

ALERT

DOJ to Use 'Carrots to Wield Larger Sticks' in 2024

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The more things change, the more things stay the same. For years, U.S. Department of Justice (DOJ) leadership has used the ABA National Institute on White Collar Crime and other major conferences to highlight enforcement priorities, reiterate the Department's focus on individual accountability in connection with corporate fraud, and preach the gospel of corporate cooperation, self-disclosures, and well-designed compliance programs. And each year DOJ seemingly announces a new twist on – or escalations of – the same. This year was no exception with top DOJ brass – Attorney General Merrick Garland, Deputy Attorney General (DAG) Lisa Monaco, Acting Assistant Attorney General (AAG) Nicole Argentieri, and others – making important policy pronouncements involving whistleblowing, voluntary self-disclosure and artificial intelligence (AI).

- On whistleblowing, DAG Monaco made breaking news this week by announcing a brand new DOJ whistleblower program intended to “fill [] the gaps” not otherwise covered in other whistleblower programs. As conceived, the “pilot program” would incentivize whistleblowers to report a wide range of criminal misconduct by rewarding them with a portion of the resulting forfeiture.
- On voluntary self-disclosure, DAG Monaco and AAG Argentieri highlighted the efficacy of new programs that provide leniency to companies (and in some cases, individuals) that voluntarily self-disclose criminal misconduct.
- Finally, on AI, consistent with Attorney General Merrick Garland's earlier announcement regarding charges against a Chinese national for theft of AI-related trade secrets, DAG

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Monaco reiterated the DOJ's focus on emerging technologies, including its commitment to seek increased penalties for the use of AI in criminal offenses.

New DOJ Whistleblower Program

DAG Monaco announced that, by the end of 2024, DOJ will launch a department-wide whistleblower pilot program intended to incentivize individuals to report a wide range of criminal misconduct. Under this pilot program, if an individual comes forward and helps DOJ uncover significant corporate or financial misconduct, that individual may qualify to receive a portion of the resulting forfeiture. The program will operate as both an enforcement tool and a prophylactic – encouraging companies to invest in their own internal whistleblower and compliance programs to prevent individuals from first knocking on DOJ's door.

While certain agencies like the SEC and CFTC have already implemented whistleblower programs, DOJ's new initiative targets corporate and financial misconduct outside those agencies' limited jurisdiction. DOJ is especially interested in tips regarding: (1) criminal abuses of the U.S. financial system, (2) foreign corruption cases outside the jurisdiction of the SEC, and (3) domestic corruption cases involving illegal payments to government officials.

But, despite the new program's broad reach, only certain whistleblowers will be able to avail themselves of the resulting forfeiture (assuming a portion of the forfeiture is available once all victims have been compensated). Qualifying whistleblowers cannot have engaged in any of the misconduct they bring to DOJ's attention. And the program will only apply if whistleblowers have truly new information – the information disclosed cannot be previously known to DOJ or subject to another financial disclosure incentive (e.g., the False Claims Act's provisions).

While the precise contours of DOJ's Whistleblower Program are currently unknown, AAG Argentieri offered some insight into what to expect at the conclusion of DAG Monaco's 90-day "policy sprint." First, because the authority for the program arises under DOJ's forfeiture powers, the Money Laundering and Asset Recovery Section (MLARS) will take a leading role in designing the program. Second, given the billions of dollars they have netted for the government since their inception, DOJ plans to lean heavily on the design of the SEC and CFTC's own whistleblower programs. Like those programs, DOJ's will require whistleblower tips to net a certain amount of money – potentially upwards of \$1 million – before the tipper is eligible to share the resulting forfeiture.

The fruits of this program are still a long way off, though. It will likely take years for companies, counsel, and (most importantly) whistleblowers to fully understand the details, and implications, of the pilot program announced this week.

Voluntary Self Disclosure

Consistent with DOJ's revisions to its policy regarding the Evaluation of Corporate Compliance Programs (announced at last year's conference), many DOJ officials used this year's ABA conference to advocate for voluntary corporate self-disclosure of criminal misconduct. Warning companies that they should "knock on our

door before we knock on yours[.]" DAG Monaco promised leniency to companies that self-report, arguing that a company "is far better off reporting the violation than waiting for DOJ to discover it."

DAG Monaco touted various Voluntary Self Disclosure (VSD) programs, including DOJ's VSD program for corporate acquisitions. Under this program, an acquiror can be afforded a safe harbor if it discloses previously unknown acquiree misconduct uncovered during the due diligence process. Furthermore, DAG Monaco highlighted U.S. Attorney's Offices in two districts that have or are currently implementing their own VSD programs: the Southern District of New York (which launched a Whistleblower Pilot Program last month offering non-prosecution agreements to culpable individuals who come forward with information about previously unknown corporate crimes) and the Northern District of California (which is expected to implement a similar program soon).

Acting AAG Argentieri later announced that these efforts have already begun to bear fruit. Since 2021, there have been substantial year-over-year increases in disclosures from companies to the Fraud Section, and in 2023, DOJ received nearly twice as many disclosures as in 2021. DOJ expects these numbers to only grow in the coming years.

However, if history is any indication, DOJ's VSD program comes with a few caveats, including, among others, that the disclosure is timely. In fact, recent settlements show that while DOJ will allow a company some time to investigate the allegation, once an allegation is substantiated, DOJ expects almost-immediate self-disclosure – even if the internal investigation is ongoing.

Stiffer Enforcement for AI Crimes

As announced last month in DAG Monaco's speech at Oxford University (and summarized in our previous client alert [here](#)), DOJ intends to thoroughly prosecute crimes facilitated and enhanced by Artificial Intelligence (AI) and other disruptive technologies. DOJ intends to use sentencing enhancements to seek stiffer penalties for wrongdoers using AI to commit crimes. But enforcement is just one facet of DOJ's focus on AI – DOJ is also thinking about how AI can be used for good. When evaluating a company's compliance program, DOJ will consider both the company's ability to manage AI-related risks and, in certain circumstances, its proactive use of available AI to enhance compliance. DOJ also plans to leverage its recently hired Chief AI Officer, former Princeton professor, Jonathan Mayer, to enhance the Department's own use of AI technology to discover fraud.

Key Takeaways

This week's pronouncements continue DOJ's years-long focus on corporate accountability, self-disclosure, and internal compliance program reform. Having an effective compliance program is not only critical to detecting misconduct but also to ensuring the company is well-positioned to self-disclose, remediate, and achieve the best available disposition.

To that end, and in light of the DOJ's remarks, companies should (1) enhance their internal whistleblower programs to ensure tips are first made internally and that wrongdoing can be addressed immediately; (2) implement disincentives for employee misconduct, such as withholding or clawing back compensation from wrongdoers; (3) assess AI risk areas, including how AI may be used by employees to facilitate crimes, and develop appropriate policies addressing those risks; and (4) consider using AI in unique and innovative ways to detect and deter possible wrongdoing.