

Filling in the Gaps: DOJ's Pilot Whistleblower Program

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On August 1, 2024, the Department of Justice (DOJ) officially launched a Corporate Whistleblower Awards Pilot Program (CWAPP) to reward individual whistleblowers who report corporate misconduct.² Under this program, whistleblowers who provide the DOJ's Criminal Division with "original and truthful information about corporate misconduct that results in a successful forfeiture *may* be eligible for an award," if they meet the criteria outlined by DOJ.³

The CWAPP is not meant to cover the entire landscape of potential crime. Rather, it is a "gap filler" designed to incentivize individual whistleblowers to come forward with information that other federal whistleblower programs do not reach. The CWAPP's primary goal is thus to identify criminal conduct that is *not* addressed by existing whistleblower programs, which are incomplete in uncovering corporate crime.⁴ Describing the existing programs as a "patchwork quilt that doesn't cover the whole bed,"⁵ Deputy Attorney General (DAG) Lisa Monaco initially announced the anticipated program in March 2024 at the American Bar Association's White Collar Crime Conference.

The CWAPP took effect on August 1, and is intended to last for three years.⁶ We identify below the key elements of this program and why is it important.

Focus Areas

The CWAPP targets four areas of corporate misconduct outside the scope of previously existing whistleblower programs maintained by the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), and the DOJ Civil Division's False Claims Act (FCA) *qui tam* program.⁷

Under the CWAPP, the information disclosed by a whistleblower *must* relate to at least one of the following areas:

1. Schemes involving money laundering, compliance violations, and fraud involving financial institutions (such as traditional banks, money transmitting businesses, and cryptocurrency);
2. Foreign corruption and bribery involving misconduct by companies;
3. Domestic corruption such as bribery and/or kickbacks involving misconduct by companies and elected officials; and
4. Healthcare fraud schemes involving private healthcare benefit programs (such as insurance plans), patients, investors, and other *non*-governmental entities in the healthcare industry, as well as other violations not covered by the Federal False Claims Act.⁸

Whistleblower Requirements and Rewards

Most importantly, a potential whistleblower must report “in writing, original information,” meaning information that is nonpublic, was not previously known to DOJ, and is derived from the whistleblower’s independent knowledge or analysis.⁹ Whistleblowers are permitted, but not required, to first report the information to their company internally (*e.g.*, to a corporate compliance officer or similar), so long as the whistleblower *also* reports the information to DOJ within 120 days of the internal reporting.¹⁰

A potential whistleblower’s submission must be voluntary and cannot occur after the government has uncovered or is investigating the misconduct. The information must be “truthful and complete” and the whistleblower must continue to cooperate with the subsequent investigation of the misconduct.¹¹

Whistleblowers are not eligible for awards under the CWAPP if “[t]hey would be eligible for an award through another U.S. government or statutory whistleblower, *qui tam*, or similar program if they had reported the same scheme that they reported under this pilot program.” DOJ recommends that if potential whistleblowers are “unsure of whether they qualify for another U.S. government program,” then they should disclose information to all of the potentially impacted programs.¹² Whistleblowers are also ineligible for an award if they “meaningfully participated in the criminal activity they reported.”¹³

Only whistleblowers who provide information that leads to a successful forfeiture of at least \$1,000,000 “in connection with a prosecution, corporate criminal resolution, or civil forfeiture action” are eligible for a reward.¹⁴ Similar to other federal whistleblower programs, any award will be based on the “net proceeds of the forfeiture.”¹⁵

The most important limiting characteristic of CWAPP is that rewards are “entirely discretionary and an award is not guaranteed.”¹⁶ Finally, it is important to note that submissions are confidential to the fullest possible extent.

Revisions to the Corporate Voluntary Self-Disclosure Policy

A company that voluntarily self-reports within 120 days of receiving a potential whistleblower’s information may be eligible for a “presumption of a declination” under the DOJ Corporate Enforcement and Voluntary Self-Disclosure (VSD) Policy if the company reports the information to DOJ prior to DOJ contacting the company.¹⁷

Key Takeaways:

How this program will play out remains to be seen, but consider the following:

1. **Fill Not Replace.** The CWAPP might not cover as much corporate misconduct as meets the eye. As explained above, the CWAPP’s primary goal is *not* to replace existing programs, but rather to fill perceived existing gaps in the whistleblower landscape. As

stressed by DOJ: “other agencies’ whistleblower programs do not cover the full scope of corporate crime [DOJ] investigates and prosecutes, leaving gaps that [DOJ] now seeks to fill.”¹⁸ Because a whistleblower may not receive a CWAPP reward if they would be “eligible for an award through another U.S. government or statutory whistleblower, *qui tam*, or similar program,” many potential areas of misconduct will fall outside of the pilot program.¹⁹ This includes many types of potential misconduct relevant to public companies, such as financial reporting issues, disclosure, internal controls, and securities offerings, which are issues covered by the federal securities laws and thus enforceable by the SEC. Most forms of potential misconduct by broker-dealers and investment advisers will likewise be excluded from coverage under the CWAPP for the same reason.

2. **Internal Reporting Still Valuable but Must Be Handled with Care.** The CWAPP contains an important accommodation for corporate legal and compliance programs: like the SEC whistleblower provisions, CWAPP allows for a whistleblower to first report internally at the company level, so long as the whistleblower also reports in writing to the DOJ within 120 days. DOJ, like other enforcement agencies, recognizes the value of internal company compliance and legal departments and does not put them at odds with the interests of law enforcement.

At the same time, by recognizing the benefits of internal reporting, but requiring the whistleblower to also disclose to DOJ within 120 days of the report, the CWAPP has created urgency for internal compliance teams with high-stakes consequences. Companies will have to perform their internal investigations of any whistleblower allegations within the relatively brief 120-day period, or risk DOJ’s learning of the information directly from the whistleblower, prior to the company. For companies that self-report, DOJ will certainly evaluate a company’s response to any such CWAPP complaint, and likely base the corporate consequences upon whether a company treated the information with proper care and attention.

3. **Health Care Fraud Against Private Insurers May Be Covered.** Although the States of California²⁰ and Illinois²¹ have *qui tam* statutes which can lead to whistleblower rewards for reporting fraud committed against private insurers, there is no corresponding federal *qui tam* statute or program. This is a large gap, because most health care fraud schemes are committed not only against government insurers (such as Medicare), but also private insurance companies. The CWAPP is designed to fill this gap by incentivizing whistleblowers to come forward to DOJ with information regarding health care fraud being committed against *private insurers*.
4. **Unclean Hands Need Not Apply.** Disclosure under the pilot program will not wash away or reward criminal liability. Thus, unlike the SEC’s whistleblower program, under CWAPP a whistleblower who materially participated in the misconduct will be ineligible for an award, unless they are able to demonstrate to the DOJ’s satisfaction that their role in the

conduct “was sufficiently limited [such] that the individual could be described as ‘plainly among the least culpable of those involved in the conduct of a group.’”²² A person in this category will likely fall under traditional “cooperator” definition and benefit only in the form of plea negotiations or a favorable submission at sentencing.²³

Conclusion

In sum, the CWAPP significantly incentivizes individual whistleblowers to report corporate criminal conduct in areas previously unavailable for a monetary reward. However, due to the internal reporting feature of the program, companies may have a chance to learn of the offensive conduct before the DOJ does. In such circumstances, companies will have to act with deliberate speed to investigate any such allegations, and make a determination, based on such investigation, whether they wish to self-report, prior to the putative whistleblower’s 120-day reporting deadline.

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²*Criminal Division Corporate Whistleblower Award Pilot Program*, U.S. Dep’t of Justice, Criminal Division (Aug. 1, 2024), <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program>.

³*Id.* (emphasis added).

⁴*Factsheet Corporate Whistleblower Awards Pilot Program*, U.S. Department of Justice (Aug. 1, 2024), <https://www.justice.gov/criminal/media/1362326/dl?inline>.

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

⁶*Criminal Division Corporate Whistleblower Award Pilot Program*, U.S. Dep’t of Justice (Aug. 1, 2024), <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program>.

⁷*Dep’t of Justice Corporate Whistleblower Awards Pilot Program*, (Aug. 1, 2024), <https://www.justice.gov/criminal/media/1362321/dl?inline>. Section I. Pg. 1 (hereinafter “*CWAPP Guidance*”).

⁸*Id.* Section II (3).

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* Section II (5). Pg. 6.

¹²*Id.* Section II (1). Pg. 2, FN 3.

¹³*Id.* Section II (1). Pg. 3.

¹⁴*Id.* Section II (7). Pg. 7.

¹⁵*Id.* Section II (7) (c). Pg. 7.

¹⁶*Id.* Section III. Pg. 7.

¹⁷Dep't of Justice, 9-47.120 - Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, available at <https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl>; Dep't of Justice, Temporary Amendment to the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Aug. 1, 2024), available at <https://www.justice.gov/criminal/media/1362316/dl?inline>.

¹⁸*CWAPP Guidance*, <https://www.justice.gov/criminal/media/1362326/dl?inline> Section I. Pg. 1.

¹⁹*Id.* Section II (1) (b). Pg. 2.

²⁰*See* California Insurance Fraud Prevention Act, Cal. Ins. Code §§ 1871 et seq.

²¹*See* Illinois Insurance Fraud Prevention Act, § 740/1 ILCS 92, et seq.

²²*CWAPP Guidance*, <https://www.justice.gov/criminal/media/1362326/dl?inline>. Section II, FN4, Pg. 3.

²³Descriptions of cooperation are usually submitted by DOJ pursuant to §5K1.1 of the United States Sentencing Guidelines which allows federal courts to deviate from the otherwise recommended sentencing guidelines range and order a lesser sentence for a defendant who provides “substantial assistance” to law enforcement authorities.