

Wanted Posters Across the Old West: Unpacking DOJ's New Whistleblower Rewards Program and Its Implications for Health Care Providers

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On March 7, 2024, as part of a presentation to the American Bar Association's National Institute on White Collar Crime regarding the U.S. Department of Justice's (DOJ) new and existing corporate enforcement initiatives, Deputy Attorney General (DAG) Lisa O. Monaco announced that a DOJ-run whistleblower incentive and rewards program would be forthcoming.¹ Under the new program, where an individual makes a report to DOJ that helps DOJ discover previously unknown "significant corporate or financial misconduct," that individual may qualify to receive a portion of the resulting payment to the government as a reward.²

The specific details of the whistleblower rewards program have not been announced in their entirety. However, DOJ has shared certain basic facets of the new program, which will include:

- Whistleblowers will only be paid after all victims are properly compensated;
- Only whistleblowers who submit truthful information not previously known to the government are eligible;
- Whistleblowers must provide the information voluntarily, rather than due to a reporting obligation, threat of disclosure from another source, or in response to a government inquiry;
- Whistleblowers involved in the criminal activity are disqualified;
- Payments will only be made in cases where there is no existing financial disclosure incentive structure, such as a False Claims Act (FCA) qui tam action, or another federal whistleblower program; and
- Rewards will likely be limited to cases that meet a certain monetary threshold, which will be defined during the pilot period.³

In further remarks the next day, Acting Assistant Attorney General Nicole Argentieri added that the pilot program will be headed by the Money Laundering and Asset Recovery Section (MLARS) within DOJ's Criminal Division.⁴ MLARS's involvement is important, because the authority for the pilot program is grounded in the Attorney General's authority to pay awards for "information or assistance leading to civil or criminal forfeiture."⁵ MLARS

will work in partnership with U.S. Attorneys, the Federal Bureau of Investigation, and other DOJ offices to define the contours of this new whistleblower program.⁶

According to DAG Monaco, DOJ intends to launch a pilot version of this program on an expedited timeline: no later than June of this year, followed by formal implementation of the full program no later than the end of 2024.⁷

Filling the Gaps: Comparisons to Existing Whistleblower Rewards Programs

To those in the white-collar space, whistleblower incentivization is nothing new, and DAG Monaco acknowledged as much. Referring to the days of “Wanted posters across the Old West,” she remarked that “law enforcement has long offered rewards to coax tipsters out of the woodwork” and described this program as an update to those practices.⁸ She went on to remark that present-day whistleblower programs run by the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Internal Revenue Service (IRS), as well as the qui tam provisions of the FCA, have all “proven indispensable,” resulting in the disgorgement of “billions in ill-gotten gains from corporate bad actors.”⁹

For example, the SEC’s whistleblower program received more than 18,000 tips in the last fiscal year and awarded \$600 million to 68 whistleblowers.¹⁰ Under the FCA’s qui tam provision, whistleblowers filed 712 suits in fiscal year 2023, resulting in \$2.3 billion in settlements and judgments for the same year, with whistleblowers receiving between 15% to 30% of that amount.¹¹ In fiscal year 2022, the IRS program collected \$172.7 million, of which \$37.8 million went to whistleblowers,¹² and the CFTC whistleblower program approved seven whistleblower awards totaling \$16 million in fiscal year 2023.¹³

But these programs, as DAG Monaco noted, are a “patchwork quilt” of federal enforcement mechanisms and leave many gaps unaddressed.¹⁴ For example, FCA qui tam actions only provide whistleblowing incentives for fraud perpetrated against the government. Meanwhile, existing programs through the SEC, CFTC, and IRS are similarly limited in scope based on the jurisdiction of the respective agencies administering those programs. And, certain statutes, such as the Anti-Money Laundering statute, have existing programs that are poorly defined. Others, like the Foreign Corrupt Practices Act (FCPA) and the newly enacted Foreign Extortion Prevention Act (FEPA), do not have any established whistleblower rewards program. DOJ’s new whistleblower rewards program aims to fill these gaps by broadening the availability of rewards for whistleblowers to include any corporate misconduct, regardless of the subject matter or who it is perpetrated against.

Implications for the Health Care Industry and Key Takeaways

Although DOJ indicated that it was particularly interested in criminal activity within the financial system and foreign and domestic corruption cases, this program is also expected to have a significant effect on companies in the health care space.

After all, health care companies are already subject to a disproportionate number of qui tam claims under the FCA, with over 67% of payouts last fiscal year stemming from the health care industry.¹⁵ Given that health care is an existing area of interest for whistleblowers, the broadening of whistleblower rewards opportunities should correlate with an increase in the sheer number of whistleblower reports against health care companies.

Further, the scope of potential whistleblower claims in the health care space will also likely expand dramatically, from focusing on claims of fraud and related misconduct involving federal programs and payers, such as Medicare and Medicaid, to now including *all* claims of misconduct irrespective of the impact on or involvement of federal payers. This means that health care companies and providers that do not bill federal payers and thus cannot be the subject of an FCA qui tam claim—as an example, those offering only elective surgeries, procedures, or other treatments—now clearly fall within the purview of a whistleblower incentivization program. While companies

have always needed to ensure compliance with state and federal laws and regulations in all areas in which they operate, they will now face possible reports from whistleblowers in new arenas, such as private insurance, drug development and clinical trials, or price discrimination.

In light of this anticipated significant impact on the health care industry, health care companies, particularly those that have not been previously subject to whistleblower programs, should consider focusing on the following key takeaways:

1. Evaluate existing compliance programs for effectiveness and particularly evaluate whether the compliance programs are likely to address the areas of greatest institutional risk;
2. Use training and other internal communications to promote compliance programs and encourage prompt reporting within approved channels of potential wrongdoing;
3. Implement strategies to more quickly and efficiently investigate any allegations of corporate misconduct to get ahead of potential whistleblower reports; and
4. Consider whether and when to voluntarily self-report allegations of corporate misconduct to the government.

While the particulars of this newly announced program remain to be seen, in light of DOJ's continued focus on corporate misconduct, the importance of a robust and efficient compliance reporting and internal investigation process will become even more acute. As DAG Monaco noted, "Now is the time to invest—and reinvest—in your compliance programs."¹⁶

¹ Deputy Attorney General Lisa Monaco, Dep't of Justice, Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (Mar. 7, 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations> [hereinafter DAG Monaco Remarks].

² *Id.*

³ *Id.*

⁴ Acting Assistant Attorney General Nicole M. Argentieri, Dep't of Justice, Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (Mar. 8, 2024), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-speech-american> [hereinafter Argentieri Remarks].

⁵ 28 U.S.C. § 524(c)(1)(C).

⁶ Argentieri Remarks, *supra* note 4.

⁷ DAG Monaco Remarks, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ SEC. & EXCH. COMM'N OFFICE OF THE WHISTLEBLOWER, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2023 (Nov. 14, 2023), <https://www.sec.gov/files/fy23-annual-report.pdf>.

¹¹ Press Release, U.S. Dep't of Justice Office of Public Affairs, False Claims Act Settlements and Judgments Exceed \$2.68 Billion in Fiscal Year 2023 (Feb. 22, 2024), <https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023> [hereinafter FCA Press Release].

¹² IRS WHISTLEBLOWER OFFICE, FISCAL YEAR 2022 ANNUAL REPORT (2022), <https://www.irs.gov/pub/irs-pdf/p5241.pdf>.

¹³ COMMODITY FUTURES TRADING COMM'N, WHISTLEBLOWER PROGRAM & CUSTOMER EDUCATION INITIATIVES, 2023 ANNUAL REPORT (Oct. 2023), <https://www.whistleblower.gov/sites/whistleblower/files/2023-10/FY23%20Customer%20Protection%20Fund%20Annual%20Report%20to%20Congress.pdf>.

¹⁴ DAG Monaco Remarks, *supra* note 1.

¹⁵ See FCA Press Release, *supra* note 11.

¹⁶ DAG Monaco Remarks, *supra* note 1.