

PUBLICATION

Jumping on the Whistleblower Bandwagon: DOJ Announces Department-Wide Pilot Program to Incentivize Individual Reporting

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The Department of Justice's (DOJ) Deputy Attorney General Lisa O. Monaco announced a department-wide whistleblower rewards program on March 7, 2024, that will be designed to supplement existing whistleblower programs, to "address the full range of corporate and financial misconduct that the Department prosecutes." This announcement comes in the wake of the U.S. Attorney's Office for the Southern District of New York's January 10, 2024, announcement of its own pilot whistleblower program. The DOJ's nationwide program will echo aspects of the largely successful (and profitable) Securities and Exchange Commission (SEC) and Commodities Future Trading Commission (CFTC) whistleblower programs established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). The DOJ's program would reach, among others, entities not regulated by the SEC and CFTC, ostensibly creating a regulatory regime for privately held firms that have skillfully navigated the waters of safe harbor provisions to avoid the extensive and expensive regulatory regimes of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).

DOJ's March 2024 Whistleblower Program Announcement

Deputy AG Monaco's remarks began by emphasizing the administration's initiative of "[u]sing a mix of carrots and sticks to promote responsible corporate citizenship." The DOJ's 2022 announcement and 2023 roll-out of its Voluntary Self-Disclosure Program as a part of its [Corporate Enforcement Policy](#) was one example of this carrot-and-stick approach. This 2024 announcement now appeals to individuals – because "people [] *and* corporations—respond to incentives."

Within the next 90-day "policy sprint" period, the DOJ plans to both develop and implement a department-wide "pilot program," which will formally go into effect later in 2024. At a high level, the program will be designed to reward an individual who comes forward with "significant corporate or financial misconduct" of which the government is not yet aware. This reward would be carved out of the asset forfeiture funds captured by the government in its prosecution of wrongdoings using the whistleblower's evidence.

The DOJ's whistleblower program will require that payments will only be made: (1) "after all victims have been properly compensated;" (2) where the "truthful information [is] not already known [by] the government;" (3) where the whistleblower is not "involved in the criminal activity itself;" and (4) in cases where "there isn't an existing financial disclosure incentive," such as *qui tam* cases or matters involving another federal whistleblower program.

These guardrails are seemingly less generous than those of the SEC or CFTC programs – where whistleblower payments are made in proportionality to the helpfulness of their information, where payments can be split if helpful information was provided by more than one whistleblower on the same conduct on a case-specific basis, and where whistleblowers earn a reward even if they were involved in the conduct at issue, assuming the whistleblower internally reported the conduct without avail prior to blowing the whistle. The DOJ's guardrails may be appropriate given the difference between civil litigating agencies and the DOJ's stated focus to find and prosecute criminal conduct.

As Deputy AG Monaco further emphasized, the DOJ is "especially interested in" reports associated with "criminal abuses of the U.S. financial system" and cases of foreign and domestic corruption (and specifically those that are outside of the SEC's jurisdiction). Further, the day after the DOJ's announcement of the proposed whistleblower program, the DOJ clarified that its statutory authority for the program is tied to the DOJ's forfeiture program, so the DOJ's Money Laundering and Asset Recovery Section (MLARS) "will play a leading role in designing the nuts and bolts of the pilot." Whether the DOJ's whistleblower program will be housed in MLARS will be a question worth watching; directed by Dodd-Frank, both the SEC and CFTC were required to create independent Offices of the Whistleblower inside their agencies to manage the whistleblower program separately from the enforcement function.

Deputy AG Monaco emphasized that, to benefit from the whistleblower program, an individual will need to be "first in the door, no one wants to be second." A tactic of the DOJ's successful leniency programs, the DOJ appears again to be harnessing its power to create a race-to-reporting frenzy for individuals who have the ability to help the DOJ find and prosecute wrongdoing.

The Path Forward and How This May Affect Corporate Practices

The DOJ's whistleblower program further promotes its recent efforts to combat corporate crime by rewarding companies for incentivizing a culture of compliance and holding individual wrongdoers (and their supervisors) accountable.

Consistent with the 2022 so-called "[Monaco Memo](#)" and the DOJ's [Voluntary Self-Disclosure Policies](#) that followed, this unveiling of a department-wide Whistleblower Program is designed to further motivate not only company-wide cooperation but individual employee cooperation. The federal agencies' race to entice whistleblowers has begun. With both criminal and civil wrongdoing reporting incentivized, whether a company is publicly traded or privately held, skilled whistleblower counsel and skilled compliance counsel will be racing to properly position their respective clients for success. The driver for whistleblowers and their (often) contingency fee-based counsel is the payout while maintaining complete whistleblower anonymity. For example, in Fiscal Year (FY) 2023 alone, the SEC [reported](#) that it received 18,354 "whistleblower tips" and awarded a record of nearly \$600 million to 68 individual whistleblowers who helped the SEC recover billions of dollars in losses.

The importance of this program is likely to have ramifications for both internal corporate investigations and future criminal prosecutions. As every regulated company understands, when there are allegations of wrongdoing, undertaking an appropriate internal investigation – generally led by outside counsel hired by management or the Board of Directors that identifies the wrongdoers, rectifies any issues, and considers whether to self-report to appropriate law enforcement – is extraordinarily important. With the DOJ's proposed whistleblower program, the need for an internal investigation, and the *speed* at which the investigation should be initiated and completed, is even more acute. With this new announcement, identifying potential wrongdoing, rectifying any issues, and weighing whether to report the wrongdoing to the appropriate authorities *before* any whistleblower makes a report to the DOJ will be paramount. Failure to investigate properly and in a timely manner will result in a financial incentive for the whistleblower to report such wrongdoing that, ultimately, the company may not be able to get ahead of.

Separately, the DOJ's announcement will affect future criminal prosecutions. More specifically, where a criminal prosecution is predicated on the whistleblower's allegations and information, that whistleblower will almost certainly be a material witness at any trial – and the potential reward of money from the Government will undoubtedly affect the credibility of the whistleblower in the eyes of a jury. How DOJ whistleblower anonymity will be addressed, if at all, is an area to watch. As noted above, SEC and CFTC whistleblowers can maintain their anonymity throughout the process, and that is of significant appeal to whistleblowers (most of whom remain in the industry and even as employees of the companies on whom they blew the whistle). Will

the DOJ's program have the same protections? It is unlikely given the vast majority of SEC and CFTC enforcement actions settle while the DOJ regularly tries cases in public forums.

Thus, while the DOJ's proposed whistleblower program may have good intentions – the reporting of wrongdoing to the government for it to address those allegations – it may present additional obstacles when prosecutors seek to obtain convictions based on those allegations. However, the incentive to report wrongdoing should be enough for all regulated companies to understand the need for a thorough and timely internal investigation in the face of allegations of wrongdoing and, just as importantly, a robust and effective compliance program. In the words of Deputy AG Monaco, "Now is the time to invest — and reinvest — in your compliance programs."

With extensive Government Enforcement and Investigations and Corporate Governance experience, Baker Donelson has the tools to help clients navigate potential challenges posed by these DOJ and other governmental initiatives. Please reach out to [Ferdose al-Taie](#), [Matthew S. Chester](#), [Lindsay E. Ray](#), or any member of Baker Donelson's [Government Enforcement and Investigation Group](#) with questions.