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DOJ's newly announced Whistleblower Awards Pilot Program includes some surprises

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DOJ's new pilot program that will reward whistleblowers for reporting certain corporate or financial misconduct to the DOJ contains a number of significant surprises, including who is eligible and a significant collateral benefit for companies. Companies should review their whistleblower policies and hotlines accordingly.

On August 1, 2024, DOJ launched its new Whistleblower Awards Pilot Program, which had been previewed earlier this year by Deputy Attorney General Lisa Monaco during her keynote speech at the ABA's 39th National Institute on White Collar Crime. The purpose of the Program is to fill in gaps not covered by existing federal whistleblower programs, such as those under the SEC, CFTC, or FinCEN, or related statutes, such as the False Claims Act. The new Program launch comes with guidance from DOJ regarding the Program's implementation, such as the criteria for determining the amount of an award and the relationship between internal reporting versus reporting to DOJ in the first instance, among other things.

In addition to what we already knew from DAG Monaco's announcement in March, the new guidance contains a number of interesting twists, including a significant "pilot" amendment to DOJ's Corporate Enforcement Policy governing company disclosures.

Below we highlight some of the notable aspects of the new DOJ Program and discuss key considerations for corporations.

Notable new DOJ guidance

Amendment to the Corporate Enforcement Policy. In what is perhaps the most surprising development of the whistleblower guidance, DOJ created a three-year "pilot amendment" to its Corporate Enforcement Policy (governing corporate disclosures) that allows companies to get the full benefits of the policy even if a whistleblower reports to DOJ first, so long as the company self-reports to DOJ within 120 days of receiving the whistleblower report and the disclosure occurs before DOJ reaches out to the company. Previously, if a whistleblower had reported to DOJ first, or even if the whistleblower informed the company he or she was about to alert DOJ, any subsequent disclosure by the company would not be considered "voluntary" under the policy because it was not prior to an "imminent threat of disclosure."

Criminals welcome (but only "minimal" ones). Although the guidance makes clear that an individual who "meaningfully participated in the criminal activity" cannot be eligible for an award, the guidance also provides prosecutors with discretion to reward an individual whose "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.'" This decision to pay for criminal referrals, particularly payments to those involved in criminal activity, is a departure from DOJ's general practices.

Eligibility even for open investigations. DOJ also made clear that an individual can still qualify for a financial reward even if DOJ already had an open investigation into the matter. Indeed, rather than focus on "whether the Department did or did not already have an investigation open related to the information provided" DOJ instead looks at whether the information being provided by the whistleblower "is non-public and previously not known to the Department."

Fraudulent and frivolous reports not welcome…eventually. DOJ may impose a permanent bar on a whistleblower "if a person makes three or more submissions that the Department finds to be frivolous or fraudulent or otherwise hinders the effective and efficient operation of the" program.

Exclusion of information learned through legal, compliance, or audit functions. DOJ limited the definition of "Original Information" to exclude information learned through legal, compliance, or audit functions within the company, including officers who learn of the information through the reporting of these functions. Specifically, original information does not include:

- Attorney-client privileged communications, unless the disclosure of that information would meet some exception under the relevant state's rules governing attorney conduct;
- Information reported to a compliance officer or otherwise learned via internal reporting channels;
- Information learned by way of conducting an investigation into whether a corporation is engaging in violations of the law, or an audit of the corporation, whether internal or external.

Only individuals qualify as whistleblowers. The new whistleblower rewards program only applies to individuals. A company cannot earn a reward for blowing the whistle on another company.

Award amount criteria. DOJ provided seven factors that will be considered when determining the amount of any potential whistleblower award; the first three relate to increasing an award, and the remaining four relate to decreasing an award. Notably, the award can be increased if the whistleblower reports internally to the company prior to reporting to DOJ.

- **Factors related to award increases**
  - The significance of the information the whistleblower provides;
  - The level of assistance provided by the whistleblower; and
  - Whether the whistleblower reported the misconduct internally and any subsequent participation by the whistleblower in any internal investigation.
- **Factors related to award decreases**
  - The culpability of the whistleblower in the underlying action;
  - Whether there was any unreasonable delay in reporting by the whistleblower;
  - Whether the whistleblower interfered with the internal reporting channels in place or otherwise interfered with any related internal investigation; and
  - Whether the whistleblower held a management role over any of the individuals involved in the misconduct.

Award limits. DOJ announced that in order to be eligible to receive an award, the information the whistleblower provides must lead to a successful civil or criminal forfeiture of at least $1,000,000. Further, the award is capped at 30% of the first $100 million of the net proceeds forfeited and 5% of the net proceeds forfeited between $100 million and $500 million.

Retaliation. Finally, DOJ's Program guidelines specifically address retaliation by requesting whistleblowers report to DOJ any instances of potential retaliation suffered as a result of their reporting. In response to such retaliation, DOJ may decline to award an otherwise cooperating company a presumption of declination and may even bring criminal action against the retaliators.

Key considerations

There are a number of key considerations for companies following the launch of the DOJ Whistleblower Award Pilot Program.

DOJ spent considerable time meeting with various stakeholders—including in-house counsel, members of the defense bar, and whistleblower counsel—to receive input on the proposed program, and it appears that they incorporated some of that input into the new program, including:

- The new program recognizes the inherent tensions that we pointed out in our prior client update about the incentives created for compliance programs and companies more broadly with the newly announced program. DOJ is encouraging whistleblowers to report internally to the company's compliance program before reporting to DOJ by stating that the size of the award can be increased if the report is made internally first.
- Likely in an effort to encourage more companies to voluntarily disclose misconduct and also to avoid a situation where individuals are treated more favorably than companies, DOJ also amended the Corporate Enforcement Policy to offer presumptions of a declination to companies that disclose misconduct to DOJ even after a whistleblower reported the misconduct to the company **and to DOJ**. This is a significant departure from the existing policy, which requires the company's disclosure to be prior to an imminent threat of disclosure to the government in order for the company to receive the presumption. This may very well lead to more disclosures by companies after receiving whistleblower reports.
- On the flip side, despite earlier suggestions that criminals would not be eligible for a massive financial payout, the new guidance leaves open the possibility that "minimal participants" can still recover, likely recognizing that individuals who engaged in the misconduct are likely to have the most useful information from DOJ's perspective. So intent on incentivizing disclosures is DOJ that it will apparently allow whistleblowers to submit three or more "frivolous or fraudulent" reports before imposing a permanent bar.
- The new program may also lead DOJ to seek more forfeiture in cases—particularly those initiated as a result of whistleblower reports—as forfeiture is the monetary component of the resolution that forms the basis of the recovery. This could impact the way in which DOJ and SEC coordinate resolutions in FCPA cases, for example, given that historically DOJ takes a penalty and SEC seeks disgorgement (essentially forfeiture).
- Finally, it is important to note that DOJ's Program seeks information that is new, but that does not mean the information cannot relate to misconduct already on DOJ's radar, or even subject to a preexisting DOJ investigation. This is yet another significant consideration for companies deciding whether to voluntarily disclose misconduct to DOJ. Specifically, if the company discloses misconduct and DOJ's investigation becomes known to employees, there may be a flood of reports about potential other misconduct in order to take advantage of the bounty program.

It remains to be seen how the DOJ's Whistleblower Award Program will play out, but it certainly is likely that there will be an increase in the number of whistleblower reports made and investigations that follow.

It also remains to be seen how DOJ will triage incoming reports, given the significant resources and time necessary to test the credibility of these whistleblower reports, and the lengths that DOJ has gone to encourage as many reports as possible. This is likely one of the motivating factors behind the Corporate Enforcement Policy amendment—to rely on companies to vet the reports on the front end and report those that have merit to DOJ.

Regardless, companies would be well served to continue to evaluate their internal reporting functions to ensure that reports are being flagged and analyzed promptly, as well as their investigations protocols and function to ensure that such reports are appropriately and timely addressed. This will put companies in the best position to determine whether to disclose to DOJ and, if they decide to do so, to qualify for the presumption of a declination under the Corporate Enforcement Policy.

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.

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