

Navigating DOJ's Patchwork Whistleblower Regime

By **Patrick Campbell, Jonathan New and Jimmy Nguyen** (November 14, 2024)

Over the past year, the U.S. Department of Justice's Criminal Division and various U.S. attorney's offices have issued different pilot programs geared toward encouraging individuals with knowledge of certain corporate criminal misconduct to report to the government in exchange for monetary awards or nonprosecution agreements.

These programs continue the DOJ's decade-long practice of trying to promote transparency and consistency by issuing written policies and programs aimed at encouraging corporate and individual self-reporting and accountability.

This includes the Criminal Division's policy on evaluating the effectiveness of corporate compliance programs when making charging decisions, enumerated in its Ten Hallmarks of Effective Compliance Programs in 2021 and now in its Evaluation of Corporate Compliance Programs,[1] as well as the DOJ's[2] and U.S. attorney's offices' largely uniform corporate enforcement and voluntary self-disclosure policies,[3] containing criteria companies must meet to qualify for a declination or other cooperation credit.

Through these programs, the DOJ has sought to provide concrete guidance to companies on the required steps to qualify for leniency if faced with a criminal investigation or prosecution.

However, rather than provide a uniform framework, the DOJ's new whistleblowing regime consists of a patchwork of Criminal Division and U.S. attorney's office programs that vary in benefits and qualifying criteria.

This patchwork may create challenges for individuals seeking to benefit from the programs and for companies wanting to stay ahead of the DOJ's new law enforcement tool. Moreover, as these policies are pilot programs, the DOJ may further refine them as it evaluates their effectiveness.

Criminal Division's Corporate Whistleblower Awards Pilot Program

Aimed at building on the U.S. Securities and Exchange Commission's and U.S. Commodity Futures Trading Commission's successful whistleblower programs, on Aug. 1, the DOJ announced its Corporate Whistleblower Awards Pilot Program, referenced herein as the monetary awards program.

The program is intended to encourage individuals who did not meaningfully participate in alleged criminal misconduct to report information for a chance at a monetary award.[4]

To qualify, the reported criminal conduct must lead to a criminal or civil forfeiture exceeding \$1 million in net proceeds forfeited in connection with a successful prosecution, corporate criminal resolution or civil forfeiture action related to corporate criminal conduct in one of four areas. Those four areas include:



Patrick Campbell



Jonathan New



Jimmy Nguyen

- Certain crimes involving financial institutions;
- Foreign corruption;
- Domestic corruption and kickback violations; and
- Healthcare fraud schemes focused on private insurers that are not subject to qui tam recovery under the False Claims Act.

Reported information must be original — in other words, "derived from the individual's independent knowledge or independent analysis" of information in their possession and not derived from public sources. The reported information must also be truthful and complete.

The individual's submission must also be voluntary, meaning it must be made "before any request, inquiry, or demand" for information by the DOJ relating to the submission, without the individual having a preexisting obligation to report the information to the government, and "in the absence of any government investigation or threat of imminent disclosure to the government or the public."

Notably, the DOJ aims to address gaps in existing whistleblower programs. Thus, individuals are ineligible for an award from the DOJ if they are otherwise "eligible for an award under another U.S. government or statutory whistleblower, qui tam, or similar program," such as the SEC's or CFTC's programs, had they reported the same information.

Awards are at the DOJ's discretion and may be up to 30% of the first \$100 million forfeited, and 5% of proceeds between \$100 million and \$500 million forfeited.

The DOJ considers various factors — including the reported information's significance, the whistleblower's participation in internal compliance systems by reporting internally first, and cooperation with law enforcement — in determining an award.

The monetary awards program includes two other particularly important components for companies to consider. The program encourages whistleblowers to report any retaliation, and the DOJ has stated that if a company retaliates against a whistleblower, it will lose cooperation and remediation credit and could face sentencing enhancements — and prosecution — for obstruction of justice.[5]

The DOJ also temporarily amended the Criminal Division's corporate enforcement policy to preserve a company's opportunity to obtain voluntary self-disclosure credit, including a potential presumption of declination, if it self-reports within 120 days of receiving an internal whistleblower report and before the DOJ contacts the company.[6]

Criminal Division and U.S. Attorney's Offices' NPA Programs

In contrast, the DOJ's other type of whistleblowing program seeks to encourage individuals involved in alleged misconduct to report information in the hopes of receiving an NPA.

Instead of one uniform policy, however, the DOJ has created several leniency programs issued by the Criminal Division and 13 U.S. attorney's offices.[7]

While all the programs broadly incentivize early cooperation in various areas of white collar crime, the programs have meaningful differences.[8]

Similar to the Criminal Division's monetary awards program, these NPA programs apply only to certain criminal conduct. The Criminal Division's NPA program covers:

- Money laundering and related offenses;
- Violations related to the integrity of financial markets;
- Foreign bribery and corruption;
- Healthcare fraud and illegal kickbacks;
- Fraud related to federally funded contracting; and
- Domestic bribery.

Offenses handled by other components of the DOJ, such as criminal tax violations and sanctions violations, will not qualify for the pilot program without the coordination and approval of the component with charging authority over those offenses.

The U.S. attorney's offices' NPA programs provide different coverage. For example, most of the programs specifically exclude Foreign Corrupt Practices Act violations and bribery of federal officials, among other areas.

Instead, each U.S. attorney's office's program covers criminal conduct concerning (1) fraud or corporate control failures, (2) the integrity of financial markets, and (3) state or local bribery.

Most of the U.S. attorney's offices' programs also cover fraud relating to federal, state or local funds. Some programs also specifically include criminal conduct more related to their dockets, such as the Eastern District of New York's inclusion of money laundering, the Northern District of California's coverage of intellectual property theft, and the District of New Jersey's inclusion of crimes by healthcare providers.

Uniquely, the Northern District of Illinois' program does not specify the criminal conduct it covers, apparently leaving it to the U.S. attorney's office's discretion.

The Criminal Division and U.S. attorney's offices do have similar qualification criteria. Among other things, each excludes elected officials; members of federal law enforcement; and CEOs, chief financial officers and equivalents, and/or the highest-ranking person within the organization where the misconduct occurred.

Most programs also exclude individuals who can exercise primary control over the organization's operations, regardless of title. The programs also exclude leaders or organizers of the illegal activity in question.

Additionally, certain prior criminal offenses, including crimes of violence and those with national security implications, will disqualify individuals from participating in these programs.

Besides the Northern District of Illinois' NPA program, which appears to be completely discretionary, individuals meeting the above conditions will qualify for NPAs if they also fulfill other requirements.

These include, similar to the monetary awards program, truly voluntary disclosures that are original, truthful and complete; full cooperation with the DOJ; and forfeiture or disgorgement of any criminal proceeds and payment of restitution to victims, except in the Central District of California's program.

Even if a whistleblower does not meet the above conditions, prosecuting offices retain the discretion to offer the individual an NPA consistent with existing DOJ cooperation policy.

Factors that prosecuting offices consider for this determination include:

- The extent that the criminal conduct was known to the government;
- Whether disclosure was voluntary, truthful and complete;
- Whether the whistleblower provided substantial assistance;
- The individual's culpability;
- Whether the individual occupies any leadership position or position of trust;
- The adequacy of noncriminal sanctions, including remedies imposed by civil regulators; and
- The whistleblower's criminal history.

Implications of the DOJ's New Whistleblowing Regime

Contrasted with the SEC's whistleblower program — which is relatively straightforward and uniform, and has proven successful in generating leads for investigations and successful enforcement proceedings — the DOJ's patchwork whistleblower regime may lead to suboptimal results and confusion for individuals and their counsel navigating the system.

Individuals with some involvement in reported criminal conduct may be unsure whether their conduct was meaningful — the primary distinction between qualifying for the Criminal Division's monetary awards program or an NPA program.

Individuals might be unsure whether the criminal conduct would qualify for a separate government whistleblower program, thereby disqualifying the individual from the monetary awards program.

Considering the several programs maintained by the Criminal Division and various U.S. attorney's offices, would-be whistleblowers may not be sure which office to report to.

This, along with the lack of a guarantee of anonymity^[9] and financial award under the monetary awards program — which are at the DOJ's discretion and depend on the DOJ obtaining forfeiture judgments — may depress the number of quality tips the government receives.

Nevertheless, this DOJ trend will likely continue. Ten of the U.S. attorney's offices' NPA programs were adopted within the past three months. It would not be surprising if more U.S. attorney's offices adopt NPA programs in the coming months, or even their own monetary awards programs, if the Criminal Division's monetary awards program proves to be successful. This would further increase the complexity for individuals and companies.

Despite the nature of the DOJ's approach and its potential impact on the whistleblower programs' success, one thing is clear: The DOJ continues to focus on encouraging voluntary self-disclosure and cooperation, and incentivizing those with information to come forward.

These whistleblower programs, notwithstanding their potential shortcomings, will likely still lead to an uptick in DOJ inquiries and investigations directed at companies.

According to the DOJ, within the first two and a half months of the monetary awards

program's launch, it has received over 200 tips. U.S. attorney's offices have also reported that disclosures under the NPA programs "have resulted in promising ongoing investigations," as noted by Principal Associate Deputy Attorney General Marshall Miller in an October speech.[10]

Companies should prepare for this new reality by ensuring their compliance programs are effective in deterring and detecting criminal conduct, especially in the whistleblower programs' focus areas.

Notably, companies should ensure their programs encourage internal reporting without fear of retaliation and include procedures to investigate reported misconduct promptly and thoroughly.

Companies should train on these policies; incentivize employees to follow them, such as by including compliance criteria in annual reviews and compensation decisions; and test them to ensure they work in practice, such as by benchmarking the volume and nature of internal reports companies receive, and the time needed to investigate and remediate them, against publicly available reporting data.

This is especially important considering the DOJ's recent revision to its Evaluation of Corporate Compliance Programs, which includes assessing whether companies encourage and incentivize reporting of potential misconduct and are committed to antiretaliation — or conversely, whether they employ practices that chill reporting — and considering the DOJ's warnings to companies about the potential consequences of retaliating against whistleblowers.

Companies should also have a mechanism for assessing whether to self-report criminal misconduct promptly after detection to qualify for their own NPA or cooperation credit, as these whistleblower programs significantly increase the likelihood that the DOJ has been or will be informed of the conduct under investigation.

The corporate enforcement policy amendment's 120-day grace period to self-disclose activity raised by an internal whistleblower further pressures companies to quickly conduct internal investigations and decide whether to self-disclose to the government.

Should a decision to self-disclose be made, companies must take care to report to the right office, considering all the different programs maintained by the Criminal Division and the various U.S. attorney's offices.

As Principal Deputy Assistant Attorney General Nicole Argentieri noted in a September speech, not only is the DOJ telling individuals its "tip line is open," but it is "also sending a message to company executives and leadership: [I]nvest in compliance and take internal reports of wrongdoing seriously, because [the DOJ is] using more tools than ever before to identify corporate misconduct." [11]

Patrick Campbell is a partner and co-leader of the compliance practice team at BakerHostetler.

Jonathan New is a partner at the firm. He previously served as an assistant U.S. attorney for the Southern District of New York and a trial attorney for the DOJ's Civil Division.

Jimmy Nguyen is an associate at BakerHostetler.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.justice.gov/criminal/criminal-fraud/page/file/937501>.

[2] <https://www.justice.gov/criminal/criminal-division-corporate-enforcement>.

[3] <https://www.justice.gov/usao-edny/pr/damian-williams-and-breon-peace-announce-new-voluntary-self-disclosure-policy-united>.

[4] <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program>.

[5] <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-newly>.

[6] <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program>.

[7] The USAOs with NPA Programs are the Southern District of New York (Feb. 13, 2024), District of Puerto Rico (Mar. 12, 2024), Northern District of California (Mar. 14, 2024), Central District of California (Aug. 23, 2024), District of New Jersey (Sept. 13, 2024), Southern District of Florida (Sept. 13, 2024), Eastern District of Virginia (Sept. 15, 2024), District of Arizona (Sept. 15, 2024), District of Columbia (Sept. 16, 2024), Southern District of Texas (Sept. 16, 2024), Eastern District of New York (Sept. 16, 2024), Northern District of Illinois (Sept. 16, 2024) and Western District of Virginia (Oct. 3, 2024).

[8] <https://www.justice.gov/criminal/criminal-division-pilot-program-voluntary-self-disclosures-individuals>.

[9] For example, whistleblowers may be required to testify at trial.

[10] <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-new-york-0>.

[11] <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-newly>.