Cooley

When the Whistle Blows, Listen Carefully – and Consider Self-Disclosure

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On February 22, 2023, the US Department of Justice announced a new voluntary self-disclosure policy for corporate criminal enforcement in US attorney's offices nationwide. The policy offers concrete and meaningful incentives – including significant discounts on fines and not guilty plea resolutions – for corporations that meet the criteria for a voluntary self-disclosure of misconduct. One catch: The policy does not apply where a whistleblower informed the DOJ about the alleged misconduct. Though the policy makes clear that self-reporting will still be considered favorably even if the government was previously made aware of the alleged misconduct, it highlights the government's increasing focus on timely self-disclosure – and, in turn, the increasing importance of a corporation's response to **internal** whistleblower complaints. While the question of whether to self-report is highly fact-dependent, corporations should, at a minimum, take every whistleblower report seriously, move to investigate any potential misconduct swiftly, and, where the decision is made to self-report, do so promptly.

Whistleblowers and voluntary self-disclosure

In a recent American Bar Association Corporate Counsel Seminar session on whistleblower reports (held prior to the DOJ's policy announcement), a panel of in-house and outside counsel discussed the many difficulties companies face in deciding whether and when to self-disclose potential wrongdoing. These decisions often implicate a variety of complex considerations, including:

- The potential for cooperation credit, including reduced fines.
- The need to weigh the economic impact of a penalty against possible reputational damage to the business.
- The risk of collateral consequences, such as disqualifications under the federal securities laws (particularly since SEC settlements can no longer be conditioned on a waiver of disqualification).
- Whether the issue is company-specific or industry-wide.
- Whether a whistleblower has raised an internal complaint.

Regarding whistleblower complaints specifically, the panelists noted the practical reality that the presence of an internal whistleblower often weighs in favor of self-disclosure, given the likelihood that the whistleblower will (or already has) made a similar report to the relevant regulatory agency or brought a qui tam action. Indeed, as we previously observed in a November 2021 post on whistleblower complaints, financial incentives to blowing the whistle to regulators have grown exponentially in recent years.

False Claims Act

The False Claims Act's strong whistleblowing incentives (including up to 30% of the recovery plus attorney's fees and expenses) continued to generate considerable activity last year. In fiscal year 2022, qui tam relators filed 652 lawsuits – an average of 12 per week – and the DOJ obtained $1.9 billion in settlements and judgments from whistleblower lawsuits. Currently pending legal cases and potential legislative activity may result in even more protections for FCA whistleblowers, including limiting the burden to show that an allegedly violated regulation was material to the government and limiting the government's ability to dismiss claims brought by whistleblowers.

Securities and Exchange Commission

Fiscal year 2022 was another record-setting year for the SEC whistleblower program. In FY 2022, the SEC received over 12,300 whistleblower tips (the largest number received in a fiscal year) and awarded $229 million to 103 individuals – the second-highest year in terms of dollar amounts and number of awards. Fiscal year 2023 has already seen significant whistleblower activity, with the SEC reporting seven awards totaling more than $138 million in recent months.

Of particular interest, on December 19, 2022, the SEC announced an award of more than $37 million to a single whistleblower who not only blew the whistle to the SEC (and to another agency), but also was the initial source of the company's internal investigation. The SEC noted that the company self-reported the alleged conduct, but that the whistleblower received credit for the investigation because they "provided the same information to the SEC within 120

days of providing it internally." This illustrates both the very real risk that an internal whistleblower will also report potential misconduct to regulators, and the importance of considering whistleblower reports when deciding whether to self-disclose.

Key takeaways

- In light of the government's increased focus on voluntary self-disclosure of potential misconduct and the proliferation of whistleblower reports to regulators, companies must be prepared to investigate allegations from internal whistleblowers promptly, diligently and efficiently.
- Companies should review their whistleblowing procedures and consider these best practices, including:
    - Take whistleblower allegations seriously.
    - Know when to hire outside counsel and when to raise issues with auditors, the audit committee and/or the board.
    - Treat whistleblowers thoughtfully and respectfully, and stay in contact where possible.
    - Don't do anything that could be construed as retaliation or limiting communications between the whistleblower and regulators.
    - Keep the whistleblower's identity confidential to the extent practicable.
    - Consider whether – and when – to self-report whistleblower allegations.
- In considering whether and when to self-report, do not assume that cooperating with later government inquiries will be treated as favorably as voluntary self-disclosure. As a senior DOJ official explained in connection with the recent policy announcement: "Even outstanding cooperation on the back end is not going to make up for a lack of voluntary self-disclosure on the front end."

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