ALERT MEMORANDUM

Two Enforcement Developments: DOJ Launches Whistleblower Awards Pilot Program and Amendments to the Foreign Extortion Prevention Act Are Passed into Law

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There were significant developments last week in two recent criminal enforcement initiatives that were first announced earlier this year. First, the Department of Justice ("DOJ") outlined the details of its long-anticipated whistleblower bounty program.[1] Second, on July 30, 2024, President Biden signed into law a number of amendments to the Foreign Extortion Prevention Act ("FEPA").[2] Both of these developments underscore the importance of investing in robust compliance programs and conducting timely investigations of potential misconduct.

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[1] We previewed this in a prior alert memorandum, "DOJ Announces New Pilot Program Seeking Voluntary Self-Disclosures from Culpable Individuals Aimed At Uncovering Corporate Misconduct," available here.

[2] A prior alert memorandum summarizing the FEPA is available here.

DOJ Whistleblower Awards Pilot Program

On August 1, 2024, DOJ launched a new Corporate Whistleblower Awards Pilot Program.[3] The new program was previewed by Deputy Attorney General Lisa Monaco in March and is part of a broader array of policies and programs that DOJ has announced over the last few years focused on corporate enforcement and incentivizing voluntary self-disclosure. In announcing the new program, DAG Monaco noted that DOJ is "doubling down on a proven strategy to ferret out criminal activity that might otherwise go unreported," harkening back to "Wanted" posters of the Old West.[4] DOJ's whistleblower program is intended to fill the gaps left by other such programs and hones in on four priority areas of focus.[5] Additionally, as explained in more detail below, DOJ continues to encourage companies to implement strong compliance programs and has built in specific incentives for whistleblowers to report misconduct internally to companies and to assist corporate investigations.

Awards for Information in Four Priority Areas of Corporate Crime

The whistleblower program will cover four areas of corporate crime that DOJ has designated a priority for investigation and prosecution within the Criminal Division:[6]

- Foreign corruption, including violations of the Foreign Corrupt Practices Act ("FCPA") and FEPA, related to privately held companies and others that are not issuers of U.S. securities;
- Certain crimes involving financial institutions, including money laundering, fraud or non-compliance with financial institution regulators;
- Domestic corruption involving companies; and
- Health care fraud schemes not already covered by *qui tam* actions under the False Claims Act.[7]

Who is Eligible for the Program?

Individuals who provide "original information" that leads to more than $1 million in criminal or civil forfeiture in connection with a successful prosecution, corporate criminal resolution, or civil forfeiture action related to corporate criminal conduct may be eligible to receive a monetary award provided the whistleblower meets certain eligibility criteria.[8] Whistleblowers are not eligible for an award if they fall into certain categories or their information is "not original" under the program, including among others:

- They are a company or another type of entity (only individuals are eligible);
- They are officers, directors, trustees, or partners of an entity and another person informed them of the allegations of misconduct or they learned about it in connection with the entity's processes for identifying, reporting, and addressing misconduct;
- They are corporate legal, compliance, or internal audit professionals who have responsibility for oversight of a company's compliance program and their information relates to or is derived from these responsibilities or functions;
- They are employees of, or associated with, a public accounting firm and derived their information from that role;

[3] Lisa Monaco, Deputy Att'y General, Remark on New Corporate Whistleblower Awards Pilot Program (Aug. 1, 2024), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-new-corporate-whistleblower-awards.

[4] *Id.*

[5] *Id.*

[6] Nicole M. Argentieri, Principal Deputy Assistant Att'y General, Remarks on New Corporate Whistleblower Awards Pilot Program (Aug. 1, 2024), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-new.

Department of Justice Corporate Whistleblower Awards Pilot Program, U.S. DEP'T OF JUSTICE (Aug. 1, 2024), https://www.justice.gov/criminal/media/1362321/dl?inline at 5 ("Pilot Program Guidance").

Id. See also Department of Justice Corporate Whistleblower Awards Pilot Program Fact Sheet (Aug. 1, 2024) ("Pilot Program Fact Sheet").

— They obtained the information through privileged communications, unless disclosure is permitted pursuant to the crime-fraud or other exception;

— They are eligible for an award under another U.S. government or statutory whistleblower program or *qui tam*;

— They are an official, employee, or contractor of DOJ or law enforcement (or were when they acquired the information) or close relative thereof;

— They are an elected or appointed foreign government official (or held such a role at the time they acquired the original information);

— They meaningfully participated[9] in the criminal activity they reported;

— They knowingly and willfully made false statements, withheld material or significant information, or otherwise interfered or obstructed DOJ's investigation;

— They are under a preexisting obligation to report alleged misconduct in connection with a criminal prosecution or civil enforcement action.[10]

Amounts of Whistleblower Awards

Awards will be based on the "net proceeds forfeited," which DOJ explained is the value of forfeited assets remaining after compensating victims and paying other costs associated with the forfeiture.[11] Under the program, a whistleblower can receive up to 30% of the first $100 million in net proceeds forfeited, and up to 5% of any net proceeds forfeited between $100 million and $500 million. Thus, the maximum award that a whistleblower can obtain through the program is $50 million.[12] As with similar whistleblower award programs, DOJ will determine the appropriate percentage for an award in a given case based on various factors, including how it values the significance and usefulness of the whistleblower's information, whether it was original, truthful and complete, the level of cooperation and assistance received, whether the whistleblower first made the report internally to the company, and whether they had a management role, among others. "Where the Department has identified individual victims of the underlying scheme with pecuniary losses that are eligible for compensation and has also determined that the whistleblower is eligible for an award, the Department will first compensate qualifying individual victims to the fullest extent possible."[13]

DOJ Continues to Place a High Premium on Compliance, Internal Company Reporting, and Voluntary Self-Disclosure

DOJ program guidance makes clear that a whistleblower's participation in and cooperation with the company's internal compliance systems or internal reporting channel may be viewed as a "consideration that increases awards."[14] In that respect, DOJ will consider whether a whistleblower reported the conduct through internal whistleblower, legal, or compliance procedures, and whether the whistleblower assisted any internal investigation or inquiry conducted by the

[9] "An individual remains eligible for an award if the Department determines, in its discretion, that the individual's minimal role in the reported scheme was sufficiently limited that the individual could be described as 'plainly among the least culpable of those involved in the conduct of a group.' U.S.S.G. § 3B1.2 cmt. n.4 (defining 'minimal participant')." *See* Pilot Program Fact Sheet ("Profit means receiving a financial benefit from the misconduct outside your normal salary or bonus.").

[10] Other categories of individuals are also excluded. *See* Pilot Program Guidance at 3. Moreover, individuals who knowingly or intentionally profited from the wrongdoing will not be eligible for the program.

[11] *Id*. at 2. *See also* Pilot Program Fact Sheet.

[12] Pilot Program Fact Sheet at 1.

[13] Pilot Program Guidance at 8. DOJ has created a landing page on the Criminal Division's website where individuals may download, complete, and submit a Voluntary Self Disclosure Intake Form, which requires individuals to identify themselves, any counsel representing them, the company involved, and a brief description of the misconduct. Whistleblowers may also make reports anonymously if they are represented by counsel. The Intake Form addresses "program eligibility," as described above and in the program guidance. Those who make fraudulent or frivolous whistleblower claims will receive a "permanent bar," meaning DOJ will no longer accept submissions from that individual. See id. at 13.

[14] *Id.* at 10 (emphasis added).

company concerning the reported conduct.[15] Similarly, DOJ noted that it would consider decreasing a whistleblower award where a whistleblower knowingly interfered with the company's internal compliance and reporting system, or otherwise undermined the integrity of such system by preventing or delaying detection of the misconduct, providing false or fraudulent information or documents, or withholding material or significant information that hindered the company's efforts to detect, investigate, or remediate the misconduct.[16]

Under the program, individuals who report misconduct through internal company systems can still seek and obtain a whistleblower award from DOJ, provided that the person submits the information to DOJ within 120 days of their initial internal report to the company.[17]

Notably, DOJ also amended its Corporate Enforcement and Voluntary Self-Disclosure Policy to allow for companies that receive internal whistleblower reports to still obtain credit and the presumption of a declination even if the whistleblower also reported to DOJ. To qualify for the policy under these circumstances, the company (i) must self-disclose the allegations to DOJ within 120 days of receiving the whistleblower's internal report (and before DOJ reaches out to the company); and (ii) meet the other requirements for voluntary self-disclosure and presumption of a declination under the policy.[18] As explained by Principal Deputy Assistant Attorney General Nicole Argentieri, DOJ is "incentivizing companies to invest in strong internal reporting structures and to report crime when they learn about it."[19] She boiled it down to a simple message that has been a repeated DOJ mantra for voluntary self-disclosure: "Call us before we call you" – signaling DOJ's full intention to leverage the information provided by whistleblowers to investigate and prosecute companies that do not come forward and self-report.[20]

Recent Amendments to the Foreign Extortion Prevention Act

On July 30, 2024, President Biden signed into law the Foreign Extortion Prevention Technical Corrections Act. The amendments revise FEPA,[21] enacted as part of the 2024 National Defense Authorization Act, to prohibit foreign officials from demanding bribes, and clarifies its key jurisdictional hooks as well as the individuals to whom FEPA applies, among other technical corrections.[22] FEPA, the companion statute to the FCPA, created an important mechanism to address the "demand side" of foreign corruption—*i.e.*, the corrupt officials who solicit and receive bribes.

The recent amendments to FEPA serve two main purposes. First, although the original FEPA was added to the domestic bribery statute under 18 U.S.C. § 201, the current amendments moved it to the part of the criminal code dealing with fraud and related offenses, creating a new offense under 18 U.S.C. § 1352 (Demands by Foreign Officials for Bribes). This was intended to eliminate "inconsistencies [that] may

[15] *Id*.
[16] *Id.* at 11.
[17] *Id.* at 10.
[18] Department of Justice Temporary Amendment to Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Aug. 1, 2024), https://www.justice.gov/criminal/media/1362316/dl?inline; *see also* Argentieri, *supra* note 6.
[19] Argentieri, *supra* note 6.
[20] *Id.* DOJ also noted that it would be regularly evaluating the design and implementation of the pilot program initiative over a three-year period, during which it will determine whether to extend the program or make any refinements. According to DOJ, over the longer term, it may benefit from legislation expanding the program beyond forfeiture. During the pilot program, DOJ also will be soliciting feedback from a broad range of stakeholders. *See* Pilot Program Fact Sheet.
[21] Cleary Gottlieb, *Congress Passes Foreign Extortion Prevention Act to Prosecute Corrupt Foreign Officials* (2023), https://www.clearygottlieb.com/news-and-insights/publication-listing/congress-passes-foreign-extortion-prevention-act-to-prosecute-corrupt-foreign-officials.
[22] Foreign Extortion Prevention Technical Corrections Act, S. 4548, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/4548/text.

prevent the FEPA and the domestic bribery statute from operating in the way that Congress intended."[23]

Second, the amendments also substantively revised certain aspects of FEPA's language to better harmonize it with the FCPA:

— *Removal of "unofficial capacity" from "foreign official" definition*: The original FEPA expanded the FCPA's definition of a foreign official to include not only persons working on behalf of a foreign government in an official capacity, but also those "acting in an unofficial capacity for or on behalf of . . . a government, department, agency, [] instrumentality . . . or a public international organization."[24] The amended Act removes the "unofficial capacity" reference from the definition of "foreign official," resolving potential confusion over the term by bringing it into alignment with the FCPA.[25] Notably, however, Congress maintained FEPA's reference to "senior foreign political figure" as part of the definition of "foreign official," which goes further than the FCPA and includes a broad array of individuals, including current or former senior government and political party officials, current or former senior executives of a foreign government-owned commercial enterprise, and immediate family members and persons "widely and publicly known . . . to be a close associate" of a senior foreign political figure.

— *Addition of related individuals to "issuer" and "domestic concern" jurisdictional prongs*: Jurisdiction under FEPA still requires that the corrupt acts by foreign officials have a sufficient nexus to the United States, falling within the same general categories used under the FCPA. The amendments make clear that FEPA prohibits foreign officials[26] not only from demanding, seeking, receiving, or accepting bribes from an issuer of U.S. securities or a domestic concern (*i.e.*, a U.S. company or U.S. person), but also any officer, director, employee, or agent of the issuer or domestic concern (or stockholder acting on its behalf).

— *Clarification and expansion of "in the territory" jurisdictional prong:* In the recent amendments, Congress made two other significant changes to FEPA, both applying only where jurisdiction is based on conduct "in the territory of the United States." First, Congress made clear that for this jurisdictional prong to apply, it must be the foreign official or a "person acting on behalf of the foreign official" who must be "in the territory of the United States"—as opposed to under the FCPA, where it is the foreign national bribe payor (or someone acting on their behalf) who must be "in the territory of the Unites States."[27] Second, by including individuals acting "on behalf of the foreign official" in this provision, Congress essentially sought to confer jurisdiction when an agent of a foreign official takes action in the United States in furtherance of a bribery scheme.[28] Notably, Congress did not include this "agency" theory in the definition of "foreign official" itself or in any other provision of FEPA.[29]

[23] S. 4548, 118th Cong., 170 CONG. REC. 4656-58 (2024) (enacted).
[24] Foreign Extortion Prevention Act, S. 2347, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/2347/text.
[25] 31 U.S.C. § 1352(a)(1).
[26] The offense language in FEPA applies equally to foreign officials and persons selected to be foreign officials.
[27] Foreign Extortion Prevention Technical Corrections Act, S. 4548, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/4548/text.
[28] *Id.*
[29] Although perhaps unintended, these particular amendments to FEPA could create potential additional risk exposure for foreign nationals and foreign companies who might not otherwise fall within the ambit of the FCPA's "in the territory" jurisdictional prong. Specifically, if a foreign national or foreign company were to engage in corrupt conduct overseas, but in doing so conspired with a foreign official or agent of a foreign official present in the territory of the United States at the time of the corrupt agreement or receipt of the bribe, that could potentially open the door to liability under FEPA (even in the absence of jurisdiction under the FCPA). Although seemingly not the intent behind FEPA (which is focused on the conduct of corrupt foreign

It remains to be seen precisely how DOJ will deploy FEPA as a tool in its fight against corruption, although it does provide DOJ with an additional useful tool in its arsenal. Following the enactment of FEPA in December 2023, DOJ amended the Justice Manual to make clear that the FCPA Unit of DOJ's Fraud Section will maintain primacy over investigating matters related to potential violations of both the FCPA and FEPA. DOJ has emphasized that the new whistleblower pilot program is "all the more important given the recent enactment of [FEPA]—which [DOJ] plan[s] to vigorously enforce, especially now that the President signed a bill earlier this week that will make it easier [] to proceed with successful prosecutions."[30]

Key Takeaways

There are a few key takeaways from the newly announced DOJ Whistleblower Program and Amendments to FEPA:

— *Importance of an Effective Compliance and Internal Reporting System*: Ensuring that a compliance program and internal reporting mechanism is implemented and effective should remain a high priority. Under the new program, DOJ prosecutors are encouraged to consider increasing the amount of a whistleblower award where the individual first reported the alleged misconduct to an internal company reporting mechanism. Companies should also consider requiring full cooperation from employees with internal investigations and inquiries as part of their code of conduct, employee handbooks and/or employment contracts.

— *Need for Efficient Reporting Process and Internal Investigation*: When dealing with a whistleblower report through an internal reporting channel, a company effectively has 120 days to assess, process, and investigate the allegations before making a determination on how best to proceed. This requires not only efficient processing and prioritization of the whistleblower reports themselves, but also quick reaction time—to investigate, analyze, and if necessary, decide on self-reporting.

— *Interactions with Foreign Officials*: In light of some of the amendments to FEPA, companies should be all the more mindful when interacting with foreign officials and potential agents of foreign officials, particularly when those interactions involve third party intermediaries (*i.e.*, consultants, local partners, distributors, introducers, etc.). In particular, foreign companies should be mindful of the potential jurisdictional reach of the FCPA and FEPA, particularly in light of some of the recent amendments. With the launch of the new pilot program, DOJ is actively calling upon individuals to report information related to possible FCPA or FEPA violations—something about which both individuals and companies should remain aware.

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officials), this new language potentially creates risk exposure for foreign companies.

[30] Argentieri, *supra* note 6.