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Why DOJ's Whistleblower Program May Have Limited Impact

By **Nola Heller, Matthew Laroche and John Hughes** (August 19, 2024, 4:46 PM EDT)


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The U.S. Department of Justice recently unveiled the details of its new Corporate Whistleblower Awards Pilot Program.[1]

Launched on Aug. 1 for a three-year trial, the DOJ's initiative aims to fill gaps left by existing whistleblower programs at the U.S. Securities Exchange Commission and the U.S. Commodity Futures Trading Commission.

While the program's goals of enhancing corporate accountability and deterring misconduct are laudable, it remains to be seen whether its implementation will yield an increase in federal criminal investigations of corporate misconduct.

The program offers eligible corporate whistleblowers awards of up to 30% of the first $100 million in asset forfeitures from original, truthful information voluntarily provided, and up to 5% more for forfeitures between $100 million and $500 million. It targets crimes involving financial institutions, foreign corruption, domestic bribery of public officials and private insurer healthcare fraud.

The DOJ also issued a temporary amendment to its voluntary corporate self-disclosure policy to provide a presumption against prosecuting companies that self-report misconduct within 120 days of receiving a whistleblower allegation, assuming the other requirements of the self-disclosure policy are met.

That said, as currently comprised, the program contains conflicting incentives for companies and individuals that have the potential to diminish its impact.

It promises rewards to whistleblowers, but also offers potential declinations of prosecution to companies that self-report. Whistleblowers only earn the promised monetary incentives when the DOJ secures an asset forfeiture of at least $1 million. If a whistleblower reports internally and the company self-reports within 120 days, resulting in a declination, either the whistleblower gets nothing, or the DOJ imposes a significant forfeiture on a company it promised not to prosecute.

While the DOJ's policies warn that asset forfeitures and restitution may be required even in declination cases, significant forfeitures may surprise companies that hoped self-reporting would limit their liability.

Moreover, unlike the SEC and CFTC whistleblower programs, which require some whistleblowers to report internally before going to regulators, the DOJ program does not mandate that any whistleblowers report internally.[2]

This structure could hinder companies' compliance efforts if whistleblowers go directly to the DOJ and bypass internal channels in order to maximize their chances of incentive awards.

In this article, we discuss the contours of the program, how it differs from preexisting SEC and CFTC whistleblower incentive programs, and the potential challenges for companies and the DOJ alike in successfully implementing it.

The differences between the DOJ's program and those of other agencies may make it less appealing to whistleblowers.

The Dodd-Frank Wall Street Reform and Consumer Protection Act[3] created the SEC and CFTC whistleblower programs, which award to whistleblowers 10%-30% of sanctions collected by any federal or state agency, including the DOJ, related to SEC or CFTC enforcement actions.

As discussed below, several differences in the DOJ's new program compared to the existing SEC and CFTC programs could make it less attractive to properly counseled whistleblowers.

1. Awards depend on asset forfeitures.

The DOJ's statutory authority for the program is a 1990 law that expanded the attorney general's discretionary award authority for tips leading to asset forfeitures from drug and racketeering cases to all federal crimes.[4]

This means the DOJ can make award payments only from tips that result in asset forfeitures, limiting the scope of potential awards. Many corporate criminal resolutions involve fines, not forfeitures, and these will not yield awards.

With the help of artificial intelligence, we analyzed asset forfeiture rates in targeted areas. Our analysis suggests that three-quarters of DOJ resolutions in targeted areas lacked forfeiture orders.[5] The DOJ's forfeiture program — which has brought in $1 billion-$1.7 billion in annual collections in recent years[6] — is dwarfed by the SEC and CFTC enforcement programs. The SEC alone collects over $4 billion a year.[7] And many DOJ forfeitures occur in areas like drug crimes not covered by the program.

2. No awards are available for individuals who meaningfully participated in misconduct.

The DOJ only rewards whistleblowers who did not "meaningfully participate" in the criminal activity they report. While this is understandable to prevent individuals' ability to profit from wrongdoing, this requirement may dampen incentives compared to the SEC and CFTC programs, which only preclude those convicted of a crime from receiving awards.

Separate DOJ programs offer nonprosecution agreements to individuals who self-report corporate misconduct in which they participated, but no financial rewards are available, and ill-gotten gains must be disgorged.[8]

Many potential whistleblowers may have some involvement in the conduct, and uncertainty about how

the DOJ will assess their culpability may deter reporting.

3. Awards are unlikely in fraud cases or matters involving victims.

Under mandatory victim restitution laws, victims must be compensated before the DOJ can offer awards — another contrast with the SEC and CFTC programs.[9]

Targeted offenses like healthcare fraud, fraud involving financial institutions and corruption cases sometimes involve victims who may not obtain full restitution — potentially precluding awards even for high-quality, original information.

4. DOJ awards may attract more political scrutiny.

Unlike mandatory, court-enforceable SEC and CFTC awards, DOJ awards are discretionary, requiring attorney general approval and advance congressional notice.[10]

This could prolong the process and introduce uncertainties for whistleblowers, as well as companies contemplating settlements, which will need to plan for greater congressional scrutiny if a whistleblower award is likely.

5. The DOJ's program lacks whistleblower protections.

While the Dodd-Frank Act provides SEC and CFTC whistleblowers legally enforceable confidentiality guarantees, payment rights and retaliation protection,[11] the statute the DOJ is relying on for its program provides none of these protections.

The absence of such protections may deter some potential whistleblowers from coming forward.

6. The DOJ may not have sufficient infrastructure to process tips.

Even the well-established SEC and CFTC programs struggle with a deluge of low-quality tips. Since 2011, the SEC has received 82,775 tips, but this only resulted in 397 awards — under 0.5%.[12]

When the Dodd-Frank Act passed, Congress boosted the SEC's and CFTC's budgets by over 40% for new responsibilities, including whistleblower programs.[13] They built dedicated offices with rigorous processes for evaluating tips. These agencies also benefit from specialists who regularly interact with issuers and provide context to whistleblower claims.

In contrast, the DOJ's program — an internal initiative rather than a congressional priority — comes with no new funding, and in fact, the DOJ's budget was cut more than 5% in inflation-adjusted terms this year.[14]

The program will run through the Money Laundering and Asset Recovery Section, but it is unclear if that section has sufficient expertise to evaluate and prioritize tips.

Forwarding tips to individual U.S. attorney's offices risks creating disparities in handling, as the 93 U.S. attorneys are independently appointed and have differing enforcement priorities.

Whistleblowers may be disinclined to provide tips to the DOJ if its processing mechanism is less efficient

than those of the other agencies.

The interplay between the DOJ's whistleblower policy and its corporate enforcement policy presents potential challenges.

Beyond these differences with the SEC and CFTC programs, the whistleblower pilot program's interplay with the corporate enforcement program presents potential challenges to both policies' effectiveness.

Whistleblowers receive awards only if cases yield asset forfeitures, but companies' incentive to self-report is the presumption of declination, which companies might expect to mean that financial penalties will be limited.

While prosecutions of culpable individuals could still generate awards, most forfeiture orders against individuals will not yield enough to result in a payout; the DOJ must collect over $1 million — after deducting investigation, prosecution and other costs, which could be substantial — before paying any award.

In practice, like the SEC and CFTC programs, awards will come mostly from corporate payments, raising questions about whether the new policy might motivate the DOJ to seek asset forfeitures more often in declination cases to support whistleblower awards — an outcome that could frustrate management and boards at companies that self-report.

Companies will likely face additional challenges due to the DOJ's tight self-reporting deadlines. The presumption of declination applies only if companies self-report within 120 days of receiving an internal whistleblower report. Large companies with established whistleblower programs often receive numerous reports, and internal reviews can take months. The 120-day deadline may leave insufficient time for thorough internal investigations.

The situation is particularly thorny when facts are ambiguous or non-U.S. companies without established whistleblower procedures are involved.

Given the short deadlines, even companies with strong compliance programs may find themselves in a dilemma: Risk self-reporting without a complete understanding of the facts, or miss the 120-day deadline and forfeit the opportunity for a declination.

Companies may also worry that financial incentives could result in exaggerated allegations. While this risk also exists in the SEC and CFTC programs, the more severe consequences of criminal matters heighten these concerns.

In cases where the whistleblower is a key witness, financial incentives could even complicate prosecutions of culpable individuals; defendants might discredit whistleblowers as financially motivated.

The program's effect on companies' internal reporting mechanisms also remains to be seen. Internal reporting is not required under the DOJ program for any whistleblower, so whistleblowers may decide to bypass it and report only to the DOJ — potentially undermining companies' internal efforts to detect and remediate misconduct.

As the program unfolds, it will be crucial for the DOJ to closely monitor these dynamics and consider adjustments to better align incentives, ensuring that corporate accountability efforts do not

inadvertently undermine their stated aims.

Conclusion

Whistleblower incentive programs can be powerful tools for uncovering violations that might otherwise go undetected, but they involve trade-offs. It is unclear whether the approach that has succeeded for civil regulators will translate effectively to criminal authorities.

The DOJ faces unique challenges: narrower statutory authority, limited resources and competing initiatives aimed at encouraging companies to identify and self-report misconduct.

Private companies — which are not normally required to have whistleblower programs, but are now targeted by the DOJ's program — should be especially vigilant and review their procedures.

The SEC's 99.5% rejection rate underscores that most whistleblower claims ultimately lack merit. But early awareness allows companies with robust investigation processes to swiftly demonstrate to the DOJ that whistleblower-raised issues do not involve genuine misconduct.

Such a proactive approach often can head off lengthier, more disruptive investigations.

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[1] DOJ, Corporate Whistleblower Awards Pilot Program (Aug.1, 2024), available at https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program.

[2] Sarbanes-Oxley Act §§307, 806, 15 U.S.C. §7245, 18 U.S.C. § 1514A; Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 151 (2d Cir. 2015) (auditors and attorneys must report internally before reporting to regulators), abrogated on other grounds by Digital Realty Tr. Inc. v. Somers, 583 U.S. 149 (2018).

[3] Pub. L. No. 111-203, §§748, 922, 124 Stat. 1376, 1739-1756, 1841-50 (2010) (codified at, inter alia, Commodity Exchange Act, §23, 7 U.S.C. §26; Exchange Act of 1934, §21F, 15 U.S.C. §78u-6).

[4] Crime Control Act of 1990, Pub. L. No.101–647, §1601, 104 Stat. 4789 (1990) (codified as amended at 28 U.S.C. §524(c)(1)(C)).

[5] We estimated forfeiture rates in targeted areas by obtaining DOJ press releases about major cases from its API, filtering based on search terms, and using language models (gpt-4-turbo-2024-04-09 and

gpt-4o-mini-2024-07-18) to identify the portion of resolutions in targeted areas that included forfeitures. While AI-based methodologies are not perfect, this approach provides reasonable evidence that DOJ resolutions in targeted areas typically lack forfeitures.

[6] DOJ, Annual Financial Statements of the Assets Forfeiture Fund and Seized Asset Deposit Fund (2019-2023), available at https://www.justice.gov/afp/reports.

[7] SEC Enforcement Division, Annual Reports (2017-2021), available at https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=Reports+and+Publications-AnnualReports&tid=39.

[8] DOJ, The Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals (Apr. 15, 2024), available at https://www.justice.gov/criminal/media/1347991/dl; SDNY, SDNY Whistleblower Pilot Program, U.S. Dep't of Justice (Feb. 13, 2024), available at https://www.justice.gov/d9/2024-02/sdny_wb_policy_effective_2-13-24.pdf, at 3 ("The reporting individual must agree to forfeit or disgorge any profit from the criminal wrongdoing and pay restitution or victim compensation.").

[9] 18 U.S.C. §§3663-3664 (granting victims restitution rights); 21 U.S.C. §853(i)(1); 28 C.F.R. §9.8 (procedures for remission of forfeited property to victims).

[10] 28 U.S.C. §524(c)(2).

[11] 15 U.S.C. § 78u–6; 7 U.S.C. § 26.

[12] SEC Office of the Whistleblower, Annual Report to Congress for Fiscal Year 2023 (Nov. 14, 2023), available at https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=Reports+and+Publications-AnnualReports&tid=59.

[13] SEC, Budget History, available at https://www.sec.gov/foia/docs/budgetact (last visited Apr. 22, 2024) (SEC spending increased 46% from 2009 to 2012); CFTC, Presidential Budgets for FY 2010 and FY 2013, available at https://www.cftc.gov/About/CFTCReports/cftcreports_historical.html?combine=&tid=4111&year=all&page=1 (CFTC budget increased 41% from 2009 to 2012).

[14] U.S. House of Representatives, Consolidated Appropriations Act, 2024 (2024), available at https://appropriations.house.gov/sites/republicans.appropriations.house.gov/files/First%20FY24%20Package%20-%20Consolidated%20Appropriations%20Act%2C%202024.pdf.