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Key Compliance Takeaways for Companies from the DOJ's New Corporate Whistleblower Program

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On August 1, 2024, the U.S. Department of Justice ("DOJ") announced its new "Corporate Whistleblower Awards Pilot Program" ("DOJ Program"),[1] a three-year initiative managed by DOJ's Money Laundering and Asset Recovery Section.[2] The DOJ Program is just the most recent in a trend of similar programs designed to incentivize reporting of corporate misconduct including those enacted by the U.S. Department of the Treasury's Financial Crimes Enforcement Network, the Commodity Futures Trading Commission, and the Securities and Exchange Commission ("SEC"). And the new program expands upon the success of DOJ's own *qui tam* whistleblower program targeting fraud against the U.S. government under the False Claims Act. Below we briefly outline the most significant components of the new DOJ Program and key takeaways for companies to consider with respect to their existing compliance and investigation procedures.

Program Overview

Under the DOJ Program, individuals who meet specified conditions[3] and provide "original information" to the Department relating to four categories of corporate misconduct are eligible for a monetary award if that information results in a successful criminal or civil forfeiture exceeding $1,000,000 in net proceeds.[4] Those four specified categories of corporate misconduct are: (1) offenses by financial institutions relating to money laundering, fraud, and failure to comply with applicable provisions of the Bank Secrecy Act; (2) offenses relating to foreign corruption and bribery; (3) offenses relating to domestic bribery and public corruption; and (4) health care fraud offenses not subject to *qui tam* recovery under the False Claims Act.

An overarching condition of eligibility under the DOJ Program is that the information reported must not be eligible for an award under another existing U.S. Government or statutory whistleblower program. Thus, the DOJ Program is explicitly designed to expand whistleblower incentives to new categories of corporate crime including corruption offenses involving private entities—which are not covered by the SEC's program applicable to securities issues—and health care fraud offenses involving private insurers which are not covered under DOJ's existing *qui tam* regime, unlike services covered by Medicare, Medicaid, or Tricare.

Issuance of awards under the program will be discretionary but can be substantial—up to 30% of the first $100 million in net proceeds forfeited

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and up to 5% of any net proceeds between $100 and $500 million.[5] Notably, under the terms of the program individuals who have some participation in the underlying misconduct are not automatically disqualified from whistleblower award eligibility provided they did not "meaningfully" participate by "directing, planning, initiating, or knowingly profiting" from the alleged misconduct or are otherwise deemed to have a sufficiently "minimal" role as determined by DOJ.[6]

In parallel with its announcement of the program, DOJ issued an amendment to its Corporate Enforcement and Voluntary Disclosure Policy[7] providing that if an individual submits an internal report and a whistleblower submission to DOJ about a company, the company can still qualify for a presumption of a declination provided it reports the information to DOJ itself within 120 days of receiving the internal report and before any affirmative DOJ outreach.[8] The DOJ guidance also includes a section entitled "Additional Guidance for Public Awareness" that includes provisions broadly outlining the Department's right to deny a company any cooperation credit and/or initiate a separate enforcement action if it determines that a company has retaliated against a whistleblower or otherwise interfered with the individual's ability to report misconduct including through confidentiality provisions or agreements.[9]

Key Takeaways

Much of the public discussion of the new program has understandably focused on the program's mechanics and how DOJ may exercise its discretion to issue awards. Many of these questions will remain unresolved until we have had time to see resolutions and awards under the program. But in the interim, there are a number of important takeaways for companies to consider in assessing and potentially refining their own compliance programs and investigative procedures.

- **Increased Risk of Government Enforcement**: Perhaps the most obvious takeaway is that the DOJ Program provides new incentives for reporting corporate misconduct—alongside the other recent government whistleblower programs. Thus, it only further heightens the risk that the DOJ will become aware of compliance failures with respect to the categories of corporate misconduct outlined in the program when they occur including with respect to matters typically in the purview of agencies such as the Department of Health and Human Services ("HHS"). And it increases the urgency for companies to evaluate the effectiveness of their existing compliance protocols and to efficiently and effectively investigate reported concerns.
- **Need to Assess Internal Reporting Systems**: The DOJ Program does not require a whistleblower to first report conduct to a company before notifying DOJ. But it does include strong incentives for individuals to do so by providing that an award may be increased if an individual "participated in internal compliance systems." Conversely, the DOJ has indicated it may reduce an award if a whistleblower interferes with a company's internal compliance and reporting systems or deliberately withholds or

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omits material information. Part of the DOJ's assessment of this element will include whether the company "has adequate and available channels for internal reporting." Given the obvious advantages to a company of having advance notice of alleged misconduct that will be reported to DOJ, companies would be wise to evaluate whether they have effective systems in place to facilitate such internal reporting and effective follow-up on reported concerns.

- **Efficient Investigation of Internal Reports**: The 120-day deadline under the program (which may be even shorter if the DOJ proactively reaches out to an affected company after receiving a submission) means that companies should evaluate whether they have procedures in place to efficiently evaluate any internal reports of misconduct that are submitted through those reporting channels and to advise the both the company and its board of directors so they can timely decide what steps to take in response. Typically, such investigations are conducted by cost-effective and experienced outside counsel.
- **Parallel Investigations:** Multiple agencies have whistleblower programs, and other agencies, like SEC, have often touted the success of their programs. Whistleblowers with concerns regarding conduct within the purview of multiple enforcement agencies, including the SEC and HHS, may report their perceived concerns to those agencies as well, potentially exposing companies to a multi-agency investigation on various aspects of a given issue.
- **Review of Applicable Policies and Agreements**: In light of the DOJ's stated intentions with respect to retaliation and interference with respect to whistleblowers, companies should also assess their internal policies, training, and employee agreements to ensure they do not contain provisions that could be deemed to run afoul of this directive. The SEC also has been active in taking enforcement action against companies' agreements and policies that allegedly impeded potential whistleblowing.
- **Federal Contractors**: Under its existing FCA *qui tam* program, the DOJ has recouped billions of dollars in judgments and garnered thousands of settlements against companies that have defrauded the government. This new pilot program reinforces DOJ's commitment to exposing and eliminating fraud within the public sector and emphasizes the cooperation and disclosure rules outlined in FAR 3.1003, 52.203-13, and 52.203-14. Contractors should be mindful of the implications of increased whistleblower protections, and reinforce their internal compliance policies accordingly. Further, contractors should be aware of their own voluntary disclosure obligations, such as the Mandatory Disclosure Ruler under FAR 52.203-13, which imparts a "credible evidence" threshold for the disclosure of any potential FCA violation, or any other criminal offense involving fraud, conflict of interest, bribery, or gratuity.

Holland & Hart's Government Investigations and White Collar Defense Group will continue to monitor these developments. If you have any

questions about the new policy or corporate compliance, generally, you should seek counsel from an attorney familiar with the issues.

[1] DOJ Press Release, "Criminal Division Corporate Whistleblower Awards Pilot Program," August 1, 2024, available at https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program

[2] Department of Justice Corporate Whistleblower Awards Pilot Program ("Program Guidance"), available at https://www.justice.gov/criminal/media/1362321/dl?inline

[3] The DOJ's guidance outlines reasons why an individual may be deemed ineligible for a whistleblower award including that the individual: (1) was eligible for an award under a different program; (2) substantially participated in the criminal activity; (3) is affiliated with the DOJ itself, a foreign government, or otherwise obtained the information from such a person; and (4) they made any false statements in their submission or otherwise interfered with the DOJ.

[4] Program Guidance at § II.3. The focus on net proceeds from forfeitures arises from Attorney's General authority under 28 U.S.C. § 524(c) to pay "awards for information or assistance leading to a civil or criminal forfeiture."

[5] Program Guidance at § III.1.

[6] *Id*. at § II.1

[7] Criminal Division Corporate Enforcement and Voluntary Disclosure Policy, available at https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline

[8] Temporary Amendment to the Criminal Division Corporate Enforcement and Voluntary Disclosure Policy, available at https://www.justice.gov/criminal/media/1362316/dl?inline

[9] Whistleblowers who are retaliated against may also have private claims under pre-existing whistleblower acts such as the Sarbanes-Oxley Act and the Dodd-Frank Act. And the SEC has also been active against actual and potential alleged whistleblower retaliation.

Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.