

Home › Experts Corner › **Implications Of The Doj'S Corporate Whistleblower Awards Pilot Program On Indian Businesses**

Implications of the DOJ's Corporate Whistleblower Awards Pilot Program on Indian Businesses

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INTRODUCTION

The United States Department of Justice (DOJ) officially rolled out its Corporate Whistleblower Awards Program (WB Program) on 01-08-2024¹ It is a three-year pilot program and at the end of the period, the DOJ will evaluate the program's success.

The WB Program seeks to reward individuals who provide "original information" regarding criminal misconduct that results in a forfeiture exceeding United States Dollar (USD) 1 million in net proceeds, if such information falls in one of four broad subject areas. The DOJ's Money Laundering and Asset Recovery Section is responsible for the management of the WB Program.

SCOPE OF THE WB PROGRAM

Acknowledging its long history of utilising information derived from whistleblowers to obtain convictions and uncover corporate criminal schemes, the DOJ hopes to “fill the gaps” that other awards programs have left behind². With respect to the Foreign Corrupt Practices Act, 1977 (FCPA), the Securities and Exchange Commission (SEC) has already implemented a program whereby awards are paid to whistleblowers who provide the Commission with original information pertaining to violations of federal securities laws (SEC Program)³. However, the ambit of the FCPA is wider in scope and not only covers bribery of foreign officials by “issuers of securities”⁴ but also violations by “domestic concerns”⁵. Whistleblowers with original information pertaining to violations of the FCPA by domestic concerns will now be able to avail the benefits of the WB Program.

SALIENT FEATURES OF THE WB PROGRAM

OBJECTIVES

Whistleblowers will have to submit original information pertaining to one of the following four subject matter areas:

- (i) Violations by financial institutions** including schemes involving money laundering, anti-money laundering compliance violations, and fraud against financial institution regulators;
- (ii) Foreign bribery and corruption by companies** including violations of the FCPA, the Foreign Extortion Prevention Act, 2023 and violations of money laundering statutes;
- (iii) Domestic bribery and corruption by companies**, and
- (iv) Healthcare fraud schemes.**

ELIGIBILITY CRITERIA

An individual may be eligible for an award under the WB Program if they, alone or jointly, provide the DOJ with original information in writing that leads to a civil or criminal forfeiture in excess of USD 1 million. However, an individual would be ineligible for an award under the WB Program if:

- a. they are a company or any other legal entity;
- b. they would be eligible for an award under another governmental or statutory whistleblower program for reporting the same information;
- c. at the time of providing the original information, they are or were an official, employee or contractor of the DOJ or any other law enforcement agency, or a spouse, parent, child or sibling of an official, employee, or contractor of the DOJ. Individuals residing in the same household as an official, employee, or contractor of the DOJ are similarly excluded;
- d. they are or were an elected or appointed foreign government official at the time of acquiring the original information;

- e. they meaningfully participated in the criminal activity they reported or knowingly profited from it;
- f. they acquired the information with the intent to evade any requirement of the WB Program or from an individual who is ineligible as set out above; and
- g. they withhold material information, make false, fictitious, or fraudulent statements, or otherwise mislead, interfere with, or obstruct the DOJ's investigation.

WHAT QUALIFIES AS "ORIGINAL INFORMATION"?

In addition to the eligibility criteria set, the information provided by the whistleblower must be original. The information must be based on or derived from an individual's independent analysis and/or knowledge and cannot be information that is publicly available or generally known. The DOJ will also examine whether the information materially adds to the information it already possesses.

The following types of information are not considered "original information":

- a. information obtained that was subject to attorney-client privilege, unless such information can be lawfully disclosed under the crime-fraud or other such exceptions;
- b. information obtained in connection with legal representation or services being provided to a client either as an individual or as an employee or member of a firm;
- c. information that is contained entirely in an allegation made in a governmental report, judicial hearing, audit, investigation, or news report. However, where the individual submitting the information is the source based on which the above allegation is made, the information will be considered "original information";
- d. information obtained as a result of being:
 - (1) an officer, director, trustee or partner of an entity who obtained the information from another person or learnt of it through internal reporting processes;
 - (2) an employee involved in compliance or internal audit capacities;
 - (3) employed by or otherwise associated with a firm retained to conduct an inquiry or investigation in relation to the possible legal violations; and
 - (4) an employee of or other person associated with a public accounting firm.

However, these exclusions would not apply if an individual had a reasonable basis to believe that the disclosure of information to the DOJ is necessary to prevent criminal conduct that could harm national security, result in crimes of violence, cause imminent financial or physical harm to others, or impede an investigation into such conduct. Similarly, if 120 days have passed since individuals mentioned in (1) and (2) had provided the information to an entity's Audit Committee, Chief Legal Officer, Chief Compliance Officer (their equivalents), or their supervisor, then their information would be considered "original"; and

- e. information obtained with the knowledge that it was obtained in violation of applicable laws.

ADDITIONAL CONSIDERATIONS

Voluntary, truthful, and complete

A submission must be **voluntary, truthful, and complete**. For information to be considered voluntary, it must be submitted before any demand, inquiry or request from the DOJ and must not be submitted in pursuance of an obligation under an agreement with the DOJ or other law enforcement agency. Additionally, details including an individual's own participation in any misconduct must also be disclosed. Information submitted by an individual who lies about, conceals, or mischaracterises their role in relation to the misconduct being reported would not be considered truthful and complete.

Cooperation

Whistleblowers submitting information must cooperate with the DOJ in its investigation. This includes providing evidence before a jury during court proceedings, producing documents, and working under the supervision of law enforcement officials.

PROTECTIONS FOR WHISTLEBLOWERS

The DOJ guarantees confidentiality of all information submitted to it that could result in the identity of the whistleblower being disclosed. This, however, is subject to the disclosure of information required under law or the DOJ's policies. Accordingly, the DOJ is empowered to share information provided by a whistleblower with other law enforcement agencies that uphold the same confidentiality commitments. Under the WB Program, whistleblowers may also submit their information anonymously through an attorney. However, prior to the payment of any award, whistleblowers are required to disclose their identity to the DOJ and have it verified.

KEY TAKEAWAYS FOR INDIAN BUSINESSES

DISCRETIONARY AWARDS

The WB Program explicitly sets out that all awards are discretionary even if all other requisite criteria are fulfilled. Further, the WB Program specifically stipulates that the DOJ's award determination is neither appealable nor subject to judicial review. This is a marked departure from the SEC Program, wherein a determination of whether or to whom to make an award may be appealed within 30 days after the SEC issues its final decision to the United States Courts of Appeals.

EMPHASIS ON TIMELY INTERNAL REPORTING

The WB Program has been criticised for incentivising whistleblowers to report possible breaches of the FCPA to the DOJ first, instead of allowing companies to receive the information first and voluntarily self-disclose. However, it is pertinent to note that one of the factors that the DOJ will consider when evaluating a potential award is whether the whistleblower participated in internal compliance systems or internal reporting first. In line with this, the DOJ has also simultaneously announced a temporary amendment to its Criminal Division Corporate Enforcement and Self-Disclosure Policy. In situations where a whistleblower has made both an internal report to a company and a submission to the WB Program, the company will still stand to qualify for a presumption of a declination as long as the company:

- (i) self-reports the conduct to the DOJ within 120 days after receiving the whistleblower's internal report; and
- (ii) meets the other requirements for voluntary self-disclosure and presumption of declination.

CREATION OF ROBUST COMPLIANCE PROGRAMS

Violations of the FCPA by domestic concerns, which were not previously covered under any federal whistleblower programs, are now covered under the WB Program. This has a significant impact on the conduct of Indian subsidiaries of US-based domestic concerns as they are now under the ambit of the WB Program and are incentivised to submit information on possible breaches of the FCPA to the DOJ. It is thus essential for such US-based domestic concerns to ensure that their subsidiaries establish and implement robust compliance programs to prevent misconduct in the first place.

CONCLUSION

While the impact of the WB Program remains to be seen, it is likely that the DOJ and companies will see an increase in whistleblower complaints. Given this, it is imperative that Indian companies continue to evaluate and strengthen their internal compliance and reporting systems. Indian companies should also consider creating detailed investigative processes to ensure any allegations are expeditiously and thoroughly investigated, preferably within a 120-day timeframe to ensure that in the event a self-disclosure is required to be made, it is as detailed as possible.

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1. dl (justice.gov).

2. Office of Public Affairs | Deputy Attorney General Lisa Monaco Delivers Remarks on New Corporate Whistleblower Awards Pilot Program | United States Department of Justice.
3. SEC.gov | Whistleblower Program.
4. "Issuer" means every person who issues or proposes to issue any security. For the purposes of the FCPA, "issuer" primarily refers to any company that has securities registered in the US or is otherwise required to file periodic reports with the SEC.
5. "Domestic Concern" means any individual who is a citizen, national or resident of the United States and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

***Disclaimer: Authors are Indian qualified lawyers and only entitled to practice law in India.**

Tags : Corporate Whistleblower | Corporate Whistleblower Awards Pilot Program | Department of Justice | Foreign Corrupt Practices | Foreign Extortion Prevention Act | Indian Businesses | Pilot Program | Securities and Exchange Commission | United States Department of Justice

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