

Client Alert

Special Matters and Government Investigations

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The Department of Justice Announces a New Program to Pay Financial Rewards to Whistleblowers for Information About Corporate Crimes

On March 7, 2024, Deputy Attorney General Lisa Monaco announced that the Justice Department intends to offer new financial incentives for whistleblowers to report allegations about white collar crimes that result in asset forfeitures.¹ Although Monaco provided few details, she was explicit about the Department's goals: to "drive companies to invest further in their own internal compliance and reporting systems" and to prosecute more individual company officers for corporate misconduct.² The following day, Criminal Division Acting Assistant Attorney General Nicole Argentieri explained that over the next 90 days, DOJ will "gather information, consult with stakeholders, and design a thoughtful, well-informed program."³

Monaco declared that the program will offer rewards for reporting alleged violations of federal law involving "corporate or financial misconduct," although the Department is particularly interested in information about "abuses of the U.S. financial system," "[f]oreign corruption outside the jurisdiction of the SEC," and "[d]omestic corruption cases, especially involving illegal corporate payments to government officials."⁴ Argentieri specified that "the program could prove especially useful in developing foreign corruption cases that are outside the jurisdiction of the SEC, including FCPA violations by non-issuers," but there was no indication that the intended program would be limited to such cases.⁵

Monaco identified four prerequisites for whistleblowers to collect rewards under the intended program for referring allegations of corporate crime:



(1) only persons who provide truthful information not already known to the government will be eligible; (2) persons involved in the criminal activity will not be eligible; (3) the policy will apply only in cases in which there is not already a financial incentive, such as a qui tam lawsuit or another federal whistleblower program; and (4) all victims must be compensated before whistleblower awards are paid.⁶

The program will operate under 28 U.S.C. § 524(c)(1)(C), which authorizes the Department to pay awards for assistance leading to civil or criminal asset forfeitures.⁷ DOJ previously has exercised this authority on a case-by-case basis, but this is the first instance of a formal and open-ended DOJ program to pay whistleblowers for information about criminal conduct. The awards would come from money that otherwise would be paid into the U.S. Treasury.

Existing whistleblower-awards programs at the SEC, CFTC, IRS, and FinCEN, according to Monaco, “are limited in scope,” necessarily covering only misconduct within the jurisdiction of those agencies. The DOJ program Monaco described would cover “the full range of corporate and financial misconduct that the Department prosecutes.” She noted that the SEC and CFTC programs have generated “thousands of tips, paid many hundreds of millions of dollars, and disgorged billions in ill-gotten gains from corporate bad actors.”⁸

Monaco said that “[t]he premise is simple: 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.” Monaco emphasized that the information must be new; the program will only reward a whistleblower who is “the first in the door.”⁹

Argentieri stated that “white collar criminal enforcement is a top priority” for DOJ and that DOJ’s new whistleblower rewards program is just one of many tools at DOJ’s disposal to encourage companies to invest in and enhance their internal compliance programs and to reduce recidivism.¹⁰

Because the Department’s statutory authority to pay awards for “information or assistance leading to civil or criminal forfeitures” is connected to DOJ’s forfeiture program, Argentieri announced that DOJ’s Money Laundering and Asset Recovery Section (MLARS), in coordination with U.S. Attorneys, the FBI, and other DOJ offices, will play a key role in designing the particulars of the program, including by developing guidelines and eligibility requirements for whistleblowers.¹¹

Argentieri stated that DOJ will provide rewards only to whistleblowers who voluntarily provide original, non-public, truthful information not already known to DOJ. Information is provided voluntarily when it is “not in response to any government inquiry, preexisting reporting obligation, or imminent threat of disclosure.” Argentieri said DOJ will also adopt a monetary threshold for financial recoveries eligible for whistleblower rewards, perhaps on the order of \$1 million, to focus the Department’s investigatory resources on the most significant cases of white-collar criminal activity.¹²

OTHER REWARDS PROGRAMS ADMINISTERED BY FEDERAL AGENCIES

In addition to the agencies mentioned by DAG Monaco, there are other examples of federal agencies providing rewards to encourage witnesses to come forward with information about criminal conduct. For example, the FBI’s Rewards for Justice was first established in 1984 to combat international terrorism.¹³ The program subsequently expanded to encourage individuals to provide information related to foreign interference in U.S. elections, malicious cyber activity, and anything related to the North Korean regime.¹⁴ In each case, the information must lead to the identification, arrest, and/or conviction of the perpetrator(s), or prevent crimes from occurring in the first place.¹⁵

The Narcotics Rewards Program, administered by the Department of State, offers rewards of up to \$25 million for information leading to the arrest or conviction of major narcotics traffickers who operate outside the United States.¹⁶



The U.S. Marshals Service offers rewards for information leading to the arrest of criminals, but such awards appear to be announced on a case-by-case basis for crimes already under investigation rather than as part of an open-ended program seeking tips about unknown crimes.

THE SEC'S WHISTLEBLOWER REWARD PROGRAM

A closer parallel to DOJ's new program is the SEC's reward program, which provides rewards to "whistleblowers," defined by the SEC as persons who voluntarily provide information, in writing, to the SEC about "a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur."¹⁷

The SEC has an Office of the Whistleblower dedicated to administering its program.¹⁸ The SEC provides financial awards to eligible whistleblowers who come forward with "high-quality," new information that "leads to" an SEC enforcement action in which sanctions are greater than \$1 million.¹⁹

Officers and directors are generally ineligible for a reward unless they satisfy an exception under Rule 21F-4(b). The whistleblower does not have to be employed by the company about which they provide information. On the other hand, a whistleblower may be barred from participating in the rewards program "if they submit three or more frivolous tips."²⁰

The SEC considers information to be "high quality" if it is specific, credible, and timely. In other words, like DOJ's program, the structure of the SEC's program ensures that the Commission dedicates greater resources to significant instances of alleged financial misconduct. The SEC is particularly interested in information related to:

- Ponzi schemes, pyramid schemes, or "high-yield investment program[s]";
- "Theft or misappropriation of funds or securities";
- Insider trading;
- "Fraudulent or unregistered securities offering[s]";
- The company making "false or misleading statements";
- "Abusive naked short selling";
- "Bribery of, or improper payments to, foreign officials,"
- "Fraudulent conduct associated with municipal securities transactions or public pension plans";
- ICOs and cryptocurrencies, generally; and
- In a catch-all provision, "[o]ther fraudulent conduct involving securities."²¹

Such information "leads to" a successful enforcement action if: (1) it causes the SEC to "open a new investigation, reopen a previously closed investigation, or pursue a new line of inquiry in connection with an ongoing investigation"; and (2) the SEC brings a successful enforcement action "based at least in part on the conduct" alleged by the whistleblower.²²

Rule 21F-6(c) provides how the award is determined. Where the award amount is \$5 million or less, there is a rebuttable presumption of 30% if "there are no negative factors (e.g., culpability, unreasonable reporting delay, and interference with an internal compliance system)."²³ This presumption is rebutted if the whistleblower provided "limited assistance," or "if a maximum award would be inconsistent with the public interest, the promotion of investor protection, or the objectives of the whistleblower program."²⁴



The SEC's program uses a monetary threshold of \$1 million, meaning whistleblowers will be awarded only when the resulting forfeiture in a successful enforcement action is greater than \$1 million. The SEC may *increase* the award based on:

- The significance of the information;
- The extent of any additional assistance the whistleblower provides throughout the SEC's investigation and any successful proceeding;
- Law enforcement's "interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of these laws;" and
- Whether, as well as the extent to which, the whistleblower participated in any internal compliance programs within the company, "such as, for example, reporting the possible securities violations through internal whistleblower, legal, or compliance procedures," either before or contemporaneously with reporting the possible violation to the SEC.²⁵

On the other hand, the SEC has authority to *decrease* the award if:

- The whistleblower participated in or is culpable for the violation they reported;
- There was unreasonable delay in reporting the violation; or
- The whistleblower interfered with the company's internal compliance program by, for example, making false statements that hindered the company's compliance department's investigation of the potential violation.²⁶

Based on the limited details DOJ has so far provided, the most notable distinction between the SEC's whistleblower reward program and DOJ's intended program is the relevance of whistleblower's culpability. Culpability or participation in the securities violation a whistleblower reports does not render an SEC whistleblower entirely ineligible for a reward. As described in Monaco's remarks, whistleblowers who have a degree of culpability would be ineligible for a reward under this intended program.

IMPLICATIONS OF DOJ'S NEW PROGRAM

Monaco and Argentieri said that the new program is intended to generate more criminal cases and encourage companies to enhance their internal compliance and reporting programs. While the Department has not expressly said it believes American businesses have been underinvesting in compliance or that there have not been enough corporate prosecutions, those assumptions are implicit in the announcement. Attorney General Merrick Garland made the point more explicitly on March 6, 2024, when he said the Department needs to send individual corporate executives to prison as a means to demonstrate "that people are being treated equally" and "like circumstances are treated alike."²⁷

As described in Monaco's and Argentieri's remarks, DOJ would pay witnesses only for "truthful" information about corporate criminal activity. It remains to be seen how this is done but the prospect of payment itself will create additional opportunities for impeachment of witnesses and new burdens for disclosure for federal prosecutors investigating and prosecuting eligible criminal cases. First, financial rewards encourage overreporting if witnesses anticipate receiving tremendous benefits when their allegations result in forfeitures while incurring no adverse consequences if they are mistaken. Many corporations may become targets of allegations raised by persons who lack firsthand information but are responding to media reports or merely speculating about potential misconduct.



Second, financial awards damage witnesses' credibility in the eyes of the judge and jury. Defense attorneys can cross-examine witnesses at trial about potential biases, and a financial stake in the outcome of a criminal case – to be paid only if a defendant is convicted – would be valuable impeachment evidence. In contrast, cooperating criminal defendants are eligible for sentence reductions in return for truthful testimony, regardless of the verdict.

Monaco favorably harkened “back to the days” of the Wild West, when overburdened law enforcement officers encouraged bounty hunters to engage in vigilantism by posting “Wanted Dead or Alive” notices promising rewards for the bodies of suspected criminals,²⁸ but those payments did not require the bounty hunters to testify at criminal trials. Moreover, few would agree that corporate America today is analogous to the Wild West given the considerable regulatory obligations and oversight.

Third, the policy will provide an additional incentive for DOJ to add forfeiture counts to corporate resolutions. Given that most corporate cases are resolved short of trial, the new policy will encourage prosecutors to insist on forfeiture remedies as part of negotiated corporate resolutions if that is the only way to compensate whistleblowers.

The program also will pose a new challenge for corporate misconduct-reporting programs because employees and customers will have a powerful financial incentive to conceal suspected wrongdoing from corporate compliance officials and instead report it to the government. That may deprive companies of the opportunity to benefit from the Department's corporate compliance policy, which rewards companies both for taking prompt remedial action when they learn about wrongdoing and for reporting it voluntarily before the government learns about it.

As of this writing, it is expected that the details of the new program will be announced at the conclusion of the 90-day “policy sprint” that Monaco launched on March 7, 2024, and the policy will go into effect later this year.²⁹ Whether this intended policy will materially increase the already considerable incentives to invest in compliance, given the repeated drumbeat of messaging for many years to that effect, remains to be seen. King & Spalding will continue to monitor and report on the implementation of DOJ's intended program.

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¹ Deputy Attorney General Lisa Monaco, Keynote Remarks at the American Bar Association’s 39th National Institute on White Collar Crime (“Monaco Remarks on White Collar Crime”) (Mar. 7, 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations>; see also Ben Penn, *DOJ to Pay Whistleblowers for Corporate Crime Tips*, Bloomberg Law (Mar. 7, 2024).

² Monaco Remarks on White Collar Crime, *supra* n.1.

³ Acting Assistant Attorney General Nicole M. Argentieri Delivers Keynote Speech at the American Bar Association’s 39th National Institute on White Collar Crime (“Argentieri Remarks on White Collar Crime”) (Mar. 8, 2024), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-speech-american>.

⁴ Monaco Remarks on White Collar Crime, *supra* n.1.

⁵ Argentieri Remarks on White Collar Crime, *supra* n.3.

⁶ Monaco Remarks on White Collar Crime, *supra* n.1.

⁷ Argentieri Remarks on White Collar Crime, *supra* n.3.

⁸ Monaco Remarks on White Collar Crime, *supra* n.1.

⁹ *Id.*

¹⁰ Argentieri Remarks on White Collar Crime, *supra* n.3.

¹¹ *Id.*

¹² *Id.*

¹³ U.S. Dep’t of State, Bureau of Diplomatic Security, *Rewards for Justice*, <https://www.state.gov/rewards-for-justice/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ U.S. Dep’t of State, Bureau of Internat’l Narcotics & Law Enforcement Affairs, *Narcotics Rewards Program*, <https://www.state.gov/inl-rewards-program/narcotics-rewards-program/>.

¹⁷ U.S. SEC, Office of the Whistleblower, *Frequently Asked Questions*, <https://www.sec.gov/whistleblower/frequently-asked-questions#:~:text=To%20be%20eligible%20for%20an,organizations%20cannot%20qualify%20as%20whistleblowers> (last updated Apr. 6, 2023).

¹⁸ U.S. SEC, *Office of the Whistleblower*, <https://www.sec.gov/whistleblower#:~:text=The%20Commission%20is%20authorized%20by,30%25%20of%20the%20money%20collected> (last updated Nov. 14, 2023).

¹⁹ U.S. SEC, Office of the Whistleblower, *Frequently Asked Questions*.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ U.S. DOJ, Attorney General Merrick B. Garland Holds Fireside Chat at the American Bar Association’s 39th Annual White Collar Institute, <https://www.justice.gov/opa/video/attorney-general-merrick-b-garland-holds-fireside-chat-american-bar-associations-39th> (30:00 - 31:25).

²⁸ Monaco Remarks on White Collar Crime, *supra* n.1.

²⁹ *Id.*