

DOJ to Develop New Whistleblower Program to Augment Existing Federal Whistleblower Programs

by Nicole Engisch, Alex Hontos, Elena Modl, and RJ Zayed

Last week Deputy Attorney General Lisa Monaco announced that the U.S. Department of Justice (DOJ) will soon begin a pilot program to reward whistleblowers who alert prosecutors to significant corporate misconduct.^[1] The goal of the program is to help DOJ prosecute the full range of corporate and financial misconduct. The funds will come out of money and assets that defendants forfeit in criminal or civil forfeiture proceedings. Given DOJ's broad mission, the program will fill in gaps from other more limited programs, such as those operated under the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Financial Crimes Enforcement Network (FinCEN).

Over the next 90 days, in what Monaco called "a 90-day sprint," DOJ will gather information and study existing programs as models for its own whistleblower program. Although the precise parameters remain unknown, Monaco indicated that DOJ will be especially interested in tips relating to abuses of the U.S. financial systems and those related to public corruption, including domestic bribery cases, foreign corruption cases that are outside the jurisdiction of the SEC, and foreign corruption cases brought against foreign officials and others under the newly enacted Foreign Extortion Prevention Act.

How Will DOJ's Program Fill in the Gaps with Existing Programs?

"Ever since Dodd-Frank created whistleblower programs at the SEC and the CFTC, those agencies have received thousands of tips, paid out many hundreds of millions of dollars, and disgorged billions in ill-gotten gains from corporate bad actors," Monaco stated. Existing whistleblower programs, however, are limited to misconduct within each agency's limited jurisdiction or, in the case of False Claims Act qui tam actions, fraud against the government itself. DOJ, in contrast, has a broader mission, and therefore the new DOJ program will fill gaps in what Monaco called the "patchwork quilt" of federal whistleblower programs that fail to "cover the whole bed." For example, the DOJ whistleblower program would apply not just to publicly-traded companies (like those covered by the SEC and CFTC programs), but to private corporations and individuals. It

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would apply to a variety of crimes and fraud, and not just to fraud on the government, like matters addressed by the False Claims Act in qui tam actions. Because of DOJ's broader mission, the new whistleblower program will likely apply to those who report sanctions and export control violations, and it could apply to drug cases, firearms offenses, or other violent crime offenses for which forfeiture may apply.

While the law currently allows the Attorney General to pay awards to those who provide information leading to civil or criminal forfeitures,^[2] DOJ has never had an official program intended to incentivize whistleblowers. Given the billions of dollars the government recovers in forfeiture, the funds for this program could be substantial.^[3] Monaco expressed the expectation that this program will work hand in glove with DOJ's other corporate enforcement policies to not only incentivize individuals to report misconduct, but also to drive companies to invest further in their own internal compliance programs and reporting systems.

What are the Core Requirements?

In advance of the 90-day policy sprint, Monaco detailed several core program requirements. In particular, to be eligible for this program, a whistleblower must:

- Present information that the government does not already know;
- Be the first in the door;
- Not be involved in the underlying criminal activity; and
- Not have an existing financial disclosure incentive, such as through a qui tam action under the False Claims Act or any other federal whistleblower program.

Additionally, payments to whistleblowers will be offered only after all victims have been appropriately compensated. Acting Assistant Attorney General Nicole Argentieri explained that DOJ expects to establish a minimum dollar threshold to reward whistleblowers who present information regarding the most significant cases.^[4] This threshold limit could be comparable to the SEC and CFTC program thresholds, which limit awards to those cases involving \$1 million or more in sanctions. Argentieri further stated that DOJ's Money Laundering and Asset Recovery Section will play a critical role leading and developing the new whistleblower program.

What Are Some Challenges with the Program?

While the precise parameters of the program remain unknown, the program may present some challenges. In particular, because the program relates to criminal cases, it may be difficult for whistleblowers to remain anonymous. In criminal cases, complaining and cooperating witnesses generally need to be identified as part of the criminal case discovery process. If so, the new program will be a staunch contrast to the SEC and CFTC whistleblower programs which allow anonymous and confidential complaints, if reported through an attorney. Additionally, if a whistleblower is a potential witness in a criminal case, that person's credibility will be subject to cross examination challenges for motive and bias. Defendants may similarly argue that the whistleblower is culpable in the wrongdoing, and if that argument is successful, the whistleblower will recover nothing

and may even be subject to criminal prosecution. This contrasts with other whistleblower programs. For example, in claims brought under the False Claims Act, the court may reduce the reward of a qui tam plaintiff who “planned and initiated” the wrongdoing, but unless the plaintiff is criminally convicted, the plaintiff may still recover some share of the bounty paid.

Another challenge is that DOJ’s program arises out of forfeiture of assets, if any. Thus, DOJ’s program may not have a dedicated pool of funds, unlike the SEC and CFTC whistleblower programs. A DOJ whistleblower, therefore, may be at risk of ultimately not recovering anything for their efforts.

How Does this Program Fit Within DOJ’s Corporate Enforcement Policies?

DOJ’s new whistleblower program is consistent with DOJ’s overall corporate enforcement policy that emphasizes a carrot-and-stick approach to incentivize corporations to foster a culture of compliance. Those policies encourage corporations to voluntarily self-disclose criminal misconduct and cooperate fully with the government,^[5] establish clawbacks of compensation given to individual wrongdoers,^[6] and voluntary self-disclose criminal misconduct in the mergers-and-acquisitions process.^[7] DOJ’s new whistleblower program also follows the newly-announced individual whistleblower pilot program in the U.S. Attorney’s Office for the Southern District of New York under which whistleblowers of certain nonviolent criminal offenses not previously known to prosecutors may receive nonprosecution agreements. The U.S. Attorney’s Office for the Northern District of California has announced a similar individual whistleblower program, and comparable programs at other U.S. Attorney’s Offices may follow.

What Are the Takeaways?

DOJ intends to develop additional parameters for its new whistleblower program during the 90-day policy sprint. Follow Dorsey & Whitney for updates as the DOJ releases additional details regarding this new whistleblower program. In the meantime, we offer the following takeaways:

- While this program adds to the pressure on companies to voluntarily self-report wrongdoing, the decision whether and when to do so is a complex one that should be undertaken only after weighing all appropriate risks and benefits.
- Companies should continue to review their compliance programs to ensure they are well designed, adequately resourced, and functioning timely and effectively. This includes adopting effective internal reporting mechanisms, such as compliance hotlines, and ensuring employees are well-trained on how to report potential wrongdoing internally.
- Corporate insiders may soon have another financial incentive—in addition to traditional bounty-programs—to report alleged wrongdoing to the government.

[1] Office of Public Affairs | Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association’s 39th National Institute on White Collar Crime

| United States Department of Justice.

[2] See 28 U.S. Code § 524(c)(1)(C).

[3] In fiscal year 2023, DOJ seized more than \$3 billion in forfeited assets. Assets Forfeiture Fund and Seized Asset Deposit Fund Method of Disposition of Forfeited Property | United States Department of Justice.

[4] Office of Public Affairs | Acting Assistant Attorney General Nicole M. Argentieri Delivers Keynote Speech at the American Bar Association's 39th National Institute on White Collar Crime | United States Department of Justice.

[5] DOJ Announces Additional Incentives for Corporate Cooperation in Criminal Enforcement | News & Resources | Dorsey.

[6] Department of Justice Announces First-Ever Pilot Program on Compensation Incentives and Clawbacks, Revisions to Corporate Guidance Regarding Electronic Communications, and Resource Commitments for Corporate Compliance with Sanctions and Export Control Laws | News & Resources | Dorsey.

[7] Department of Justice Seeks to Reward Due Diligence and Timely Self-Disclosures in Mergers & Acquisitions Through New Safe Harbor Policy | News & Resources | Dorsey.