

# Client Alert

Special Matters and Government Investigations

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## DOJ Announces Corporate Whistleblower Awards Pilot Program

### I. INTRODUCTION

On August 1, 2024, the Department of Justice (“DOJ”) Criminal Division launched a Corporate Whistleblower Awards Pilot Program (the “Pilot Program”). Whistleblowers who report allegations about certain white collar crimes that result in asset forfeiture may be eligible for financial incentives. Deputy Attorney General Lisa Monaco initially previewed this program on March 7, 2024, at the American Bar Association’s 39th National Institute on White Collar Crime.

#### *Key Takeaways*

The Pilot Program is a significant expansion of the role of whistleblowers in DOJ investigations and adds to the already vast federal whistleblower space. The introduction of the Pilot Program follows a series of steps that DOJ has taken to encourage whistleblowers to come forward and incentivize companies to develop internal systems for gathering and responding to complaints. There are several key takeaways even at this early juncture.

- DOJ views whistleblowers as an integral tool in its arsenal for investigating and prosecuting corporate white collar crime and is willing to compensate whistleblowers accordingly with potentially significant monetary awards.
- DOJ continues to focus on prosecuting corporate crime. Its efforts to encourage voluntary disclosure and cooperation provide both whistleblowers and companies with potential benefits, while opening avenues for DOJ to investigate conduct more broadly.
- The Pilot Program provides that whistleblowers may only be paid a portion of forfeiture as opposed to any fine or restitution. Consequently,



whistleblowers may advocate for resolutions with significant forfeiture amounts.

- Companies may wish to review their internal reporting procedures and ensure that there are appropriate reporting mechanisms in place so that complaints can be elevated and investigated quickly and effectively, with the goal of enabling a company to evaluate its options within the 120-day reporting window provided by DOJ.
- Companies should consider how the Pilot Program increases their risk areas and may subject them to additional regulatory reviews. For example, private companies who are outside the SEC's jurisdiction and therefore had a lower risk profile with respect to certain whistleblower claims may now face an increased risk for external escalations.

## II. PROGRAM SUMMARY

During an August 1, 2024, speech announcing the new Program, Principal Deputy Assistant Attorney General Nicole M. Argentieri noted that the Pilot Program aims to fill in gaps not covered by other federal whistleblower avenues. Specifically, the Pilot Program applies to four areas that are priorities for Criminal Division prosecutors:

- 1) crimes involving financial institutions;
- 2) foreign corruption;
- 3) domestic corruption; and
- 4) health care fraud involving private insurance plans.

If a whistleblower provides DOJ with previously unknown information that results in a forfeiture greater than \$1 million, the whistleblower may be eligible to receive an award based on the value of the asset DOJ forfeits after compensating victims and paying other associated costs. Specifically, whistleblowers may receive up to 30% of the first \$100 million in net proceeds forfeited, and up to 5% of any net proceeds forfeited between \$100 million and \$500 million.

In addition to the Pilot Program, DOJ also announced an amendment to its Corporate Enforcement and Voluntary Self-Disclosure Policy: if a company discloses misconduct to DOJ within 120 days of receiving an internal report from a whistleblower and before DOJ reaches out to the company, the company may be eligible for a declination.

## III. PILOT PROGRAM DETAILS

The Pilot Program is modeled on other successful federal whistleblower programs, described in further detail in the next section, and seeks information on corporate misconduct not covered by other whistleblower programs. It is a three-year initiative managed by the Criminal Division's Money Laundering and Asset Recovery Section. At the end of the three-year period, DOJ will determine whether to extend the Pilot Program or make any modifications.

The Pilot Program sets out certain criteria that a whistleblower must meet to be eligible for an award. If those criteria are met and the information leads to criminal or civil forfeiture exceeding \$1 million as a result of a prosecution, resolution, or civil forfeiture action, then the whistleblower may be eligible for an award. A whistleblower will not be eligible for an award under the Pilot Program if they would have been eligible for an award through another whistleblower program or *qui tam* action for the same reported conduct.

- *First*, the whistleblower must provide original information in writing that is non-public and not previously known to DOJ and that materially adds to information already in DOJ's possession.



- *Second*, the information must pertain to one of four subject areas, described in more detail below, not covered by existing federal whistleblower programs.
- *Third*, the information must be voluntarily provided, meaning it is given before a DOJ inquiry and where the individual has no preexisting obligation to provide DOJ information, such as through a prior agreement with DOJ.
- *Fourth*, the information must be truthful and complete, including the extent of the whistleblower's role in or awareness of any misconduct, although whistleblowers who have meaningfully participated in the criminal activity they are reporting will not be eligible for an award under the Pilot Program.
- *Fifth*, the individual must cooperate with DOJ in its investigation.

The information that a whistleblower provides must pertain to at least one of four subject areas that are current DOJ priorities:

- **Crimes Involving Financial Institutions:** DOJ seeks information regarding abuses of the financial system, including obstruction or defrauding financial regulators and efforts to access services from U.S. financial institutions through fraud.
- **Foreign Corruption:** DOJ is focused on foreign corruption resulting from violations of the Foreign Corrupt Practices Act ("FCPA"), the Foreign Extortion Prevention Act ("FEPA"), and money laundering statutes. The Securities and Exchange Commission's ("SEC") whistleblower program covers alleged FCPA violations by companies that are within SEC's jurisdiction, meaning ones that issue securities in the U.S. The Pilot Program helps expand DOJ's reach to companies not within SEC's jurisdiction – private companies and foreign issuers without listed American Depositary Receipts. This is also a way for DOJ to prioritize enforcement of the recently enacted FEPA, which makes it a criminal offense for a foreign government official to solicit or receive bribes from a person in the U.S., any issuer, or domestic concern. See our previous [client alert](#) on the FEPA for more explanation of the law.
- **Domestic Corruption:** This includes companies bribing or providing kickbacks to domestic public officials, including federal or state officials, and officers or employees of a government department or agency.
- **Health Care Fraud Involving Private Insurers:** In its introductory remarks, DOJ noted that *qui tam* recovery under the False Claims Act ("FCA") covers fraud on federal health care benefits, such as Medicare, but the Pilot Program seeks information regarding fraud involving private insurers, which DOJ says involves tens of billions of dollars in fraud annually.

DOJ attempts to address a concern raised by the defense bar after the Pilot Program was introduced in March: the Pilot Program may incentivize employees to go outside of internal reporting channels contemplated by a company's compliance program. Specifically, pursuant to the Pilot Program, a whistleblower is eligible for a DOJ award even if they initially reported the misconduct internally if they submit the information to DOJ within 120 days of doing so internally. The act of reporting internally may also increase the potential whistleblower award.

Companies are also encouraged to come forward. In the introductory remarks, DOJ announced a related amendment to its Corporate Enforcement and Voluntary Self-Disclosure Policy: if a company receives a whistleblower report and discloses the misconduct to DOJ within 120 days of receiving the complaint and before DOJ contacts the company, the company will be eligible for a declination, provided the company cooperates and remediates.



If the information provided fits the above criteria and leads to forfeiture exceeding \$1 million in total net proceeds forfeited, then the whistleblower may be eligible for an award. However, awards are entirely discretionary. A whistleblower may be eligible for an award based on the following calculation:

- Up to 30% of the first \$100 million in net proceeds forfeited.
- Up to 5% of any net proceeds forfeited between \$100 million and \$500 million.
- No award on net proceeds forfeited above \$500 million.

The Pilot Program outlines certain criteria in determining the amount of the award. DOJ may increase the award amount if the information provided by the whistleblower is significant, the whistleblower provides considerable assistance to the DOJ in its investigation, or if the whistleblower initially utilized a company's internal reporting mechanisms. Other factors may lead DOJ to decrease the size of an award, including if the whistleblower had some culpability in the misconduct, unreasonably delayed providing DOJ with information, interfered with internal compliance and reporting systems, or had a management role over the personnel or offices involved in the misconduct.

#### IV. OTHER GOVERNMENT WHISTLEBLOWER PROGRAMS

As noted above, to be eligible for an award under the Pilot Program, information must pertain to one of four identified subject areas not already covered by an existing federal whistleblower program. In the financial sector, the SEC, Commodity Futures Trading Commission ("CFTC"), and Treasury Department's Financial Crimes Enforcement Network ("FinCEN") each have their own whistleblower programs. In the health care space, whistleblowers may seek an award through the *qui tam* provision of the FCA.

The Pilot Program is focused on expanding enforcement in areas that fall outside of other programs' purview. One such area that DOJ identified in announcing its Pilot Program are foreign corruption cases that fall outside of the SEC's jurisdiction, namely, corruption by foreign issuers and private companies. Another area the Pilot Program seeks to cover is misconduct involving financial institutions where financial system abuses might escape the jurisdiction of a particular regulator or regulators and/or fall outside of their whistleblower programs, as we have recently seen with certain cryptocurrency exchanges, for example. Significantly, DOJ also announced that it is targeting health care fraud involving private insurers, which previously has not been covered by a federal whistleblower or *qui tam* program.

Although there are many similarities between these existing federal whistleblower programs and DOJ's Pilot Program, the breadth of DOJ's jurisdiction and enforcement objectives allow its Pilot Program to cover more conduct and there are some slight differences in application between programs.

The SEC's Whistleblower Program incentivizes the reporting of information about federal securities laws violations.<sup>i</sup> The CFTC's Whistleblower Program pays monetary awards for information about violations of the Commodity Exchange Act ("CEA").<sup>ii</sup> Violations of the CEA can include certain actions or behavior in connection with futures, options, and swaps and in connection to a contract of sale of any commodity in interstate commerce, involving, among other things, fraud, market manipulation, and trade practice violations. FinCEN's Anti-Money Laundering and Sanctions Whistleblower Program, which is still in its infancy, is also modeled after the SEC's and CFTC's whistleblower programs, and it focuses on two broad categories of misconduct: (1) violations of the Bank Secrecy Act, and (2) violations of certain designated sanctions laws.<sup>iii</sup> The DOJ Civil Division oversees the FCA *qui tam* program, but it operates differently than the other whistleblower programs. The FCA, which provides for treble damages plus a civil monetary penalty, includes a *qui tam* provision that allows private citizens to sue on behalf of the government for fraudulent or false claims submitted to the



government. The FCA reaches a broad range of conduct, but it is well known for incentivizing whistleblowers to report on fraud involving federal health care programs (e.g., Medicaid, Medicare, and TRICARE).

Under all these programs, whistleblowers are eligible to receive monetary awards, but the way the award is calculated differs from the Pilot Program. The SEC, CFTC, and FinCEN are authorized to provide monetary awards for information that leads to an enforcement action in which over \$1 million in sanctions is ordered, which is the same as the forfeiture threshold amount required for an award under the Pilot Program. When certain criteria are met, the SEC, CFTC, and FinCEN may also pay rewards for amounts collected in related actions, which does not appear to be the case under DOJ's Pilot Program. Under the existing whistleblower programs, the range for the award is between 10% and 30% of the money collected. This differs from the calculation under DOJ's Pilot Program where a whistleblower may be eligible for an award of up to 30% of the first \$100 million in net proceeds forfeited or an award of up to 5% of any net proceeds forfeited between \$100 million and \$500 million. While the SEC, CFTC and FinCEN may pay rewards for amounts collected in related actions unlike DOJ, DOJ's Pilot Program seems to incentivize whistleblowers more by increasing the award percentages. *Qui tam* awards under the FCA operate a little differently. Whistleblowers who file under the FCA can receive a portion of the penalty and damages award ranging from 15% to 25% if the government intervenes in the action and 25% to 30% if the government does not participate. They are also entitled to receive special damages.

Most of the programs consider similar factors in determining the award amounts. The amount awarded to an individual whistleblower by the SEC and CFTC depend on several factors that may increase an award: the significance of the information provided, assistance provided by the whistleblower, law enforcement interest, and the whistleblower's participation in internal compliance systems. There are also several factors that may decrease an award: culpability, unreasonable reporting delays, and interference with internal compliance and reporting systems. FinCEN's program's factors differ only slightly. Likewise, DOJ will consider very similar factors, discussed above, in determining award amounts under the Pilot Program. In contrast, whistleblower awards under the FCA are set by the court that hears the case and largely depend on the extent of participation by the whistleblower. The minimum 15% award generally has been regarded as a finder's fee, and an award above that may be warranted based on the significance of information contributed, the whistleblower's contribution to the result and avoidance of harming the government's efforts, and the government's prior knowledge of the fraud. DOJ guidelines provide an extensive list of additional considerations that weigh on whether to increase or decrease an award.

If the success of the federal whistleblower programs on which DOJ's program is modeled is an indicator, the Pilot Program will yield a return on DOJ's and whistleblowers' investment. As of November 2023, the SEC has awarded 397 whistleblowers with more than \$1.9 billion since the inception of its program in 2011. As of June 2024, the CFTC has granted whistleblower awards of approximately \$370 million associated with enforcement actions yielding monetary sanctions totaling more than \$3.2 billion since issuing its first award in 2014. As of May 2024, the much newer FinCEN program has received over 270 unique tips.

Similarly, the DOJ Civil Division's *qui tam* program has yielded exorbitant recoveries for the federal government and whistleblowers alike. To put FCA recoveries in context, in fiscal year 2023 alone, 348 new health care-related *qui tam* suits were filed, and the government reported over \$1.8 billion in health care-related recoveries from settlements and judgments arising from lawsuits filed under the FCA and pursued by the government and whistleblowers.<sup>iv</sup> During that same time period, whistleblowers who filed *qui tam* actions were awarded over \$200 million. In recent years, DOJ has pursued fraud involving private insurers on a much smaller scale using statutes like the Travel Act and wire fraud, among others. In announcing the details of its Pilot Program, DOJ estimated there are "tens of billions of dollars in fraud" in this



space each year. Given this assessment and the road map of success provided by the Civil Division's *qui tam* program, we can expect DOJ to focus heavily on this area of enforcement over the duration of the Pilot Program.

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<sup>i</sup> *Whistleblower Program*, SEC, <https://www.sec.gov/enforcement-litigation/whistleblower-program>.

<sup>ii</sup> *The Whistleblower Program*, CFTC, <https://www.whistleblower.gov/>.  
<sup>iii</sup> See 31 U.S.C. § 5323.

<sup>iv</sup> *Fraud Statistics - Overview*, Civil Division, U.S. DOJ, <https://www.justice.gov/opa/media/1339306/dl?inline>.