Incentives to fight financial wrongdoing: DOJ introduces pilot whistleblower program

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The Department of Justice (DOJ) recently announced through remarks by Deputy Attorney General (DAG) Lisa Monaco and Acting Assistant Attorney General (AAAG) Nicole Argentieri a "90-day sprint" to develop and implement a pilot whistleblower program to bolster the DOJ's corporate enforcement efforts by offering financial incentives to individuals who come forward with information about federal corporate or financial wrongdoing.

The pilot program aims to fill in the "patchwork quilt" of existing whistleblower programs currently in place at other federal agencies, including the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC), to ensure that all areas of criminal wrongdoing the DOJ prosecutes are covered. Monaco's remarks (https://bit.ly/4cMLNQH) were made at the American Bar Association's 39th National Institute on White Collar Crime in San Francisco on March 7 and Argentieri's remarks were delivered (https://bit.ly/3VUke1l) at the same conference the following day, March 8.

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The DOJ has specified that it is "especially interested" in whistleblower tips that touch upon:

- criminal abuses of the U.S. financial system;
- foreign corruption cases outside the jurisdiction of the SEC; and
- domestic corruption cases, especially involving illegal corporate payments to government officials.

The pilot program is expected to be launched in the next several months, and the DOJ's Money Laundering and Asset Recover Section will be at the forefront of this effort.

While the announcements provide some "guardrails" around the anticipated pilot program—including *who*, *how*, and *when* one may qualify—key questions remain to be answered as the DOJ works to build out the program, such as whether any individuals may be exempt from the program.

The pilot program is also significant because it provides another mechanism the DOJ can rely upon as part of its "core strategy" to promote voluntary self-disclosure. Both DAG Monaco and AAAG Argentieri spent part of their announcement remarks to highlighting the DOJ's related efforts on this front, including the recent compensation clawback pilot program and the new voluntary self-disclosure policies and safe harbor provision during mergers and acquisitions.

Given the success of the whistleblower programs at the SEC and CFTC, it is expected that the DOJ's pilot program will lead to more prosecutions. This success, however, also may generate inter-agency tension with these other federal agencies as individuals and the agencies themselves grapple with who the appropriate authority is to handle a tip, particularly one that implicates potential criminal conduct related to the U.S. financial markets.

What we know about the DOJ whistleblower program

While the DOJ has sporadically used the authority conferred to the Attorney General under 28 U.S. Code § 524 to pay awards for "information or assistance leading to civil or criminal forfeitures," the DOJ has never had a targeted program around whistleblower awards like its counterparts at the SEC or CFTC.

Development of the pilot program remains in its early stages, but DAG Monaco previewed—and AAAG Argentieri confirmed—the "basic guardrails" on *who*, *how*, and *when* one qualifies to receive incentives under the program, as well as *what* one who qualifies may be entitled to under the program.

Who: Any individual who helps the DOJ discover "significant corporate or financial misconduct," provided the individual is not involved with the criminal activity itself.

How: The individual must be the first to voluntarily submit original, non-public, truthful information not already known to the DOJ and there cannot already be an existing financial disclosure incentive, such as *qui tam* or another federal whistleblower program. DAG Monaco underscored this first-in-the-door requirement as a "central aspect" of the forthcoming whistleblower program. AAAG Argentieri

also made clear that the disclosure must be voluntary and not made pursuant to a government inquiry, preexisting reporting obligation, or "imminent threat of disclosure."

When: The whistleblower may receive a portion of any resulting forfeiture after all victims have been "properly compensated."

What: The DOJ likely will follow the SEC and CFTC whistleblower programs in limiting awards to those cases in which the DOJ secures a certain monetary threshold in penalties or sanctions. The DOJ did not disclose what that amount may be at this time (SEC and CFTC thresholds are $1 million).

What we do *not* know about the DOJ whistleblower program

The DOJ will now work to fill in the gaps and answer the questions that remain following the announcements of this pilot whistleblower program. For example, how much, if at all, will the DOJ borrow from the whistleblower pilot program that the U.S. Attorney's Office for the Southern District of New York (SDNY) launched in February 2024?

SDNY's pilot program applies to information related to criminal conduct "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." *See* SDNY Whistleblower Program at 1 (Feb. 13, 2024), available at https://bit.ly/49x7ZLG.

Will the DOJ borrow this definition to clarify what conduct constitutes "criminal abuses of the U.S. financial system" under the new pilot program?

Further, will the DOJ exempt certain individuals from its whistleblower program? SDNY's pilot program currently excludes (1) federal, state, or local elected or appointed and confirmed officials, (2) an official or agent of a federal investigative or federal law enforcement agency, or (3) the CEO or equivalent or CFO or equivalent of a public or private company. Neither DAG Monaco nor AAAG Argentieri previewed exclusions for officials, law enforcement, or certain corporate officers during their announcements.

A big unknown is the degree to which DOJ's pilot whistleblower program causes tension with programs established by other federal authorities. DAG Monaco noted that whistleblowers under the DOJ pilot program are only entitled to recover monetary rewards "where there isn't an existing financial disclosure incentive."

Does this mean an individual who discloses wrongdoing to the SEC or CFTC first are precluded from recovering from the DOJ if they subsequently disclose to the DOJ? This is a question that DOJ is expected to sort through given that DOJ's emphasis on "[c]riminal abuses of the U.S. financial system" necessarily overlaps with the jurisdiction of the SEC and CFTC.

Finally, how many U.S. Attorney's Offices will follow Main Justice and SDNY by launching their own whistleblower initiatives? The answer is not zero. On March 18, the U.S. Attorney for the Northern District of California (NDCA) released new policies underlying its whistleblower pilot program.

Under NDCA's pilot program, in exchange for self-disclosure of "unknown federal crimes" and ongoing cooperation against others involved in the alleged criminal conduct, the NDCA will enter into a non-prosecution agreement where certain specified conditions are met, including that the government was not previously aware of the criminal conduct that is the subject of the disclosure.

Doubling down on DOJ priorities

The new whistleblower program is yet another example of efforts by the DOJ to encourage voluntary self-disclosure.

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During their remarks, the senior DOJ officials reminded their audiences of the other incentives the DOJ has prioritized to help companies identify and disclose corporate wrongdoing, including: (1) the DOJ's recent pilot program to encourage companies to claw back or withhold compensation from culpable employees; and (2) new voluntary self-disclosure policies, including the new safe harbor to incentivize disclosures of wrongdoing identified during mergers and acquisitions.

Indeed, according to AAAG Argentieri, DOJ's Fraud Section received nearly twice as many corporate disclosures in 2023 as in 2021.

Takeaway: More investigations are coming

As seen from the SEC and CFTC whistleblower programs, money talks. Just last year, the SEC received more than 18,000 whistleblower tips, resulting in nearly $600 million in awards — the highest total in that program's history, with the total including a single award for almost $279 million, the largest amount the SEC has ever awarded. Last year, the CFTC received 1,530 tips resulting in $16 million in awards.

Irrespective of the *how* the DOJ's pilot whistleblower program is rolled out, numerous senior DOJ officials continue to beat the drum that they are offering incentives to reward self-disclosure of corporate misconduct. The proverbial stick to that carrot was articulated bluntly by Ismail Ramsey, the U.S. Attorney for the Northern District of California: "[i]f you choose not to come forward, someone else will." *See* Press Release, U.S. Attorney Ismail Ramsey Announces Policies Underlying Whistleblower Pilot Program (Mar. 18, 2024), available at https://bit.ly/3xv8XLl.

We can expect the DOJ's pilot whistleblower program, combined with its voluntary self-disclosure and safe harbor policies, to generate more leads for the DOJ, thereby generating more

investigations of individuals and corporations. The anticipated flood of whistleblower disclosures will require DOJ to devote substantial resources to investigate the leads.

The million-dollar question (perhaps more aptly, the *hundred*-million-dollar question) is whether the flood of whistleblower leads will turn into the volume of prosecutions and resolutions with individuals and corporations that DOJ clearly hopes and expects to follow from these initiatives.

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