

## The Race to Report: DOJ Announces Pilot Whistleblower Program

Update

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In recent years, the Department of Justice (DOJ) has rolled out a significant and increasing number of carrots and sticks aimed at deterring and punishing white collar crime. Speaking at the American Bar Association White Collar Conference in San Francisco on March 7, Deputy Attorney General Lisa Monaco announced the latest: a pilot program to provide financial incentives for whistleblowers.

While the program is not yet fully developed, the premise is simple: if an individual helps DOJ discover significant corporate or financial misconduct, she could qualify to receive a portion of the resulting forfeiture, consistent with the following predicates:

- The information must be truthful and not already known to the government.
- The whistleblower must not have been involved in the criminal activity itself.
- Payments are available only in cases where there is not an existing financial disclosure incentive.
- Payments will be made only after all victims have been properly compensated.

### Money Motivates

Harkening back to the “Wanted” posters of the Old West, Monaco observed that law enforcement has long offered rewards to incentivize tipsters. Since the passage of Dodd Frank almost 15 years ago, the SEC and CFTC have relied on whistleblower programs that have been incredibly successful. In 2023, the SEC received more than 18,000 whistleblower tips (almost 50 percent more than the previous record set in FY2022), and awarded nearly \$600 million —

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the highest annual total by dollar value in the program's history. Over the course of 2022 and 2023, the CFTC received more than 3,000 whistleblower tips and paid nearly \$350 million in awards — including a record-breaking \$200 million award to a single whistleblower. Programs at IRS and FinCEN have been similarly fruitful, as are *qui tam* actions for fraud against the government. But, Monaco acknowledged, those programs are by their very nature limited. Accordingly, DOJ's program will fill in the gaps and address the full range of corporate and financial misconduct that the Department prosecutes. And though only time will tell, it seems likely that this program will generate a similarly large number of tips.

The Attorney General already has authority to pay awards for “information or assistance leading to civil or criminal forfeitures,” but it has never used that power in any systematic way. Now, DOJ plans to leverage that authority to offer financial incentives to those who (1) disclose truthful and new information regarding misconduct (2) in which they were not involved (3) where there is no existing financial disclosure incentive and (4) after all victims have been compensated. The Department has begun a 90-day policy sprint to develop and implement the program, with a formal start date later this year. Acting Assistant Attorney General Nicole Argentieri explained that, because the statutory authority is tied to the department's forfeiture program, the Department's Money Laundering and Asset Recovery Section will play a leading role in designing the program's nuts and bolts, in close coordination with US Attorneys, the FBI and other DOJ offices.

Monaco spoke directly to potential whistleblowers, saying that while the Department will accept information about violations of any federal law, it is especially interested in information regarding

- Criminal abuses of the US financial system;
- Foreign corruption cases outside the jurisdiction of the SEC, including FCPA violations by non-issuers and violations of the recently enacted Foreign Extortion Prevention Act; and
- Domestic corruption cases, especially involving illegal corporate payments to government officials.

Like the SEC and CFTC whistleblower programs, DOJ's program will allow whistleblower awards only in cases involving penalties above a certain monetary threshold, but that threshold has yet to be determined.

Prior to Monaco's announcement, the United States Attorney's Office for the Southern District of New York launched its own pilot “whistleblower” program, which became effective February 13, 2024. Both the Department-wide pilot and the SDNY policy require that the government have been previously unaware of the misconduct, but they are different in a critical way: the Department-wide policy under development will explicitly apply only to reports by individuals *who did not participate* in the misconduct, while SDNY's program offers incentives to

*“individual participants in certain non-violent offenses.”* Thus, it appears that SDNY’s program is actually more akin to a VSD program, while DOJ’s Department-wide pilot program will target a new audience of potential whistleblowers.

Companies with an international footprint should also pay attention to non-US prosecutors. The new Director of the UK Serious Fraud Office recently announced that he would like to set up a similar program, no doubt noticing the effectiveness of current US programs.

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## Corporate Considerations

Though directed at whistleblowers, the pilot program is equally about incentivizing companies to voluntarily self-disclose misconduct in a timely manner. Absent aggravating factors, a qualifying VSD will result in a much more favorable resolution, including possibly avoiding a guilty plea and receiving a reduced financial penalty. But because the benefits under both programs only go to those who provide DOJ with *new* information, every day that a company sits on knowledge about misconduct is another day that a whistleblower might beat them to reporting that misconduct, and reaping the reward for doing so.

“When everyone needs to be first in the door, no one wants to be second,” Monaco said. “With these announcements, our message to whistleblowers is clear: the Department of Justice wants to hear from you. And to those considering a voluntary self-disclosure, our message is equally clear: knock on our door before we knock on yours.”

By providing a cash reward for whistleblowing to DOJ, this program may present challenges for companies’ efforts to operate and maintain an effective compliance program. Such rewards may encourage employees to report misconduct to DOJ instead of via internal channels, such as a compliance hotline, which can lead to compliance issues going undiagnosed or untreated — such as in circumstances where the DOJ is the only entity to receive the report but does not take any further action. Companies must therefore ensure that internal compliance and whistleblower systems are clear, easy to use, and effective — actually addressing the employee’s concerns and, to the extent possible, following up with the whistleblower to make sure they understand the company’s response.

If an employee does elect to provide information to DOJ, companies must ensure that they do not take any action that could be construed as interfering with the disclosure. Companies already face potential regulatory sanctions for restricting employees from reporting misconduct to the SEC. Though it is too early to know, it seems likely that DOJ will adopt a similar position, and a

company's interference with a whistleblower's communications potentially could be deemed obstruction of justice.

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