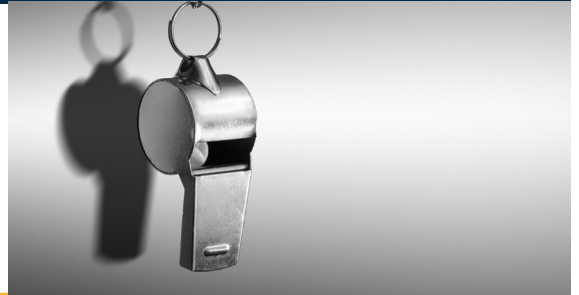


Client Alert | [August 13, 2024](#)

DOJ's Whistleblower Pilot Program Pays Employees to Report Misconduct



Law enforcement officials are now offering money to employees to report their colleagues' and employers' bad conduct. A new program implemented by the U.S. Department of Justice (DOJ) incentivizes employees to report corporate misconduct directly to the government rather than inform employers about their concerns. The DOJ's Corporate Whistleblower Awards Pilot Program, [launched August 1](#), offers payments to employees who become successful whistleblowers and increases the pressure on companies to self-report wrongdoing to authorities. This new program supplements similar successful programs already in place at other federal agencies, including the U.S. Securities and Exchange Commission (SEC), Commodity Futures Trading Commission, Internal Revenue Service (IRS) and the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). Now, employees at private corporations, partnerships and even nonprofits who might not have been compensated in the past for reporting wrongdoing to the government are incentivized to do so.

The DOJ asserts that its program is focused on four main areas: foreign corruption, crimes involving financial institutions, domestic corruption and health care fraud. However, the pilot program's language is broad and will motivate employees across a spectrum of industries to divulge suspicious conduct to law enforcement officials.

Incentives to Whistleblowers Will Lead to Increased Reporting

As anticipated in our [March 2024 client alert](#), the DOJ's final pilot program presents incentives aimed at increasing the likelihood that employees will report misconduct directly to the DOJ instead of internally reporting to their employers. Under the [new DOJ program](#), individuals are not required to make internal reports to their employers as a prerequisite for obtaining compensation. Rather, individuals who meet the specified criteria and alert the DOJ to significant corporate misconduct could be compensated with a monetary award based on the "net proceeds forfeited" if the investigation and prosecution lead to a forfeiture greater than \$1 million. This award may be up to 30% of the first \$100 million in net proceeds forfeited and up to 5% of any net proceeds forfeited between \$100 million and \$500 million. The percentage that whistleblowers will be paid is subject to various factors, including the "usefulness of the whistleblower's information and the level of assistance" provided to the DOJ.

The program could result in more DOJ investigations and more government investigations in general. The DOJ program encourages individuals reporting to the DOJ to also share their reports with multiple government agencies. The [program specifically states](#) that whistleblowers who are not sure which program to submit information to "should submit information to both programs so that the Department can assess the information." The result could be multiple simultaneous investigations and even greater trouble for unprepared companies.

www.stradley.com | Pennsylvania | Washington, D.C. | New York | California | New Jersey | Illinois | Delaware

This communication is provided as a general informational service to clients and contacts of Stradley Ronon Stevens & Young, LLP. It should not be construed as, and does not constitute legal advice, nor does this message create an attorney-client relationship. This material may be considered attorney advertising in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.



In addition to incentivizing whistleblowing, the pilot program encourages companies to self-report to the DOJ. In its simultaneously revised Corporate Enforcement and Voluntary Self-Disclosure Policy (VSD Policy), the DOJ said that if a company reports misconduct to the DOJ within 120 days of learning of it, the entity will still be eligible for a presumption of declination,¹ even if the whistleblower also reported the conduct directly to the DOJ. To be eligible for a presumption of declination, in addition to reporting within 120 days, the company must fully cooperate with the DOJ investigation and remediate any harm caused by the criminal conduct.

However, for this to apply, companies must first receive an employee's internal report. Receiving an internal report is only feasible if a business has reporting mechanisms in place and its employees are educated to report internally. Once a report is made, companies should be prepared to respond by quickly initiating internal investigations and making swift reports after confirming the presence of problematic activity.

Whistleblower Awards Are Subject to Exceptions and Discretion

The DOJ's program includes provisions similar to those in the SEC's program, such as prohibiting award payments to individuals who "directed, planned, initiated or were convicted of the misconduct they reported." The DOJ's program goes a step further by prohibiting payments to "any whistleblower who meaningfully participated in the criminal activity they report."

Another notable provision unique to the DOJ's pilot program is that any award given to whistleblowers is discretionary. A discretionary award will likely be less appealing to whistleblowers and their lawyers than a mandatory award. In the past, discretionary award programs such as those offered by the SEC [were not vastly successful](#) in obtaining whistleblower tips. Ultimately, [changes to the SEC, IRS and False Claims Act programs were made](#) to provide non-discretionary awards to whistleblowers. Subsequently, whistleblower programs have been more successful, both in terms of the number of whistleblower reports and the amount of monetary award. While the success of the DOJ's ability to incentivize whistleblowers is yet to be determined and may be limited, the DOJ's program does not prohibit whistleblowers from submitting information to several whistleblower programs spanning multiple agencies.

Key Considerations for Companies

Risk of Multiple, Simultaneous Investigations: As noted, the DOJ program is structured to incentivize whistleblowers to share their reports simultaneously with multiple government agencies. The DOJ will now receive information at the same time as other agencies with whistleblower programs. Because employees are encouraged to report to multiple agencies, companies may face the prospect of multiple investigations, which may be concurrent, coordinated or even competing. Companies will need to employ more complex and calculated decision-making to navigate these multi-agency investigations. Companies should take proactive approaches by having in place plans to coordinate responses to subpoenas and other government inquiries from multiple agencies.

Incentivizing Prompt Investigations and Self-Reporting: The DOJ's program should incentivize even more companies to invest in robust internal reporting structures and promptly self-report potential wrongdoing. The DOJ amended its existing VSD Policy so that if a company that receives an internal

¹ A declination is a decision not to prosecute a company that would have otherwise been prosecuted or criminally resolved except for the fact that the company has voluntarily disclosed potential criminal violations and fully cooperated with the DOJ.

report from a whistleblower in turn reports the misconduct to the DOJ within 120 days and before the DOJ reaches out to the company, that company will be eligible for a presumption of declination.

However, in order to take advantage of this policy, companies must be prepared. If an individual reports misconduct to a business, that business has 120 days to act. If no internal report is ever made, companies will not receive the opportunity to make a disclosure under the 120-day provision. Companies can always decide whether to report over the course of 120 days, but first they must focus on what they can do to best position themselves for having the option to do so. Companies need to create comprehensive internal reporting systems, educate employees on how to use such mechanisms, and convince employees that such reports are taken seriously.

Upgrading Internal Reporting Tools: [In our previous client alert](#), we suggested that clients consider taking steps to evaluate and review their existing compliance policies and procedures, including internal hotlines and other reporting mechanisms. This consideration is even more imperative now that Principal Deputy Assistant Attorney General Nicole Argentieri explicitly stressed the clear importance of companies prioritizing making the “necessary compliance investments to help prevent, detect and remediate misconduct.” The 120-day deadline should provide companies with a heightened sense of urgency to get their compliance programs and internal investigations procedures up to date. If an internal report comes in at any time, companies should be prepared to act quickly. This can only be done if a business is prepared with the tools, policies and procedures to evaluate any reports efficiently, effectively and in a timely manner to determine whether a disclosure to the DOJ should be made.



[Steven D. Feldman](#)
212.404.0659 | sfeldman@stradley.com



[Rebecca Falk](#)
215.564.8068 | rfalk@stradley.com