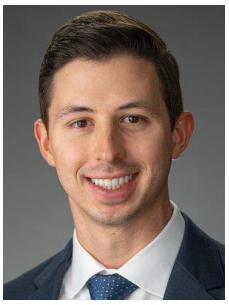
Reducing Risk While DOJ Plans New Whistleblower Rewards

By **Caleb Hayes-Deats and Walter Hawes** (March 26, 2024, 2:47 PM EDT)


Caleb Hayes-Deats


Walter Hawes

On March 7, Deputy Attorney General Lisa Monaco announced a new whistleblower program offering "rewards to coax tipsters out of the woodwork," much like the "'Wanted' posters across the Old West."[1]

Though Monaco touted the success of existing whistleblower programs run by the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, IRS and Financial Crimes Enforcement Network, she noted those programs are a patchwork.

The U.S. Department of Justice is thus launching a "90-day sprint to develop and implement a pilot program," expected to start later this year and create what Monaco called "a multiplier effect" on existing incentives to report misconduct under the DOJ's voluntary self-disclosure program. The program will rely on the attorney general's discretion, under Title 28 of the U.S. Code, Section 524(c)(1)(C), to pay "awards for information or assistance leading to a civil or criminal forfeiture."

Policy details — many of which the DOJ has not yet explained — will have critical implications for how the program operates. The DOJ has not specified how awards will be calculated, how eligibility will be determined or even who will oversee that process. Instead, it has only indicated that the Money Laundering and Asset Recovery Section is expected to play a leading role in the program and that whistleblowers with certain conflicts of interest will not be eligible.

The absence of detail, however, is unlikely to stop whistleblowers from approaching the DOJ. Indeed, as a point of comparison, FinCEN has not yet promulgated regulations concerning the statutory program it enacted in 2021, but has already received hundreds of whistleblower complaints.

Companies concerned about potential whistleblowers should thus immediately begin preparing for the impact of the DOJ's new policy.

Filling the Gaps

Whistleblower programs have proliferated in recent years. In 2010, the Dodd-Frank Act created whistleblower programs for the SEC and CFTC that reward disclosures of statutory violations within each agency's jurisdiction.

Those programs have since grown exponentially. Last year, the SEC's whistleblower program received 18,000 tips and paid nearly $600 million in rewards.[2] In 2021, Congress created a similar program to incentivize disclosure of Bank Secrecy Act violations to FinCEN. After Russia invaded Ukraine in 2022, Congress expanded FinCEN's program to encompass violations of U.S. economic sanctions.

The DOJ has also recently sought to encourage voluntary reports of misconduct. In 2022 and 2023, it

adopted a Voluntary Self-Disclosure Program that reduces criminal penalties for companies that report wrongdoing early, cooperate with an investigation and undertake appropriate remediation.

When companies meet these criteria, the DOJ will neither demand that the company plead guilty to a crime nor seek to impose a compliance monitor. It may also significantly reduce any penalty the company must pay. The DOJ's agreement to reduce or forgo penalties, like existing whistleblower programs, seeks to encourage disclosure of misconduct that might not otherwise come to the government's attention.

But as Monaco noted, existing whistleblower programs create a patchwork — each addressing only issues within the responsible agency's jurisdiction. The DOJ's new effort appears aimed at establishing a comprehensive whistleblower program that covers all violations of federal law, at least where forfeiture is a remedy the government can pursue.

Monaco identified three gaps of particular interest to the new program. First, Monaco raised criminal abuses of the financial system in the U.S., such as bank frauds that do not involve securities or commodities.

Second, she highlighted cases of foreign corruption outside the SEC's jurisdiction. While the SEC has jurisdiction over foreign bribes paid by publicly traded companies, other forms of bribery — such as payments made by private companies — fall outside its provenance. It also lacks authority to pursue cases against the recipients of bribes, prosecution of which was recently authorized by the December 2023 enactment of the Foreign Extortion Prevention Act.

Finally, Monaco emphasized that the DOJ was interested in receiving information on domestic cases of corruption under the new program.

The new program could cover other gaps as well. The Bank Secrecy Act, for example, does not authorize payment of whistleblower awards from amounts the government collects as forfeiture or restitution. Under the existing FinCEN program, whistleblowers can receive compensation only from amounts collected as "penalties, disgorgement, and interest." This has generated concern that even successful whistleblower tips might not result in awards.

Historically, the government has often imposed substantial forfeitures in Bank Secrecy Act cases. Penalties have sometimes been more modest and were occasionally even deemed satisfied by the same money the defendant forfeited. Whistleblowers thus expressed concern that even a large recovery by the government might not give rise to any award to those who provided crucial information.

The DOJ's newly announced program appears to alleviate that concern by making an award available for forfeited amounts.

Questions About the New Program

While the DOJ's announcement staked out the outer boundaries of its anticipated program, critical questions remain regarding the program's details.

To understand the extent of the financial incentive, whistleblower advocacy groups have asked how awards will be calculated and whether the program will guarantee any minimum award in successful cases. The agency programs generally guarantee that whistleblowers will receive at least 10% of

monetary sanctions in successful cases. Monaco did not outline such a guarantee, however, instead stating that whistleblowers would receive awards "only after all victims have been properly compensated."

Other questions concern eligibility for a whistleblower award. Monaco stated that whistleblowers would be ineligible if they were "involved in the criminal activity" or if other programs provided an "existing financial disclosure incentive." But it is unclear how the DOJ will interpret those requirements.

Does "involved in the criminal activity" mean that a whistleblower must be convicted of a crime, or could involvement be determined by a prosecutor's subjective view that a whistleblower shares culpability for the misconduct reported?

Similarly, who will decide whether another program might apply to a whistleblower claim? Will the determination turn on whether a whistleblower received an award from another program, whether the whistleblower filed a claim or whether the program could have conceivably applied to the claim submitted to the DOJ?

These questions will affect who approaches the DOJ, as well as other programs.

Finally, what protections will the DOJ provide to whistleblowers? Will it permit them to proceed anonymously, and can it protect them from retaliation?

The issue of anonymity is especially difficult for the DOJ. On the one hand, the bigger the crime, the more concerned whistleblowers may be about disclosing their identities and facing retaliation. On the other, criminal defendants have constitutional rights to know the proof and witnesses against them, especially if the case proceeds to trial.

Some of these questions may be answered as the DOJ performs its 90-day sprint to establish the guidelines for the pilot program. Other questions may be developed over the course of the pilot, as the DOJ compares its experience to existing programs.

How Companies Can Mitigate Risk

Notwithstanding uncertainty about the new program, companies should begin preparing for its impact. If past is prelude, the DOJ's announcement by itself is likely to trigger an influx of reports.

Congress amended the Bank Secrecy Act to create the FinCEN whistleblower program in 2021. As noted above, although FinCEN has not yet issued implementing regulations, it has already received hundreds of tips. The same is bound to happen at the DOJ, particularly given the publicity surrounding the new program.

The most effective step companies can take to mitigate the risk of external whistleblower claims is to provide potential whistleblowers an effective and credible mechanism for reporting internally. Internal reporting permits businesses to investigate concerns before they are confronted with a government subpoena.

Studies show that most employees prefer to raise concerns within their company. For fiscal year 2021, the SEC analyzed whistleblowers who received awards for reporting misconduct by their current or former employers and found that "more than 75% raised their concerns internally to their supervisors,

compliance personnel, or through internal reporting mechanisms ... before reporting their information of wrongdoing to the Commission."[3]

Companies can take several steps to encourage internal reporting and mitigate the risk of an unexpected investigation. The first step is to implement internal reporting mechanisms such as anonymous hotlines. But reporting mechanisms alone are not enough.

Employees must believe that their institution will take such complaints seriously and not engage in retaliation. Companies can cultivate that belief by encouraging reporting at the highest levels, enacting robust anti-retaliation protections and making investigations into complaints as transparent as possible.

Reporting programs that employees regard as credible maximize a company's opportunity to resolve issues proactively, rather than in response to an investigation.

Conclusion

Companies should not wait on official guidance to implement or review internal reporting mechanisms. Such mechanisms provide the best opportunity to remediate and address issues before a government investigation begins.

Self-reporting may be the DOJ's goal. Monaco described the whistleblower program as meant to reinforce the DOJ's voluntary self-disclosure policy and create a multiplier effect. "When everyone needs to be first in the door," she said, "no one wants to be second."

Caleb Hayes-Deats is a partner at MoloLamken LLP. He previously served as an assistant U.S. attorney in the Southern District of New York

Walter H. Hawes IV is an associate at the firm.

[1] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

[2] https://www.sec.gov/files/fy23-annual-report.pdf.

[3] https://www.sec.gov/files/owb-2021-annual-report.pdf.