

Insights

DOJ PILES ON THE INCENTIVES FOR INDIVIDUALS TO BLOW THE WHISTLE ON COMPANIES

Aug 06, 2024

Historically, successful white-collar prosecutions often turn on the government's ability to identify "insiders" with firsthand knowledge of the alleged criminal scheme, who opt to cooperate with prosecutors in exchange for certain rewards or leniency. Last week, the Department of Justice added another tool to its arsenal for identifying such "insiders," announcing a three-month pilot program that will allow whistleblowers to recover a percentage of forfeited money that the government recovers due to the information relayed to it. Pursuant to the program, a whistleblower may earn up to 30% of the first \$100 million in forfeited assets plus another 5% of the next \$400 million. This program is consistent with DOJ's voluntary self-disclosure program, which it instituted earlier this year. DOJ has aptly named this the "Corporate Whistleblower Awards Pilot Program," thus demonstrating its commitment to go after companies that are committing wrongdoing, by creating new financial incentives for insiders with knowledge of such wrongdoing to disclose what they know to law enforcement.

The pilot program does have some limitations. First, the information must be both truthful and original. Importantly, the program encourages the whistleblower to report to the company internally, and will credit that as the original reporting date to the DOJ if the whistleblower makes a disclosure to DOJ within 120 days of that initial internal report. If the whistleblower first participates in internal reporting and investigation, it is a factor that may increase the award they may receive. Likewise, if the company reports to the DOJ within that 120-day period, and before being contacted by DOJ, the company can still be eligible for a non-prosecution agreement under the DOJ's voluntary disclosure guidelines.

Second, there are several carve outs for who qualifies, including most importantly, if the whistleblower "meaningfully participated in the criminal activity they reported, including by directing, planning, initiating, or knowingly profiting from that criminal activity." The program notes, however, that if the whistleblower is only a "minimal participant," they may still qualify for an award.

Third, the information must relate to one of the following four areas:

1. certain crimes involving financial institutions, from traditional banks to cryptocurrency businesses;

2. foreign corruption involving misconduct by companies;
3. domestic corruption involving misconduct by companies; or
4. health care fraud schemes involving private insurance plans.

Other government programs may cover (and reward) separate disclosures to the government, such as the IRS whistleblower program, the False Claims Act, and Sarbanes-Oxley whistleblower awards.

There are other usual requirements, such as being done voluntarily (as opposed to in response to or in anticipation of DOJ action), truthful and complete, continuing cooperation, and leading to a successful forfeiture of at least \$1,000,000. This last point is significant. The amount due to the whistleblower is only from forfeited funds. It is not from any restitution or money that goes to pay back victims of the wrongdoing. This may limit the funds available.

There is no doubt that this program is aimed at convincing companies to maintain vigorous compliance programs. As DOJ emphasized in its policy statement: “Strong compliance programs can prevent, identify, and remediate misconduct before it begins or expands, and enable companies to report misconduct to the Department when it occurs.” That is the goal of this program and similar whistleblower-incentive programs. And it serves as an important reminder for companies to periodically conduct risk assessments and continually monitor and strengthen their compliance programs. The BCLP white collar team can assist in evaluating and strengthening your company’s compliance program as well as conduct internal investigations when issues arise. In addition, our lawyers will fight to defend companies and individuals when DOJ prosecutors come knocking.

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- White Collar

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