Published on *The National Law Review* https://natlawreview.com

DOJ Implements New Whistleblower Reward Program

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Companies who submit healthcare claims to private payors, provide financial services to customers, interact with domestic or foreign public officials, or otherwise operate in highly regulated industries should take note that the Department of Justice (DOJ) has taken another significant step in its ongoing effort to encourage new whistleblowers with information about potential corporate criminal malfeasance to report that information to the government. On August 1, 2024, the DOJ announced its long awaited Corporate Whistleblower Awards Program. The program seeks to fill "gaps" in existing whistleblower programs by providing awards of up to 30% of forfeited proceeds for reporting criminal conduct that is not otherwise covered by an existing system for awarding whistleblowers. The silver lining for companies is that the program incentivizes the whistleblowers to cooperate with the company's internal compliance function. DOJ also provides for a presumptive declination of criminal charges for companies that self-report to DOJ within 120 days of the time the issue is first raised internally by the whistleblower, providing strong incentives for companies to investigate issues quickly.

The program represents the DOJ's latest effort to increase the number of voluntary self-disclosures of corporate criminal activity. In January 2023, the DOJ announced its revised Corporate Enforcement and Voluntary Self Disclosure Policy, which sought to expand the incentives for companies to voluntarily self-disclose misconduct, cooperate with DOJ investigations, and take prompt and full remedial measures. The policy's primary incentive was the prospect of a presumed declination for companies who followed its mandates.

As we discussed in a previous post, efforts to increase voluntary self-disclosures continued in April 2024 when the DOJ launched a Pilot Program on Voluntary Self Disclosures for Individuals. That initiative expanded the scope of potential whistleblowers by including those complicit in wrongdoing, granting them eligibility for immunity from prosecution in return for reporting the activity. In substance, that structure incentivized both individual wrongdoers and the corporations for whom they worked to be the first to report criminal activity. By pitting the would-be whistleblowers and the companies against each other, the DOJ effectively constructed a prisoners' dilemma where the government stood to benefit regardless of which party acted first.

The program is a different verse from the same hymnal. It offers a different (but more traditional)

incentive for whistleblowers – the opportunity for financial reward – while maintaining the goal of increasing the number of voluntary self-disclosures. The program seeks to achieve that objective by motivating those who are aware of misconduct, but perhaps are otherwise unable to qualify for a bounty under the current framework or otherwise uninterested in reporting the activity without a personal benefit.

The Basic Framework

Under the program, eligible individuals who voluntarily provide original information to the government in certain areas of focus and cooperate with the resulting investigation stand to receive 30% of any criminal or civil forfeitures over $1 million in accordance with a defined payment priority. The program lays out a basic structure for determining whether an individual is entitled to an award, but also affords the DOJ substantial discretion in deciding whether to make such awards, and in what amount. The key elements are:

- **Areas of focus** – The program identifies four subject matter areas: 1) violations by financial institutions, their insiders and agents involving money laundering, fraud, and fraud against or non-compliance with regulators; 2) foreign corruption and bribery and violations of money laundering statutes; 3) domestic corruption violations including bribes and kickbacks paid to domestic public officials; and 4) healthcare offenses involving private or non-public healthcare benefit programs and fraud against patients, investors or other non-governmental entities in the healthcare industry, or other violations of federal law not covered by the federal False Claims Act (FCA).
- **Eligible individuals** – The program excludes several categories of individuals, including those eligible to report under other whistleblower programs and those who "meaningfully participated" in the criminal activity reported (although those who played a "minimal role" can still participate).
- **"Original information"** – Essentially, independent non-public knowledge or analysis in the individual's possession is considered "original" information. Notably, information can be deemed "original" if it "materially adds to the information that the Department already possesses." Information that the individual has already reported through the company's internal whistleblower, legal or compliance procedures can still be deemed "original," provided the individual also reports that information to the government within 120 days of reporting internally. Privileged information is not considered "original" unless the crime, fraud or other exception to state attorney conduct rules apply.
- **"Voluntary" submission** – The information must be reported before the DOJ or any federal law enforcement or civil enforcement agency initiates any inquiry relating to the subject matter.
- **"Cooperation"** – Individuals who report must also cooperate fully with the DOJ's investigation, including by participating in interviews, testifying before a grand jury or at trial, producing documents and, if requested, working in a "proactive manner" with federal law enforcement. This could include clandestine activities to gather evidence, such as recording phone calls or wearing a wire.
- **Criteria for determining amount of award** – The program lists several factors that could militate in favor of increasing or decreasing the whistleblower's financial award. Increases may be justified by the significance of the information provided, by the nature and extent of assistance provided, and, notably, by participation in internal compliance programs. Decreases may be appropriate where the reporting individual was a minimal participant in the underlying activity, or where the individual unreasonably delayed reporting, interfered with the company's internal compliance and reporting systems, or had management or oversight

responsibilities over the offices or personnel involved in the conduct.

- **Payment priority** – When the victim is an individual, he or she must first be compensated "to the fullest extent possible" before a whistleblower can recover. When the victim is a corporate entity or government agency, the whistleblower jumps the line and is compensated first.
- **Relationship to the Corporate Enforcement and Voluntary Self Disclosure Policy** – While the program incentivizes whistleblower reports to the DOJ, a simultaneous amendment to the self-disclosure policy provides that "if a whistleblower makes both an internal report to a company and a whistleblower submission" to the DOJ, companies who self-report that conduct within 120 days of the internal report "will still qualify for a presumption of a declination[.]" This amendment underscores the DOJ's focus on increasing self-disclosures, inasmuch as it effectively removes the need for them to be truly "voluntary." A company that receives a complaint through its whistleblower program may still be eligible under the self-disclosure policy even if the individual has already reported the conduct to the DOJ, but it has a limited time to investigate and decide whether to self-report the conduct.

Key Takeaways

Reading the tea leaves, we see several potentially significant takeaways for companies evaluating the program's likely impact.

1. As a starting point, companies should evaluate whether and to what extent their operations create new reporting opportunities under the program, and thus necessitate action. That process should involve answering the following questions:
    - Does the company operate in one of the areas of focus? If so, the program creates new opportunities and incentives for whistleblowers, and the company must assess whether it is prepared to address an increase in reports and to recognize that a reporter may have already disclosed information to the DOJ.
    - Is the company publicly traded? If so, the company is already subject to the Sarbanes-Oxley Act (SOX), which should mean that systems are already in place to receive, investigate and determine whether to take action, including potentially making a voluntary self-disclosure. The program provides an opportunity to reassess the efficacy of those systems but should not necessarily require the creation of new ones. Note that even those companies with existing whistleblower programs should consider the need to expand those systems to cover new areas of focus. For example, a company with a SOX whistleblower policy should consider the need to expand its scope to cover domestic corruption violations, which may not otherwise be covered.
    - Does the company submit claims to government payors? If so, it is already subject to the FCA and should already have a system in place to analyze internal compliance concerns. If that system focuses on or prioritizes issues regarding government payors, the company should expand its focus to include claims and conduct regarding private payors, which may now be subject to whistleblower bounties under the program.
2. For privately held companies operating in the areas of focus that are not subject to the FCA, the program necessitates a thorough and candid assessment of the risk the program creates. Depending on the extent of that danger, companies should consider the following measures:
    - Create, or enhance as necessary, internal reporting mechanisms to receive and evaluate whistleblower reports.
    - Publicize the company's expectation that employees should promptly report concerns internally about potential violations of law or company policy, making clear that no retaliation will result from reports made in good faith.
    - Design a process for investigating whistleblower reports based on their nature and

seriousness. Establish criteria for identifying those that can be investigated by HR, those that require the involvement of in-house counsel, and those that must be handled by outside counsel. If there is any possibility of criminal exposure, ensure an appropriate investigation is conducted and concluded in time to allow the company to determine whether to self-report in the 120-window for a presumptive declination.

3. All companies should have in place a system for quickly and accurately evaluating whether to voluntarily self-disclose violations. This process is a multi-factor calculus that considers a range of factors, including primarily the merits of the underlying information and the amount of financial loss or gain that resulted. While decision-making in this context varies by situation, one essential element remains constant: the need for accurate information regarding the nature, scope and effect of the underlying conduct.

Only time will tell exactly how the program will impact the number and nature of whistleblower reports. But companies can take practical steps now to gauge whether and to what extent they are likely to be affected and begin installing the measures necessary to minimize the risk that might otherwise result.

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National Law Review, Volume XIV, Number 226