

GIBSON DUNN



White Collar Defense & Investigations Update

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Mind the Gap – The New DOJ Whistleblower Program

This update addresses several of the most pressing questions involving DOJ's Whistleblower Pilot Program's scope and functionality and offers strategies and considerations for navigating this new regime.

On August 1, 2024, the Department of Justice (DOJ) announced its new [Corporate Whistleblower Awards Pilot Program](#) (Pilot Program). As previewed by Deputy Attorney General Lisa Monaco earlier this year, longstanding whistleblower programs (such as those operated via the Securities and Exchange Commission, the Commodity Futures Trading Commission, the False Claims Act *qui tam* program, and the Financial Crimes Enforcement Network) have proven successful, but—from the standpoint of DOJ—have not addressed the full range of corporate and financial misconduct that DOJ seeks to prosecute. The Pilot Program is intended to fill those gaps.

In this update, we answer several of the most pressing questions involving the new Pilot Program's scope and functionality, as well as offer strategies and considerations that existing and prospective clients should contemplate when navigating this new regime.

I. PILOT PROGRAM: HOW IT WORKS

What Is the Pilot Program?

The Pilot Program is a three-year initiative managed through DOJ Criminal Division's Money Laundering and Asset Recovery Section (MLARS). The Pilot Program applies to individuals

only,^[1] with awards issued in DOJ's sole discretion and funded from DOJ's Asset Forfeiture Fund (DOJ's Forfeiture Fund).^[2] Awards are only available on forfeitures exceeding \$1 million USD.

As will be explained in more detail below, the Pilot Program limits awards to misconduct involving specific offenses: including money laundering related crimes, both foreign and domestic corruption disputes, and health care fraud schemes involving non-governmental entities.^[3] Whistleblowers cannot have meaningfully participated in the alleged criminal activity they seek to report, nor can whistleblowers relay information learned through their work as an internal auditor or compliance officer within a given corporation.^[4]

Who Can Be a Whistleblower Under the Pilot Program?

Earlier this year, announcements about the Pilot Program had indicated that whistleblowers would be disqualified from receiving any recovery if they participated in any way in the alleged misconduct.^[5] However, the now-operative version of the program makes clear that even those who "minimally" participate or are "least culpable" can still be eligible for an award.^[6] Determining a whistleblower's level of culpability is tied to definitions promulgated by the United States Sentencing Commission and will likely be subject to interpretive dispute in individual cases. For instance, we anticipate that purported whistleblowers (even ones who may be significant participants in the scheme) will try to argue that their level of culpability is only "minimal"—thereby positioning themselves as rightful recipients of the forfeited proceeds, or at least attempting to complicate DOJ's decision making regarding whether to prosecute them individually.

The decision to allow awards to those with unclean hands will also expand the pool of individuals seeking to participate in the Pilot Program.

What Types of Information Must a Whistleblower Relay to Receive an Award?

Under the Pilot Program, individuals are required to provide "original information" to DOJ.^[7] Such original information must be derived from the individual's independent knowledge *and* must be information not previously known to prosecutors.^[8] Importantly, this does *not* mean that a whistleblower must be the first individual to inform DOJ about alleged wrongdoing. DOJ may well be aware of the alleged misconduct, even to the point where the department already has initiated a criminal investigation. Instead, where a purported whistleblower's information comes after DOJ has begun to investigate, a whistleblower will only qualify for a reward if DOJ determines that the intelligence is material in some aspect to the ongoing investigation, as well as if the specific information was previously unknown to the government.^[9]

In addition to providing "original information," a whistleblower will need to identify alleged misconduct concerning one of the four following subject areas. These include:

- Violations by financial institutions related to money laundering schemes, anti-money laundering compliance violations (in violation of the Bank Secrecy Act), failures to register money transmitting businesses, and additional violations of fraud-related provisions.
- Violations related to foreign corruption and bribery, as proscribed under the Foreign Corrupt Practices Act or the Foreign Extortion Prevention Act.

- Violations of public corruption statutes—including actions by companies related to bribe payments or kickbacks remitted to covered public officials at both the local (i.e., Federal Program Bribery) and federal level.
- Violations associated with federal health care offenses, with the information necessarily involving non-governmental benefit programs as opposed to allegations involving public ones.^[10]

How Does the Pilot Program Interact with Other Whistleblower Programs?

Several of the Pilot Program’s subject matter areas overlap with those that are the focus of other federal whistleblower programs. For instance, as we discussed in a [January 2021 client alert](#), the Treasury Department’s Financial Crimes Enforcement Network (or FinCEN), pursuant to the Anti-Money Laundering Act of 2020, provides for awards to whistleblowers who provide information about relevant money laundering violations—a key focus of the Pilot Program as well.^[11] Similarly, the Securities and Exchange Commission (SEC) encourages tips regarding alleged bribery and improper payments to foreign officials—similarly tracking those areas of focus in the new Pilot Program.^[12] A narrower pilot program recently launched in the Southern District of New York also focuses on soliciting information regarding a narrower set of federal corruption statutes.^[13]

Other aspects of the Pilot Program’s covered subject areas (both for other corruption offenses and specific health care offenses) do not similarly overlap with existing federal whistleblower programs. Specifically, reporting instances of domestic public corruption against federal officials is not a current focus of the SEC’s program and reporting regarding health care offenses applies only to *non*-governmental entities under the Pilot Program, not the public programs covered by DOJ’s False Claims Act *qui tam* regime.

Whistleblowers will not be able to recover under the Pilot Program if they can recover under another award program (such as through submissions of similar misconduct to the SEC or FinCEN).^[14] Nevertheless, the new Pilot Program is structured to incentivize whistleblowers to share their reports with multiple government agencies. As the Pilot Program specifies, “if an individual is unsure of whether they qualify for another U.S. government program or may qualify for ... [the Pilot Program], they should submit information to both programs so that the Department can assess the information.”^[15] Multiple federal agencies, including DOJ, stand to be apprised of the same alleged misconduct and could conceivably commence concurrent investigations, complicating the field that clients must navigate.

How Will Rewards Under Pilot Program Compare to Other Federal Whistleblower Programs?

Whistleblowers under the Pilot Program likely stand to gain less when compared to available recoveries under other whistleblower programs. Awards for the Pilot Program will be paid from DOJ’s Forfeiture Fund. Already, DOJ’s Forfeiture Fund averages approximately \$1.8 billion in outlays per year, and the fund is typically used to (1) compensate victims and (2) pay for law enforcement expenses.^[16] The Pilot Program maintains longstanding DOJ prioritization that victims must be paid first, with no award available for whistleblowers until victim compensation takes place.^[17] Moreover, as currently structured, any awards paid under the Pilot Program

must have been captured in an individual case, meaning that there will be no carryover from one matter to another and thus no freestanding whistleblower compensation fund that can be used to address shortfalls in the amounts that DOJ wishes to compensate a whistleblower. As a result of these and other limitations articulated in the program documents, we doubt that the awards available under the Pilot Program will come anywhere near the lucrative sums paid out by other programs, such as the SEC's.

II. PILOT PROGRAM: KEY IMPACTS AND TAKEAWAYS FOR CORPORATIONS

The Pilot Program comes on the heels of other DOJ initiatives designed to incentivize corporations to collaborate with, and quickly convey alleged misconduct to, DOJ. A central example is the Corporate Enforcement and Voluntary Self-Disclosure Policy, which we summarized in a [March 2023 client alert](#) and incentivizes a corporation's timely sharing of information to potentially earn presumptions from DOJ against charges for criminal conduct.^[18] Given that individual whistleblowers can now earn financial rewards for disclosing similar information directly to DOJ, corporate clients may be unsure of how to address future compliance efforts and position themselves to consider voluntary self-disclosure and other well-deserved cooperation credits. In the remainder of this alert, we consider those questions and the broader implications for corporations that the Pilot Program poses.

Are Whistleblowers Required to Report Alleged Misconduct Through a Corporation's Compliance Program Before Disclosing Information to DOJ?

No, the Pilot Program contains no specific requirement that whistleblowers first exhaust any internal reporting requirements before reporting information to DOJ. However, DOJ encourages whistleblowers to cooperate with their employers through use of existing internal compliance programs. For instance, the Pilot Program instructs whistleblowers that DOJ will consider whether to increase award amounts based on whether the individual first reported the misconduct through the corporation's internal compliance program.^[19] In turn, if a whistleblower deliberately withholds information from an employer corporation, such omissions stand to decrease the overall value of an informant's reward as well.^[20]

The details of how DOJ applies these factors to awards will be important. Without strong and explicit messaging to whistleblowers that they must first report matters through a corporation's internal compliance program, DOJ risks undermining some of the very incentives the department previously put forth in the Corporate Enforcement and Voluntary Self-Disclosure Policy—specifically those regarding the benefits corporate entities stand to gain from developing robust compliance programs capable of investigating whistleblower complaints in the first instance.

The structure of the Pilot Program therefore creates an effective race to DOJ between the corporation and its whistleblower employee. This race is complicated because it is rare that any complaint is clear-cut—which means that a corporation is typically required to undertake substantial investigative efforts to ferret out the real gravamen of the complaint. It is not as obvious that individual whistleblowers are burdened by similar administrative requirements.

If Whistleblowers Relay Information to DOJ, Can Corporations Still Earn Criminal Declinations Under the Corporate Enforcement and Voluntary Self-Disclosure Program?

Yes. If a whistleblower makes an internal report to both the corporation and DOJ, the corporation can still qualify for a presumption of a declination. However, the corporation must self-report the conduct to DOJ within 120 days of receiving the whistleblower's submission *and* must independently meet the other requirements for voluntary self-disclosure, including demonstrating to DOJ that the corporation exercised due diligence in identifying alleged problems and implementing appropriate remedial measures.^[21]

A corporation will need to move relatively expeditiously to report the alleged misconduct in the requisite 120-day window.^[22] And moving expeditiously to report alleged misconduct becomes even more important given that corporations are not eligible for a presumption of a declination if DOJ initiates contact *before* the corporate entity has the chance to disclose matters based on a whistleblower's report.^[23] Corporations should therefore begin to consider whether compliance updates are needed to streamline the consideration of reports and the analysis of voluntary disclosure, all without sacrificing a system's overall thoroughness. The escalation processes within a company's human resources, compliance, and legal departments will all be essential to assess. Gibson Dunn stands ready to assist in these efforts.

Will the Pilot Program Lead to More Government-Initiated Investigations of Corporations?

In general, we expect that the Pilot Program will increase the number of DOJ inquiries and investigations that a corporation will face. Employees, inspired by the promise of payment, may submit information to DOJ that would not (and should not) otherwise lead to government scrutiny absent the Pilot Program here. While we fully expect DOJ's vetting processes to sift out meritless pursuits, corporations should brace for the possibility that increased tips will lead to increased government questions. To that end, corporations should continue to improve internal compliance systems and operate with a continued understanding that DOJ may soon request access to internal, potentially sensitive, information for investigative purposes.

Beyond inquiries from DOJ alone, we do expect that the Pilot Program—with its provision encouraging whistleblowers to submit information to a host of whistleblower programs in moments of doubt—will likely result in duplicate submissions to multiple agencies by whistleblowers. That DOJ will now be receiving information at the same time as other agencies with whistleblower programs could lead to increased coordination (or worse, competition) among agencies with overlapping enforcement authority—generating the need for corporations to engage in more complex decision-making to navigate multi-agency inquiries.

The Pilot Program may also present substantial challenges for corporations that have taken steps to impose zero tolerance disciplinary measures against employees who participate in any alleged wrongdoing. As currently crafted, the Pilot Program allows whistleblowers to reap rewards even where they participated, albeit minimally, in the underlying scheme.^[24] However, any otherwise-appropriate termination decision taken by a corporation against such a whistleblower may run counter to the Pilot Program's anti-retaliation provision—frustrating the chance that the

corporation (though operating by objective standards and in good faith) would receive cooperation credit.^[25]

III. CONCLUSION: CONSIDERATIONS FOR THE FUTURE

Though in its infancy, we expect the whistleblower bar to lobby Congress for certain changes to the Pilot Program. DOJ crafted the Pilot Program using language from a decades-old statute, 18 U.S.C. 524(c); and pursuant to that provision, DOJ maintains discretion over whether a whistleblower award is ultimately issued. That level of DOJ discretion stands in sharp contrast to FinCEN's recently crafted whistleblower program—where the relative statutory provision *mandated* that officials pay tipsters.^[26] That distinction may compel the whistleblower bar to lobby Congress for statutory amendments that similarly ensure that Pilot Program whistleblowers are assured of financial compensation in exchange for their proffered intelligence. Should that happen, we expect an even further potential increase in government inquiries and investigations—as the incentive to whistleblowers will become more assured.

As the Pilot Program continues to unfold, we will continue to monitor for relevant updates and report on steps that corporations should take to navigate the newfound program.

^[1] Dep't of Justice Corporate Whistleblower Awards Pilot Program (hereafter Pilot Program) § II.1.a.

^[2] *Id.* § II.7.a.

^[3] *Id.* § II.3.a-d.

^[4] *Id.* § II.2.e.iv.

^[5] Dep't of Justice: Office of Public Affairs, Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (Mar. 7, 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations>.

^[6] Pilot Program § III.3.b.i.

^[7] *Id.* § II.2.

^[8] *Id.* § II.2.a-b.

^[9] *Id.* § II.2.c.

^[10] *Id.* § II.3.a-d.

^[11] Gibson Dunn: The Top 10 Takeaways for Financial Institutions From the Anti-Money Laundering Act of 2020 (Jan. 1, 2021), <https://www.gibsondunn.com/wp->

[content/uploads/2021/01/the-top-10-takeaways-for-financial-institutions-from-the-anti-money-laundering-act-of-2020.pdf](https://www.gibsondunn.com/wp-content/uploads/2021/01/the-top-10-takeaways-for-financial-institutions-from-the-anti-money-laundering-act-of-2020.pdf).

[12] U.S. Securities and Exchange Comm'n, Whistleblower Frequently Asked Questions, <https://www.sec.gov/enforcement-litigation/whistleblower-program/whistleblower-frequently-asked-questions#faq-3>.

[13] Southern District of New York, Whistleblower Pilot Program (Feb. 13, 2024), https://www.justice.gov/d9/2024-05/sdny_wb_policy_effective_2-13-24.pdf.

[14] Pilot Program § II.1.b.

[15] *Id.* § II.1.b.n.3.

[16] U.S. Dep't of Justice: Asset Forfeiture Program, FY 2025 Performance Budget (Feb. 27, 2024), https://www.justice.gov/d9/2024-03/afp_fy_2025_pb_narrative_2.27.24_final_1.pdf.

[17] Pilot Program § III.2.c.

[18] U.S. Dep't of Justice, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, <https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl>.

[19] Pilot Program § III.3.a.iii.

[20] *Id.* § III.3.b.iii.

[21] U.S. Dep't of Justice: Criminal Division, Criminal Division Corporate Whistleblower Awards Pilot Program: Frequently Asked Questions (Aug. 1, 2024), <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program>.

[22] *Id.*

[23] *Id.*

[24] Pilot Program § III.3.b.i.

[25] *Id.* § IV.4.

[26] Gibson Dunn: The Top 10 Takeaways for Financial Institutions From the Anti-Money Laundering Act of 2020 (Jan. 1, 2021), <https://www.gibsondunn.com/wp-content/uploads/2021/01/the-top-10-takeaways-for-financial-institutions-from-the-anti-money-laundering-act-of-2020.pdf>.

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