Regulatory and Enforcement Alert

DOJ Announces Corporate Whistleblower Policy That Offers Financial Rewards for Tips

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Last week, the U.S. Department of Justice ("DOJ") announced it intends to develop a new whistleblower policy to further its efforts to induce corporations, their executives, and their employees to approach DOJ with reports of potential criminal misconduct. This policy comes on the heels of recent guidance highlighting corporate incentives for disclosing misconduct, including the DOJ's revamped Voluntary Disclosure Policy, and implementing guidance by DOJ's Criminal Division and U.S. Attorneys' Offices, as well as DOJ's guidance for acquiring companies in M&A transactions. While the contours of the program are still to be fully defined as part of a 90-day development period, DOJ has made clear that the new whistleblower program turns the focus on individuals by offering monetary incentives to report criminal misconduct.

The new whistleblower policy follows announcements earlier this year by the U.S. Attorney's Offices for the Southern District of New York and, more recently, the Northern District of California, of pilot programs for whistleblower policies meant to encourage voluntary disclosure by individuals. But where the two U.S. Attorney programs focus on encouraging individuals *with* criminal liability to come forward and cooperate against more culpable individuals in return for leniency, the DOJ's newly announced program sets its sights on more traditional targets of corporate whistleblower programs—individuals *without* criminal liability themselves who inform prosecutors of the misconduct of others. And where the U.S. Attorney programs propose non-prosecution agreements as a reward for providing information, the new DOJ policy offers an incentive more in line with traditional whistleblower programs at the Securities and Exchange Commission ("SEC") or the Commodities Futures Trading Commission ("CFTC")—money.

The New Program

As announced by Deputy Attorney General Lisa O. Monaco during remarks at the ABA White Collar Conference on March 8, 2024, and further described by Acting Assistant Attorney General Nicole Argentieri the following day, the DOJ whistleblower pilot program will start later this year, after it is designed and formalized during a 90-day run-up phase. Because the program has yet to be fully designed, the officials were able to offer few details at the time of the announcement.

However, the two-day announcement touched on several salient aspects of the program which, according to DOJ, will be its hallmarks once launched:

"ORIGINAL, NON-PUBLIC, TRUTHFUL INFORMATION"

As announced, the program is geared toward rewarding individuals who step forward with "original, non-public, truthful information not already known to the department." That the department cannot already know of the information creates a dynamic of potential competition, not only among potential individual whistleblowers, but also between that category of individual whistleblowers and corporate entities to be the first to disclose an issue to DOJ. Moreover, an individual whistleblower will be eligible only when the information is presented free of any "government inquiry, preexisting reporting obligation, or imminent threat of disclosure." It is unclear at this point whether, for example, a failure to truthfully live up to an existing reporting obligation is rewardable disclosure under the policy, or what constitutes an imminent threat of disclosure.

Further, citing SEC and CFTC limitations on rewards to cases in which those agencies order sanctions of $1 million or more, the DOJ announcement also pointed to a similar threshold, the amount of which has yet to be determined. Whatever the amount, a challenge facing individuals considering making disclosures who are motivated by money, will be the difficulty in estimating ahead of time whether a given set of facts will yield a case that meets the threshold and is thus likely to generate a reward at all.

STATUTORY AUTHORITY AND PAYOUT CONDITIONS

DOJ intends to base its authority on that section of Title 28 of the United States Code that authorizes DOJ to pay rewards for "information or assistance leading to civil or criminal forfeitures." Acting Assistant Attorney General Argentieri explained that DOJ's Money Laundering and Asset Recovery Section will, as a result, be heavily involved in coordinating guidelines across DOJ components and U.S. Attorney's Offices that address eligibility for whistleblowers.

Deputy Attorney General Monaco stated that the target areas for the program will include knowledge of criminal abuses of 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 involving illegal corporate payments to government officials. Notably, eligibility for payouts will be limited only to cases where there is not already an existing financial disclosure incentive (existing incentives would include, for example, *qui tam* suits or a competing federal whistleblower program). This would seem to exclude significant amounts of securities and commodities fraud-related misconduct (already covered by the SEC's Dodd-Frank era program) and government fraud cases already covered by the False Claims Act from consideration. Finally, Deputy Attorney General Monaco emphasized that payouts pursuant to the program will only take place *after* victims are compensated. Given that in many frauds cases compensation does not always happen promptly or at all–due to dissipated proceeds, for example, or lengthy legal proceedings that take place before a final sentencing—potential whistleblowers will need to consider that their participation is not necessarily an assurance of an immediate payment.

THE SDNY AND N.D. CAL. PROGRAMS

Deputy Attorney General Monaco lauded the Southern District of New York and Northern District of California programs as other examples of "innovation" in the white collar whistleblower space. But these programs are, at their core, significantly different from what DOJ announced last week. By offering non-prosecution agreements to certain categories of criminally culpable individuals, these programs read more as a modification of existing criminal cooperation policies than a traditional whistleblower program, with meaningful potential rewards in the best of cases, but few promises to most of those who avail themselves of the process at the outset.

For example, the SDNY program, announced last month, offers the potential for non-prosecution agreements where individuals with criminal culpability voluntarily disclose and cooperate with the federal authorities. (Traditionally, most individuals who enter cooperation agreements with the SDNY are required to plead guilty to the most serious possible charges and hope for leniency from the judge at sentencing in exchange for the information they provided under its cooperation policy, thus making the possibility of a non-prosecution agreement a particularly significant departure.) Notably, as in the DOJ program, the program is limited to cases in which the prosecutors were not previously aware of the misconduct. In the vast majority of cases, there exists no way for potential individual whistleblowers to know whether the conduct they have to report is already known to the government, creating real risk not only that their "leap of faith" will go unrewarded, but that they may subject themselves to criminal liability that they may otherwise have avoided but for their attempt at whistleblowing.

Further, the SDNY's program is limited to non-violent misconduct involving public or private companies, exchanges, financial institutions, or corruption offenses involving bribery or fraud involving federal, state or local funds. Eligibility for the SDNY program is limited to ensure that the whistleblowers have someone "higher up" in a criminal scheme to offer, as federal state and local officials, chief executive officers and chief financial officers of companies are barred from participating. So, too, are convicted felony-level fraudsters or individuals who have engaged in violent, sex-based, or national security-related crimes.

Fewer details are known about the N.D. California program, which was informally announced during Deputy Attorney General Monaco's recent visit to that U.S. Attorney's Office but has not yet been the subject of a formal written announcement.

Conclusion

At the end of the 90-day policy period, we can expect a more detailed description of the DOJ's new whistleblower program. But even at this early moment, significant open questions remains about its impact—whether the prospect of potential monetary recovery will be enough to overcome uncertainty regarding eligibility and payout. There are also questions about whether DOJ will be able to protect whistleblowers' anonymity, particularly in the criminal context where significant information must be turned over to the defense. As companies that discover potential misconduct undertake the difficult calculus of whether and when to engage in a potentially damaging and costly self-report, these considerations are further complicated by the knowledge that DOJ is now actively

encouraging individual employees to report the same facts—potentially limiting the companies' relief and options if they do not reach the prosecutor's office first.

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