower programs that are currently targeted towards misconduct within the jurisdiction of the regulators. DOJ plans to use the program to specifically focus on misconduct involving the U.S. financial system, foreign corruption cases outside the jurisdiction of the SEC, including FCPA violations by non-issuers and violations of the recently enacted Foreign Extortion Prevention Act, and domestic corruption cases, especially those involving illegal corporate payments to government officials.

One day later at the ABA conference (which has now become a familiar setting for the announcement of new DOJ corporate enforcement policies), Acting Assistant Attorney General Nicole M. Argentieri announced that the Money Laundering and Asset Recovery Section (MLARS) will lead efforts to implement the new whistleblower program. Under Title 28 of the U.S. Code, the Attorney General is authorized to pay awards for "information or assistance leading to civil or criminal forfeitures." MLARS has worked closely with the SEC, CFTC and FinCEN in cases involving whistleblowers, positioning the section to design the new pilot program. Moving forward, MLARS will coordinate with U.S. Attorneys, the FBI, and other DOJ offices to develop the program guidelines that will address eligibility requirements for potential whistleblowers.

In order for whistleblowers to receive payments under the new program, (i) all victims must first be properly compensated; (ii) the whistleblower must submit truthful information not already known to the government; (iii) the whistleblower must not be involved in the criminal activity; (iv) the information must be provided voluntarily, not in response to a government inquiry; and (v) there must not be an existing financial disclosure incentive such as *qui tam* or another federal whistleblower program available to the whistleblower. DOJ expects to establish a monetary threshold for recovery, similar to SEC and CFTC whistleblower programs that limit payments to whistleblowers to cases in which the agency orders sanctions of $1 million or more.

Assistant Attorney General Argentieri suggested that more details will come following the 90-day interim period in which DOJ will be gathering information, consulting with stakeholders, and otherwise designing the program.

Copyright 2024 Davis Polk & Wardwell LLP

Key takeaways

The announcement is the most recent in a number of policies by DOJ meant to spur corporate disclosures by increasing both the “carrot” and the “stick” side of the equation for a company’s voluntary disclosure analysis. In January 2023, DOJ’s Criminal Division announced revisions to its Corporate Enforcement Policy to further encourage disclosures, while DAG Monaco instructed all other DOJ components to follow in March 2023, instructing that each component handling corporate enforcement must announce a voluntary disclosure policy. And in October 2023, the DOJ announced a disclosure program to incentivize companies engaged in acquisitions to surface misconduct to DOJ in their due diligence. The policy created a six-month “safe-harbor” during which an acquiring company can report misconduct without being prosecuted. As noted, the U.S. Attorney’s Office in the Southern District of New York and the Northern District of California recently announced their own individual whistleblower programs.

The new whistleblower program continues the trend of DOJ putting pressure on companies to voluntarily disclose corporate misconduct. When corporate misconduct is discovered, companies will face greater pressure to disclose promptly, rather than risk a whistleblower disclosing the misconduct before the company is able to, with the company losing the ability to receive credit under DOJ’s voluntary self-disclosure policy.

As an initial matter, DOJ’s continued policy changes to spur referrals relating to corporate criminal matters through these new policies begs that question as to whether in fact there are some substantial number of corporate malfeasance cases that are missed, or alternatively, if the substantial investment in corporate compliance programs—encouraged by the Department—is working. Said differently, are DOJ’s new policies a solution in search of a problem? It is not clear how many instances of misconduct are occurring at companies not currently covered by existing whistleblower programs, how many of those are not reported by the company or discovered through other methods, and how many more will be disclosed as a result of this new initiative.

More broadly, given the number of existing whistleblower reports that companies receive, many of which are baseless, companies and DOJ will now be put in the position of expending potentially considerable resources to investigate whistleblower reports that may have no basis in fact, potentially at the expense of devoting limited resources to more pressing and genuine risks. This past year alone, for example, the SEC received almost 20,000 whistleblower tips. DOJ may end up spending its time and resources running down questionable whistleblower reports rather than progressing existing and more credible leads. This issue is compounded by the requirement that, in order to recover, the whistleblower cannot have been “involved in” the misconduct, which means the individual reporting the misconduct will likely not have firsthand knowledge of it.

In addition, the new incentive structure, whereby whistleblowers report information based on a financial incentive, will likely create complications for DOJ at trials where key witnesses will have been paid in connection with the information to which they are testifying.

Finally, there are a number of open questions, including the criteria for determining the amount of awards, whether there will be any restrictions or prohibitions on information provided by attorneys or compliance officers, whether there will be an attempt to address retaliation and whether there will be a qualified requirement to report internally before reporting to DOJ.

As with all of DOJ’s other recent guidance, we will have to see what the ultimate pilot program looks like after the 90-day period, and how DOJ implements it.

Copyright 2024 Davis Polk & Wardwell LLP

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Greg D. Andres
+1 212 450 4724
greg.andres@davispolk.com

Sidney Bashago
+1 212 450 4826
sidney.bashago@davispolk.com

Martine M. Beamon
+1 212 450 4262
martine.beamon@davispolk.com

Robert A. Cohen
+1 202 962 7047
robert.cohen@davispolk.com

Daniel S. Kahn
+1 202 962 7140
daniel.kahn@davispolk.com

Tatiana R. Martins
+1 212 450 4085
tatiana.martins@davispolk.com

Fiona R. Moran
+1 202 962 7137
fiona.moran@davispolk.com

Paul J. Nathanson
+1 202 962 7055
+1 212 450 3133
paul.nathanson@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

Copyright 2024 Davis Polk & Wardwell LLP