Updates

The U.S. Department of Justice (DOJ or the Department) announced its much-anticipated Corporate Whistleblower Awards Pilot Program on August 1, 2024.

This three-year pilot will, for the first time outside of the False Claims Act context, compensate whistleblowers who report to federal prosecutors original information about significant corporate misconduct. In connection with this announcement, DOJ also introduced a 120-day deadline by which companies that are notified internally of potential misconduct and are *not* first in the door at DOJ must self-report to remain eligible for a presumption of a declination of prosecution.

Because these announcements potentially affect both the timing and scope of internal investigations, as well as decisions on when and whether companies should self-disclose potential misconduct to DOJ, in-house counsel

and their outside legal advisors should get up to speed on these new developments.

Overview of the Corporate Whistleblower Awards Pilot Program

Under DOJ's three-year Pilot Program, whistleblowers who provide the Department with original information that leads to criminal or civil forfeiture exceeding $1 million may be eligible for financial compensation. However, to be eligible for an award, the whistleblower must first meet several criteria, including the following:

1. **Eligibility.** The whistleblower cannot be a foreign government official or an official, employee, or contractor (or immediate relative or household member thereof) of DOJ or any other law enforcement organization. The whistleblower also must not have meaningfully participated in the criminal activity reported and must not have acquired the reported information from another ineligible person, unless they are providing DOJ with information about possible violations involving that other person. Finally, an individual who would be eligible for an award through another U.S. whistleblower program based on the information reported is precluded from receiving an award under the Pilot Program.
2. **Original information.** The whistleblower must provide, in writing, *original*, nonpublic information derived from the whistleblower's independent knowledge or independent analysis that materially adds to the information DOJ already possesses.
3. **Subject matter.** The whistleblower's information must pertain to one of the following subject matters:
    1. Violations by financial institutions.
    2. Violations related to foreign corruption and bribery.
    3. Violations committed by or through companies related to the payment of bribes or kickbacks to domestic public officials.
    4. Violations related to federal healthcare offenses and related crimes, healthcare fraud, and other federal healthcare-related violations not covered by the False Claims Act.
4. **Voluntary.** The whistleblower must have no preexisting obligation to disclose the information. In addition, their submission must occur before the whistleblower receives any request, inquiry, or demand from DOJ or any other federal law or civil enforcement agency and in the absence of any government investigation or threat of imminent disclosure.
5. **Truthful and complete.** The whistleblower must provide all information of which they have knowledge related to any misconduct—including the complete extent of their own role, if any—and all matters about which DOJ may inquire.
6. **Cooperation.** The whistleblower must cooperate with DOJ in its investigation of related conduct and any criminal or civil actions, including providing truthful and complete testimony and evidence.
7. **Leading to forfeiture.** The information must lead to successful forfeiture exceeding $1 million in net proceeds forfeited to DOJ in connection with a prosecution, corporate criminal resolution, or civil forfeiture action related to corporate criminal conduct.

Finally, recognizing that the Pilot Program could encourage whistleblowers to skip internal reporting mechanisms in order to ensure they are "first in the door" at DOJ, the Department has specified that whistleblowers who first raise allegations via their companies' internal ethics and compliance hotline, and whose internal report then forms the basis of a corporate self-disclosure, will still be eligible for a whistleblower award under the Pilot Program even if the company makes the first report to DOJ, as long as the whistleblower subsequently reports to DOJ within 120 days of reporting internally. Additional detail regarding each of these requirements can be found here.

Criteria for Determining the Amount of the Award

Under the Pilot Program, whistleblowers may be eligible for an award of up to 30% of the first $100 million in net proceeds forfeited and an award of up to 5% of any net proceeds forfeited between $100 million and $500

million. Successful whistleblowers are not entitled to an award on net proceeds forfeited above $500 million.

That said, the amount of any whistleblower award falls entirely within DOJ's discretion. DOJ may increase the award amount based on the significance of the information provided, whether the whistleblower first reported the information internally, and the degree to which the whistleblower assisted DOJ and/or any internal investigation or inquiry. Conversely, DOJ may decrease the amount of the award if the whistleblower unreasonably delayed reporting the possible criminal violations, interfered with or undermined the integrity of the company's internal compliance and reporting systems, or held a management role over the personnel or offices involved in the misconduct. Again, a whistleblower is *not* eligible for payment if they meaningfully participated in the criminal activity.

Effect on Internal Investigations and Disclosure Decisions (the 120-Day Window)

By generally requiring whistleblowers to be "first in the door" at DOJ to be eligible for an award, the Pilot Program, on its own, has the potential to ultimately *disincentivize* companies from self-reporting. This stems from the fact that DOJ's Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP) also requires companies to be first in the door in order to qualify for the presumption of a declination of prosecution—after all, if a corporate whistleblower beats the company to the punch, the company might as well wait to see if DOJ takes any interest in the whistleblower's report before raising its hand.

Possibly in recognition of this unintended outcome (and/or in what may be an attempt to ensure that companies remain incentivized to promptly identify and remediate potential misconduct), DOJ, in connection with announcing the Pilot Program, also amended the CEP. The amendment provides that if a corporate whistleblower makes both an internal report to a company and a whistleblower submission to DOJ, the company will still qualify for a presumption of a declination of prosecution—even if the whistleblower submits to DOJ before the company self-discloses—provided the company self-reports the conduct to DOJ *within 120 days after receiving the whistleblower's internal report.*

This amendment marks the first time that DOJ has put an official deadline on when a company must self-report in order to receive a presumption of declination. Previously, the CEP specified that a company would qualify for a presumption of declination if, among other things, it self-disclosed to the Criminal Division within a "reasonably prompt" time after becoming aware of the misconduct. "Reasonably prompt" was left undefined, and the few CEP declinations published since that language was introduced in 2023 offer little insight into what "reasonably prompt" means in practice.

The new amendment therefore puts immense pressure on companies to expedite their internal investigations where internal whistleblowers are involved, so they can make an informed decision on disclosure within the 120-day window. After all, 120 days is a short time to adequately investigate allegations of serious misconduct—a process which often involves the collection and review of thousands of documents and interviews with dozens of witnesses (or more).

However, there are some important caveats to this new 120-day deadline:

1. **No internal whistleblower, or whistleblower doesn't report to DOJ.**

First, the amendment to the CEP only addresses the specific scenario in which a whistleblower first reports potential misconduct through their employer's internal compliance hotline or related procedure, and then subsequently reports to DOJ. This means that a company that discovers potential criminal misconduct on its own without the aid of an internal whistleblower presumably is still only required to self-disclose to DOJ within a "reasonably prompt" time after becoming aware of the misconduct to receive a presumption of a declination.

The same would be true in cases where an internal whistleblower elects not to report to DOJ. However, companies considering voluntary self-disclosure in the absence of a DOJ whistleblower would still be wise to keep the 120-day timeframe in mind, as, under the CEP, they bear the burden of showing that any self-disclosure is "reasonably prompt." It is not hard to imagine DOJ using the 120-day timeframe as a default measure of promptness in *all* cases of corporate self-disclosure going forward, even where whistleblowers are not involved.

2. **Criminal recidivism and other aggravating factors.**

Second, it appears the 120-day window will not apply for criminal recidivists or in cases where other aggravating factors are present.

To explain, the new amendment to the CEP outlines when a company will *remain eligible* for a *presumption* of declination. Presumptive declinations have never been available in cases involving criminal recidivism or other aggravating circumstances (such as involvement by executive management in the misconduct or where the misconduct is egregious or pervasive within the company). Instead, the CEP specifies that a declination may still be appropriate in cases where aggravating circumstances are present if the company, among other things, voluntarily self-discloses to DOJ "immediately upon becoming aware of the allegation of misconduct." And while "immediately" is not defined, it is safe to assume that, in choosing that phrasing, the DOJ contemplated a timeframe shorter than 120 days.

Takeaways

The Corporate Whistleblower Awards Pilot Program and the accompanying amendment to the CEP continue to increase the pressure on companies to self-disclose potential corporate misconduct to DOJ. This is unambiguously the intent of the program, as Deputy Attorney General Lisa Monaco made clear in her prepared remarks when she noted that "when everyone needs to be first in the door, no one wants to be second. Suddenly everyone is racing up the front steps, all hoping they're the first to knock."

For this reason, it is more critical now than ever before for companies to ensure that their corporate compliance programs are robust and effective. This includes having an established process for identifying and escalating reports of misconduct to the appropriate individuals, as well as for evaluating allegations quickly, so the company can make an informed decision on whether to self-disclose to DOJ within 120 days from the time it learns of the alleged misconduct, if not sooner. Finally, companies should ensure they have a mechanism in place to make disclosure decisions based on incomplete information or before an internal investigation can be concluded in cases where alleged misconduct may be more complex and require more time to appropriately investigate.

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