

6 KEY TAKEAWAYS

Whistleblower Programs: How the U.S. Government Seeks to Create a Speak-Up Culture & Parts of the World Want One Too

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The U.S. Government has several way to incentivize whistleblowers. The U.S. Government can leverage several federal statutes and reward programs to entice whistleblowers to raise concerns. Examples include:

Statutes

- False Claims Act
- Anti-Money Laundering Act
- Lacey Act

Reward Programs

- Securities & Exchange Commission
- Commodities Future Trading Commission
- Internal Revenue Service

All are welcome. Whistleblowers do not need to be U.S. citizens or residents to benefit from the statutes or reward programs.

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The Securities and Exchange Commission has the most successful program. The SEC has reached over U.S. \$1 billion in payouts to whistleblowers.

- In 2021, the SEC handled over 12,200 tips.
- Up 76% from 2020 and a more than 300% increase since the beginning of the program.
- Awards of about \$564 million to 108 individuals in fiscal year 2021 (more than the combined total for fiscal years 2011 through 2020).
- The SEC received tips from individuals in 99 foreign countries and from every state in the U.S., including the District of Columbia.
- Approximately 20% of the meritorious claimants in 2021 were based outside of the U.S.

A reward program incentivizes even those who may be culpable. One notable September 24, 2021 SEC high-profile award to a whistleblower may set a precedent for other government whistleblower programs.

- The SEC awarded a \$36 million bounty to a single whistleblower claimant, who provided information related to a SEC and another federal agency's actions.
- The whistleblower delayed reporting for over five years (which is also the statute of limitations for most federal crimes).
- The whistleblower alleged misconduct by a financial institution and personnel from a "foreign government entity," while being culpable for the underlying misconduct.

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The EU Directive on Whistleblower Protection provides broad protections abroad.

- The Directive:
 - Seeks to protect those who expose wrongdoing both in the private and public sector;
 - Covers a broad range of potential wrongful conduct; and
 - Provides the EU Member States the minimum requirements for the internal whistleblower protection regulations.
- It mandated that EU Member States must pass national legislation to implement a majority of the minimum requirements. However, many members are in various stages of legislative adoption.
- The Directive requires all measures to be effective by December 17, 2023.
- A "whistleblower" under the Directive can include not only corporate employees, but those who may have a partial or future working relationship, including those who discover an issue during the recruitment process.
- Legal entities with over 50 workers will need to:
 - Implement internal reporting channels to keep the whistleblower's identity confidential;
 - Provide the whistleblower an acknowledgement of the reporting within seven days;
 - Share with the whistleblower, within a reasonable timeframe, any follow-up; and
 - Give feedback to the whistleblower within three months of the reporting.
- The Directive also requires EU Member States to implement support measures for whistleblowers, which could include free legal advice, financial assistance, or psychological support.

U.S. Government's Expectations for Corporate Whistleblower Programs.

- The hallmarks of a well-designed compliance program include an "efficient and trusted" mechanism for employees to speak up anonymously and confidentially regarding alleged breaches of a code of conduct, policies, or suspected or actual misconduct.
- When assessing a whistleblower program, consider whether there is/are:
 - Proactive measures to create an atmosphere without fear of retaliation;
 - Appropriate process for submission of complaints;
 - Process to protect whistleblowers;
 - Process for handling investigations (e.g. routed to qualified personnel, timely completion of independent, objective, properly scoped and documented investigations);
 - Appropriate follow-up and discipline; and
 - Tracking and analysis of results.
- It is important to ask three key questions when evaluating a whistleblower program:
 - Is the system well-designed?
 - Is the system applied earnestly and in good faith (adequately resourced and empowered to function effectively)?
 - Does it work in practice?

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