

March 18, 2024

DOJ Announces New Whistleblower Program Aimed at Increasing Corporate Enforcement

On March 7, 2024, Deputy Attorney General Lisa Monaco (“DAG Monaco”) announced that the U.S. Department of Justice (DOJ) will launch a new whistleblower program this year (the “DOJ Program” or the “Whistleblower Program”) that is intended to “create new incentives for individuals to report misconduct” to DOJ and “drive companies to invest further in their own internal compliance and reporting systems.”¹

While a number of federal agencies currently have whistleblower programs, DAG Monaco noted that these programs only cover crimes within their jurisdictions, creating a “a patchwork quilt that doesn’t cover the whole bed.” According to DAG Monaco, the DOJ Program aims to “fill gaps” in existing whistleblower programs by covering criminal activity where there is not already an existing program, including the SEC, CFTC, IRS, and FinCEN whistleblower programs. See Appendix A (“Existing Programs”).²

Under the new DOJ program, “if an individual helps DOJ discover significant corporate or financial misconduct — otherwise unknown to us — then the individual could qualify to receive a portion of the resulting forfeiture.” DAG Monaco highlighted that if an employee at a private equity firm or a technology start-up discovers financial fraud or bribery, the whistleblower would be able to “get paid as part of the recovery from that criminal case.” The DOJ will be “especially interested” in information about: criminal abuses of the U.S. financial system; foreign corruption outside the jurisdiction of the SEC, including FCPA violations by non-issuers, and violations of the recently enacted Foreign Extortion Prevention Act³; and U.S. domestic corruption cases, especially involving illegal corporate payments to government officials.

¹ Dep’t of Justice, *Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association’s 39th National Institute on White Collar Crime* (Mar. 7, 2024), available [here](#). DOJ intends to use authority under 28 U.S.C. § 524(c)(1)(C) to develop the program. This 40-year-old statutory authority established the DOJ’s Asset Forfeiture Fund (“AFF”), a special fund authorized to receive the proceeds of forfeiture. The statute also authorizes, “at the discretion of the Attorney General, the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Fund.” Historically, law enforcement agencies relied on this authority to pay confidential human sources using AFF monies, but it has not been used before to proactively develop and fund a whistleblower program.

² The DOJ Program also considers violations of the False Claims act to be outside of its scope given the provisions for *qui tam* lawsuits.

³ This Act establishes criminal liability for foreign officials who “corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value from” from any person while in the territory of the United States or from a U.S. issuer or domestic concern, in exchange for an improper business advantage. See Paul, Weiss, *Congress Passes Foreign Extortion Prevention Act, Expanding Federal Criminal Liability to Foreign Officials* (Dec. 22, 2023), available [here](#).

The Whistleblower Program is a significant development in DOJ's focus on corporate criminal enforcement and fits within DOJ's continued initiatives to encourage companies to file Voluntary Self-Disclosures ("VSD") of potential violations.⁴ DAG Monaco underscored this point, noting that the DOJ's message to companies "considering a voluntary self-disclosure" is that they should "knock on our door before we knock on yours."

Design and Implementation

DOJ has provided limited information about the new program so far, but DAG Monaco explained in her March 7 speech that DOJ would be "launching a 90-day sprint to develop and implement a pilot program." During those 90 days, DOJ will "gather information, consult with stakeholders, and design a thoughtful, well-informed program."⁵ DOJ's Money Laundering and Asset Recovery Section (MLARS) will be at the forefront of that effort since DOJ's statutory authority to administer the whistleblower program is "tied to the department's forfeiture program." Whether DOJ will ultimately administer its program through a central whistleblower office, like those that administer the SEC, CFTC, IRS, and FinCEN programs, remains to be seen.

DAG Monaco also explained that there will be certain parameters limiting the scope of the program. Specifically, DOJ intends to offer payments only (i) after all victims have been properly compensated; (ii) to those who submit truthful information not already known to the government; and (iii) to those not involved in the criminal activity itself.

As with other whistleblower programs, the DOJ Program will only pay awards to individuals who are "first in the door." DAG Monaco emphasized that this point is key "[b]ecause the same rule applies to the Department's [VSD] programs." The restriction applies "regardless of whether [the reporting individual or entity is] an innocent whistleblower, a potential defendant looking to minimize criminal exposure, or the audit committee of a company where the misconduct took place." The result will be a "multiplier effect" where companies and individuals are both incentivized to be first to report corporate misconduct.

In a March 8 speech, Acting Assistant Attorney General Nicole M. Argentieri explained that MLARS intends to work closely with U.S. Attorneys, the FBI, and other DOJ offices to develop the program guidelines for eligibility. One such guideline may be a monetary threshold like those the SEC and CFTC use for their whistleblower programs. While the SEC and CFTC limit rewards to cases in which the agency orders at least \$1 million in sanctions, DOJ may ultimately choose to set a different threshold.

It remains to be seen how the new DOJ-wide policy will relate to recent whistleblower initiatives announced by the U.S. Attorney's Office for the Southern District of New York ("SDNY") and the U.S. Attorney's Office for the Northern District of California ("NDCA"). In January 2024, the SDNY announced its own corporate whistleblower pilot program,⁶ which will focus on "self-disclosure of criminal conduct." The policy will be "applicable to circumstances where an individual discloses to [the] Office information regarding criminal conduct undertaken by or through public or private companies, exchanges, financial institutions, investment advisers, or investment funds involving fraud or corporate control failures or affecting market integrity, or criminal conduct involving state or local bribery or fraud relating to federal, state, or local funds." In exchange for self-disclosure and cooperation, SDNY "will enter into a non-prosecution agreement where certain specified conditions are met," including that the government was not previously aware of the disclosed information. As such, unlike the DOJ Program, the SDNY pilot program

⁴ In February 2023, DOJ announced a VSD policy applicable to all corporate prosecutions that provides benefits to companies that voluntarily self-disclose corporate misconduct. Paul, Weiss, *United States Attorney's Offices Announce Voluntary Self-Disclosure Policy for Corporate Prosecutions* (Feb. 24, 2023), available [here](#). In October 2023, DOJ announced a department-wide "Mergers & Acquisition Safe Harbor Policy" which established a presumption that companies that take certain steps to disclose and remediate misconduct in the context of mergers and acquisitions will receive a declination. Paul, Weiss, *DOJ Announces New Department-Wide Mergers & Acquisitions Safe Harbor Policy and Emphasizes Expanded Focus on National Security Corporate Crime* (Oct. 6, 2023), available [here](#).

⁵ Dep't of Justice, *Acting Assistant Attorney General Nicole M. Argentieri Delivers Keynote Speech at the American Bar Association's 39th National Institute on White Collar Crime* (Mar. 8, 2024), available [here](#).

⁶ Dep't of Justice, *U.S. Attorney Williams Announces Enforcement Priorities And SDNY Whistleblower Pilot Program* (Jan. 10, 2024), available [here](#).

incentivizes whistleblowers with non-prosecution, rather than monetary awards. The NDCA recently announced that it plans to launch a similar program soon.

Compliance Considerations

Although the DOJ Program is still being defined, it is clear that DOJ is continuing to aggressively incentivize individuals and companies to provide the Department with information about corporate misconduct. As a result, there are a number of steps that potentially impacted companies should consider.

- Because the DOJ Program will cover a range of potential illicit activity, including fraud and bribery, companies should consider reviewing and updating their whistleblowing policies and procedures (or adopting them if needed). These policies and procedures should address the assessment and prompt internal investigation of allegations of misconduct, as well as non-retaliation against whistleblowers (and avenues for whistleblowers to seek recourse in the event there is retaliation).
- Companies may also wish to consider developing a clear framework for reporting potential violations internally so that the company will be well positioned to evaluate when and how to avail itself of the DOJ Program.

We will monitor developments related to the DOJ Program and similar programs at U.S. Attorney's Offices in the coming months.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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Appendix A: Existing Programs

- **SEC Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to the SEC related to violations of federal securities laws.⁷ Since its inception in 2011, the SEC Whistleblower Program has awarded more than \$1.9 billion to more than 397 individual whistleblowers.⁸ The program has been particularly successful recently; in Fiscal Year 2023, the Commission received over 18,000 tips, which was almost 50% more than the previous record set in Fiscal Year 2022.
- **CFTC Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to the CFTC related to violations of the Commodity Exchange Act (CEA).⁹
- **IRS Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to the IRS on tax payers avoiding or underpaying a tax obligation of at least \$2,000,000 (inclusive of interest and penalties). Because the recovery threshold is high, the IRS Whistleblower Program is most successful in large avoidance schemes like corporate tax fraud and fraud by high net worth persons.
- **FinCEN Whistleblower Program.** Eligible whistleblowers can receive awards if they provide information to FinCEN on violations of the Bank Secrecy Act or economic sanctions. This information can then be used by a number of enforcement agencies (including FinCEN, OFAC, and DOJ) to bring enforcement actions. As discussed in our 2023 Year in Review,¹⁰ FinCEN expects to issue regulations this year and in the interim has established an Office of the Whistleblower and is processing tips.
- **Qui Tam lawsuits:** The False Claims Act creates a private right of action that allows private citizens to bring suits on behalf of the government (“*qui tam*” suits) related to fraud against the government.¹¹

⁷ To be eligible for an award, SEC whistleblowers (i) must provide “original information” in writing to the SEC; (ii) that information must lead to a successful SEC enforcement action; and (iii) the successful SEC enforcement action must result in an order of monetary sanctions over \$1 million. SEC, Office of the Whistleblower, Frequently Asked Questions, available [here](#).

⁸ SEC, *Securities and Exchange Commission Office of the Whistleblower Annual Report to Congress for Fiscal Year 2023* (Nov. 14, 2023), available [here](#). These data are current as of November 2023.

⁹ CFTC, *Part 165—Whistleblower Rules* (amended July 31, 2017), available [here](#). The CFTC will pay an award to whistleblowers who (i) provide a voluntary submission to the Commission; (ii) that contains original information; and (iii) that leads to the successful resolution of a covered judicial or administrative action or successful enforcement of a “Related Action” or both. *Id.* at § 165.5. Under the CFTC’s Whistleblower Rules, a “Related Action” is a judicial or administrative action brought by: (i) DOJ; (ii) an appropriate department or agency of the Federal Government; (iii) a registered entity, registered futures association, or self-regulatory organization; (iv) a state criminal or appropriate civil agency; and (v) a foreign futures authority. Since the CFTC issued its first whistleblower award in 2014, it has awarded approximately \$365 million to whistleblowers, and subsequent enforcement actions have resulted in monetary sanctions of more than \$3 billion. CFTC, *Release Number 8806-23: CFTC Awards Whistleblower Over \$18 Million* (Oct. 12, 2023), available [here](#).

¹⁰ Paul, Weiss, *Economic Sanctions and Anti-Money Laundering Developments: 2023 Year in Review* (Jan. 22, 2024), available [here](#).

¹¹ 31 U.S.C. §§ 3729-3733.