



# A Robinson+Cole Legal Update

March 12, 2024

## DOJ Announces New Whistleblower Compensation Pilot Program, Ratcheting Up Pressure on Corporate Voluntary Self-Disclosures

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On March 7, 2024, Deputy Attorney General (DAG) Lisa Monaco announced the contours of a new Department of Justice (DOJ) pilot program (Pilot) offering financial incentives to individual whistleblowers who report certain criminal conduct to the DOJ. This significant announcement came in a speech that emphasized individual accountability for corporate conduct, more significant sanctions for recidivist corporations, expansion of credit for voluntary self-disclosures (VSDs), and a focus on prosecution of misconduct aided by artificial intelligence. (Acting Assistant Attorney General (AAG) Nicole M. Argentieri expanded on DAG Monaco's comments on March 8, 2024.) As with corporate VSDs, after satisfying other prerequisites, the Pilot—designed to formalize the DOJ's previously *ad hoc* approach with something more akin to the whistleblower compensation programs arising from the Dodd-Frank Act—rewards only the first reporter of misconduct, further setting the table for a race to the DOJ. As DAG Monaco said, “When everyone needs to be first in the door, no one wants to be second.”

The Pilot springs from the impact of extant programs, such as the hundreds of millions of dollars in rewards associated with billions of dollars in disgorgement under a similar Securities and Exchange Commission (SEC) program. DAG Monaco highlighted the Dodd-Frank whistleblower programs at the SEC and the Commodity Futures Trading Commission, similar programs at the Internal Revenue Services and the Financial Crimes Enforcement Network, and *qui tam* actions. However she noted that each of these has limitations, resulting in “a patchwork quilt that doesn't cover the whole bed.” The DOJ will cover the rest of the bed with a program that “address[es] the full range of corporate and financial misconduct that the Department prosecutes.”

### **The Pilot**

While the Pilot is inchoate, DAG Monaco outlined key elements. The DOJ anticipates that the Pilot will be fully formed after “a 90-day sprint to develop and implement a pilot program, with a formal start date later this year.” During these 90 days, the DOJ will “consult with stakeholders and design a thoughtful, well-informed program.” In the meantime, the basic outline of the Pilot involves funding from civil and criminal forfeitures, restrictions on compensation, a focus on certain types of misconduct, whistleblower innocence, and first reporter status.

**Funding.** The Pilot, as currently conceived, will be funded through civil and criminal forfeitures. DAG Monaco did not indicate that, like the SEC's program, funds would come from disgorgement associated with the resolution of related misconduct. Acting AAG Argentieri noted that the Money Laundering and Asset Recovery Section will play a central role in developing the Pilot because funds will come from forfeitures. (The DOJ did not discuss staffing for the Pilot, which has the potential to solicit significant volumes of reports that will need to be assessed to identify the most credible, high-value leads.) Using funds from civil and criminal forfeiture actions may limit the size of payouts to whistleblowers.

**Whistleblower Compensation.** Under the Pilot, a whistleblower will receive compensation only after “all victims” have been “properly compensated,” although the DOJ has not yet defined those terms. Moreover, Acting AAG Argentieri expressed the DOJ's expectation to limit compensation to cases involving a certain monetary threshold to focus “resources on the most significant cases.” Furthermore, to be eligible, a whistleblower must report misconduct to the DOJ that is not subject to “an existing financial disclosure incentive—including *qui tam* or another federal whistleblower program.” Acting AAG Argentieri noted that “we can make the greatest impact by offering financial incentives to disclose misconduct in areas where no such incentives currently exist ... [such as] foreign corruption cases that are outside the jurisdiction of the SEC, including FCPA violations by

non-issuers.” In other words, rather than being an entirely new quilt, the Pilot will provide additional patches where the current quilt fails to cover the bed. Given the potential limitations on awards, the incentives may be less enticing than those in the SEC program or *qui tam* actions.

**Covered Conduct.** The Pilot will apply to all violations of federal criminal law. However, as with recent announcements on VSDs, the DOJ is most focused on information about “[c]riminal abuses of the U.S. financial system,” “[f]oreign corruption cases outside the jurisdiction of the SEC ... and violations of the recently enacted Foreign Extortion Prevention Act,” and “[d]omestic corruption cases, especially involving illegal corporate payments to government officials.” DAG Monaco provided examples of the Pilot’s target conduct, such as cases involving “a fast-growing private startup ... in the Bay Area” bribing domestic officials and “a private equity firm [whose] CFO is forging underlying loan documents.”

**Whistleblower Innocence.** Under the Pilot, only a whistleblower “not involved in the criminal activity itself” will be eligible for compensation. Whistleblowers involved in criminal activity will have to avail themselves of programs like those in the Southern District of New York and the Northern District of California that incentivize these types of individuals to make VSDs.

**First Reporter Status.** As with VSDs, to be eligible under the Pilot, the whistleblower needs to report misconduct unknown to the DOJ. DAG Monaco announced that the DOJ is trying to leverage the “innocent whistleblower, [the] potential defendant looking to minimize criminal exposure, [and] the audit committee of a company where the misconduct took place.” The DOJ believes the best way to leverage all of these actors is to reward only one of them for reported misconduct. Further, the report must not involve “information in response to a government inquiry, preexisting reporting obligation, or imminent threat of disclosure.” Finally, this requirement for first reporter status may incentivize whistleblowers who would have otherwise reported through internal company mechanisms, to contact the DOJ in the first instance, forestalling a company’s ability to investigate allegations before disclosure to the DOJ.

### Key Takeaways

- Companies should evaluate the efficacy of their reporting mechanisms to ensure that whistleblowers are using them, that reports are being properly escalated, and that credible reports are being appropriately and timely investigated.
- To increase the possibility of preserving first reporter status and to mitigate the risk of a whistleblower going to the DOJ in the first instance, companies may want to consider compensating whistleblowers whose reports are substantiated by investigation. Any such whistleblower compensation must be properly structured to not run afoul of DOJ perceptions that it stifles whistleblower reports to enforcement authorities.
- A company conducting an investigation arising from a whistleblower report should ensure proper engagement with the whistleblower to minimize the risk that the whistleblower will become disaffected by the process and go to the DOJ, forestalling the company’s ability to be a first reporter and receive VSD credit.
- A company engaged with a whistleblower who is perceived as likely to report to the DOJ may want to report partial findings to the DOJ to preserve first reporter status before the whistleblower reports the conduct. However, the DOJ may characterize the risk of a whistleblower report as an imminent threat of disclosure that disqualifies the company from VSD status.
- As conceived, the Pilot has certain aspects that may limit its impact—a limited funding source and limitations on the types of cases eligible for compensation.
- DAG Monaco conceded that the Pilot is a rough draft, an idea in development. Its final form, and accompanying staffing, will take shape in the coming months, and companies should monitor relevant developments.

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