

Whistleblowing in Focus: Recent Developments, Emerging Issues, and Considerations for Companies. Part One: Developments in the U.S.

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Introduction

Whistleblower programs have proliferated and been growing in importance in the criminal and regulatory enforcement landscape globally. In this three-part series, we first discuss recent developments in whistleblower programs in the United States. Second, we review whistleblower initiatives in other non-U.S. jurisdictions over the past year. Third, we address how developments in whistleblower programs impact corporations.

Part 1: The United States

In relevant developments in U.S. whistleblower programs over the past year, (1) the Department of Justice (“DOJ”) introduced a three-year pilot program that offers monetary awards for reports relating to certain specific types of corporate misconduct; (2) the annual reports for the Securities and Exchange Commission (“SEC”) and Commodity Futures Trading Commission (“CFTC”) whistleblower programs disclosed record numbers for 2024; (3) the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) reported on the development of its own whistleblower award program; (4) the National Highway Traffic Safety Administration adopted its whistleblower rule; and (5) a federal district court held the False Claims Act’s *qui tam* provision unconstitutional, potentially impacting an important mechanism through which individual whistleblowers sought recovery for alleged violations of federal law.

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A. Department of Justice

In August, the DOJ launched the Corporate Whistleblower Awards Pilot Program, a three-year pilot program offering monetary awards to individuals who report specified types of corporate misconduct to the DOJ (“Whistleblower Pilot”).¹ The DOJ reported in December that it had received over 250 tips since the pilot program was initiated four months earlier.²

1. Eligibility

The Whistleblower Pilot seeks to incentivize reporting of corporate crimes investigated and prosecuted by the DOJ, but not already covered by other whistleblower programs.³ Qualifying reports must relate to one of the following four areas:

1. Violations involving financial institutions, including schemes involving money laundering, anti-money laundering compliance violations, fraud statutes, and fraud against or non-compliance with financial institution regulators;
2. Violations related to foreign corruption involving companies, including violations of the Foreign Corrupt Practices Act, Foreign Extortion Prevention Act, and money laundering statutes;
3. Violations committed by or through companies related to payment of bribes or kickbacks to domestic public officials; and
4. Violations related to (i) federal health care offenses and related crimes involving non-public

health care benefit programs, (ii) fraud against non-governmental entities in the health care industry, and (iii) other federal violations involving conduct related to health care not covered by the Federal False Claims Act.⁴

Like the pre-existing SEC and CFTC whistleblower programs, eligible reports under the Whistleblower Pilot must provide original information and be made voluntarily.⁵ Similar to the SEC whistleblower program, to promote companies’ internal reporting systems, reports will still qualify under the Whistleblower Pilot if an individual first voluntarily reported original information to her employer and within 120 days reported to the DOJ or responded to a request from the DOJ.⁶ The Whistleblower Pilot sets a monetary threshold at the same level as the SEC and CFTC programs.⁷ Specifically, eligible reports must lead to criminal or civil forfeiture exceeding \$1 million in net proceeds from a prosecution, corporate criminal resolution, or civil forfeiture action.⁸

In contrast to the SEC and CFTC programs, awards under the Whistleblower Pilot will be made from the DOJ’s Assets Forfeiture Fund, rather than a dedicated fund established by Congress.⁹ The Whistleblower Pilot makes ineligible for awards individuals who meaningfully participated in the criminal activity they reported, whereas the SEC and CFTC programs only make ineligible individuals convicted of a crime related to the conduct they reported.¹⁰

¹ Memorandum from the U.S. Dep’t of Just. Crim. Div., Corporate Whistleblower Awards Pilot Program (“Memorandum”) at 2 (Aug. 1, 2024), available at <https://www.justice.gov/media/1362321/dl?inline>.

² Marshall Miller, Principal Associate Deputy Attorney General, Keynote Address at the Practicing Law Institute’s White Collar Crime 2024 Program (Dec. 6, 2024), available at <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-keynote-address>.

³ Memorandum at 1, 5–6.

⁴ *Id.* at 5–6.

⁵ *Id.* at 3–5, 6; 17 CFR § 240.21F-3(a); 17 CFR § 165.1.

⁶ Memorandum at 6; 17 CFR § 240.21F-4(b)(7). The CFTC program provides 180 days for an individual to report to the CFTC following an internal report and still qualify for an award. 17 CFR § 165.2(l)(2).

⁷ Memorandum at 2; 17 CFR § 240.21F-3(a)(4); 17 CFR § 165.5(a).

⁸ Memorandum at 2.

⁹ Memorandum at 8; 17 CFR § 240.21F-14(a); 17 CFR § 165.12(a).

¹⁰ Memorandum at 2–3; 17 CFR § 240.21F-8(c)(3); 17 CFR § 165.6(a)(2).

2. Related Policies

Over the course of 2024, the DOJ adopted other policies relating to self-disclosures. In April, the DOJ's Criminal Division launched a Pilot Program on Voluntary Self-Disclosures for Individuals intended to encourage voluntary self-disclosure by individuals involved in specified types of criminal conduct involving companies.¹¹ Under the program, an individual who voluntarily self-discloses original information about criminal misconduct, fully cooperates, and meets other conditions will receive a non-prosecution agreement.¹² The launch of the program follows individual self-disclosure pilot programs introduced by the U.S. Attorney's Office for the Southern District of New York in February and the U.S. Attorney's Office for the Northern District of California in March.¹³ Over the course of 2024, other U.S. Attorney's Offices introduced individual self-disclosure pilot programs, including the Central District of California, the District of New Jersey, the Eastern District of Virginia, the District of Columbia,

the Eastern District of New York, and the Northern District of Illinois.¹⁴

In conjunction with the launch of the Whistleblower Pilot in August, the DOJ made a temporary amendment to its Corporate Enforcement and Voluntary Self-Disclosure Policy ("CEP"). The amendment allows a company that receives an internal report to qualify for a presumption of a declination under the CEP for a self-disclosure that it makes after the whistleblower has already reported to the DOJ, as long as the company (a) self-discloses to the DOJ within 120 days of receiving the internal report (and before the DOJ reaches out to the company); and (b) meets the other requirements for voluntary self-disclosure and presumption of a declination under the CEP.¹⁵

In September 2024, the DOJ updated its guidance relating to whistleblower programs in its Evaluation of Corporate Compliance Programs ("ECCP"), which is used to assess compliance programs in determining the form of a resolution, any monetary penalty, and any

¹¹ Memorandum from the U.S. Dep't of Just. Crim. Div., The Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals at 1 (Apr. 15, 2024), available at <https://www.justice.gov/criminal/media/1347991/dl?inline>.

¹² *Id.*

¹³ Memorandum from the U.S. Attorney's Office for the Southern District of New York, SDNY WHISTLEBLOWER PILOT PROGRAM at 1 (Feb. 13, 2024), available at https://www.justice.gov/d9/2024-05/sdny_wb_policy_effective_2-13-24.pdf; Memorandum from the U.S. Attorney's Office for the Northern District of California, NDCA WHISTLEBLOWER PILOT PROGRAM at 1 (Mar. 14, 2024), available at https://www.justice.gov/d9/2024-03/ndca_whistleblower_pilot_program.pdf.

¹⁴ Memorandum from the U.S. Attorney's Office for the Central District of California, CDCA WHISTLEBLOWER PILOT PROGRAM at 1 (Aug. 23, 2024), available at <https://www.justice.gov/usao-cdca/media/1365146/dl?inline>; Memorandum from the U.S. Attorney's Office for the District of New Jersey, DNJ WHISTLEBLOWER NON-PROSECUTION PILOT PROGRAM at 1 (Sept. 13, 2024), available at <https://www.justice.gov/usao-nj/media/1367691/dl?inline>;

Memorandum from the U.S. Attorney's Office for the Eastern District of Virginia, EDVA WHISTLEBLOWER NON-PROSECUTION PILOT PROGRAM at 1 (Sept. 15, 2024), available at <https://www.justice.gov/usao-edva/media/1367986/dl?inline>; Memorandum from the U.S. Attorney's Office for the District of Columbia, DISTRICT OF COLUMBIA WHISTLEBLOWER NON-PROSECUTION PILOT PROGRAM at 1 (Sept. 16, 2024), available at <https://www.justice.gov/usao-dc/media/1367686/dl?inline>; Memorandum from the U.S. Attorney's Office for the Eastern District of New York, EDNY WHISTLEBLOWER NON-PROSECUTION PILOT PROGRAM at 1 (Sept. 16, 2024), available at <https://www.justice.gov/usao-edny/whistleblower-policy>; Memorandum from the U.S. Attorney's Office for the Northern District of Illinois, United States Attorney's Office Northern District of Illinois Individual Self-Disclosure Pilot Program for Organizational Misconduct September 16, 2024, to March 16, 2025 at 1 (Sept. 16, 2024), available at <https://www.justice.gov/usao-ndil/media/1368056/dl?inline>.

¹⁵ U.S. Dep't of Just. Crim. Div., Temporary Amendment to Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Aug. 1, 2024), available at <https://www.justice.gov/criminal/media/1362316/dl?inline>.

compliance obligations.¹⁶ The September 2024 update revised the assessment of the effectiveness of a company's reporting mechanism to consider whether it encourages and incentivizes reporting or uses practices that "tend to chill" reporting, as well as how the company assesses the willingness of employees to report.¹⁷ The update also added specific guidance relating to the company's commitment to whistleblower protection and anti-retaliation, including the existence of an anti-retaliation policy, training on internal anti-retaliation policies and external anti-retaliation and whistleblower protection laws, training on internal reporting systems and external whistleblower programs and regulatory regimes, and discipline of employees involved in misconduct who made internal reports relative to those who did not.¹⁸

B. Securities and Exchange Commission and Commodity Futures Trading Commission

In the fall, the SEC and CFTC published their annual reports on their whistleblower programs, which were created by the Dodd-Frank Act in 2010.¹⁹ The SEC and CFTC programs cover information about violations of the federal securities laws and Commodity Exchange Act, respectively. The reports were for the period from October 1, 2023 through September 30, 2024.

Relevant highlights from the SEC's Report include the following:

- About 38% of whistleblowers who received awards during the period were outside the entity that was the subject of the enforcement action (such as investors, competitors, or market observers), while about 62% were insiders.²⁰
- The SEC continues to receive tips from around the world, with the most non-U.S. tips during the period coming from Canada, the United Kingdom, India, Australia, and Germany.²¹
- During the reporting period, the SEC brought a record number of enforcement matters (11) for impeding whistleblower communications with the SEC in violation of its whistleblower rules.²² The matters were based on settlement agreements with clients requiring them to keep confidential the facts of the settlements and not permitting them to voluntarily contact the SEC; non-disclosure agreements with job applicants barring them from disclosing confidential information to government agencies voluntarily or without notification to the company; agreements requiring counterparties to represent that they had not made reports to regulators, would withdraw any such reports, or would abstain from making such reports; and agreements requiring counterparties to waive their right to possible whistleblower awards.²³

¹⁶ Nicole M. Argentieri, Principal Deputy Assistant Attorney General, Remarks at the Society of Corporate Compliance and Ethics 23rd Annual Compliance & Ethics Institute (Sept. 23, 2024), available at <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-society>; U.S. Dep't of Just. Crim. Div., Evaluation of Corporate Compliance Programs (Sept. 2024), available at <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl>.

¹⁷ U.S. Dep't of Just. Crim. Div., Evaluation of Corporate Compliance Programs (Sept. 2024), available at <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl>.

¹⁸ *Id.*

¹⁹ SEC, Office of the Whistleblower, Annual Report to Congress for Fiscal Year 2024 ("SEC Report") (Nov. 15, 2024), available at <https://www.sec.gov/files/fy24-annual-whistleblower-report.pdf>; CFTC, Whistleblower Program, Customer Education Initiatives 2024 Annual Report ("CFTC Report") (Oct. 2024), available at https://www.whistleblower.gov/sites/whistleblower/files/2024-11/FY24%20Customer%20Protection%20Fund%20Annual%20Report%20to%20Congress.pdf?utm_medium=email&utm_source=govdelivery.

²⁰ SEC Report at 5.

²¹ *Id.* at 12.

²² *Id.* at 1.

²³ *Id.* at 9–11.

Highlights from the CFTC’s Report include the following:

- The CFTC received a record number (over 1,700) of whistleblower tips and award applications during that period.²⁴
- Most of the whistleblower tips to the CFTC in that period involved digital assets.²⁵ Digital asset cases also represented almost half of the CFTC’s docket over that time.²⁶
- During the period, the CFTC received whistleblower tips from over 60 identified countries, with the most non-U.S. tips coming from the United Kingdom, Chile, India, Spain, and South Africa.²⁷
- The CFTC made its first whistleblower award to a compliance officer.²⁸ To mitigate potential conflicts of interest of individuals with supervisory, compliance, or audit responsibilities, the CFTC’s whistleblower program (like other programs) generally makes them ineligible for awards based on information they received because of their role, unless an exception applies.²⁹ The compliance officer here qualified under an

exception available for reporting to the CFTC at least 120 days after making an internal report.³⁰

- The CFTC also took enforcement action for the first time against a company for impeding whistleblower communications with the CFTC in violation of its whistleblower rules.³¹ The action was based on the company’s use of employment and separation agreements barring disclosure of its confidential information with third parties, without carve-outs “expressly permitting communications with the Commission or law enforcement except to the extent required by law or court order.”³² The CFTC’s Republican Commissioners issued statements reflecting their view that the Commission’s interpretation of its whistleblower rules was contrary to the relevant regulation’s text and intent.³³

C. Financial Crimes Enforcement Network

In February, FinCEN provided an update on its efforts to implement the 2022 Anti-Money Laundering Whistleblower Improvement Act.³⁴ The Act amended the whistleblower incentives and protections of the Anti-Money Laundering Act of 2020 to mirror the Dodd-Frank whistleblower programs. Specifically, the 2022 Act set mandatory awards for eligible

²⁴ CFTC Report at 3. The CFTC also noted that over 40% of its enforcement matters involve whistleblowers. *Id.* at 8.

²⁵ *Id.* at 6; Press Release, CFTC, CFTC Awards Over \$1 Million to Whistleblower Who Aided a Digital Assets-Related Investigation (Aug. 8, 2024), *available at* <https://www.cftc.gov/PressRoom/PressReleases/8939-24>.

²⁶ *Id.*

²⁷ CFTC Report at 10.

²⁸ CFTC Report at 5–6.

²⁹ 17 C.F.R. § 165.2(g)(4) and (5).

³⁰ 17 C.F.R. § 165.2(g)(7)(iii); Press Release, CFTC, CFTC Awards Insider Whistleblower Approximately \$1.25 Million (Mar. 14, 2024), *available at* <https://www.cftc.gov/PressRoom/PressReleases/8878-24>.

³¹ CFTC Report at 15.

³² Press Release, CFTC, CFTC Orders Trafigura to Pay \$55 Million for Fraud, Manipulation and Impeding

Communications with the CFTC (June 17, 2024), *available at* <https://www.cftc.gov/PressRoom/PressReleases/8921-24>; In re Trafigura Trading LLC, CFTC Docket No. 24-08 (June 17, 2024).

³³ Commissioner Summer K. Mersinger, Concurring Statement Regarding Settlement With Trafigura Trading LLC (June 17, 2024), *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement061724>; Commissioner Caroline D. Pham, Statement Regarding Settlement Order with Trafigura Trading LLC (June 17, 2024), *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement061724>.

³⁴ Andrea Gacki, FinCEN Director, Statement before the House Committee on Financial Services (“FinCEN Director Statement”) (Feb. 14, 2024), *available at* <https://www.fincen.gov/news/testimony/statement-fincen-director-andrea-gacki-house-committee-financial-services>.

whistleblowers and established a fund for the payment of such awards.³⁵ In addition, the Act expanded the scope of the whistleblower program to cover sanctions violations.³⁶ FinCEN reported that it has created the fund established under the law.³⁷ FinCEN also announced future plans to issue a notice of proposed rulemaking for fully implementing the program.³⁸ The rules should provide clarity about the operation of the program, including by defining key terms, describing the procedures for applying for awards, and identifying factors FinCEN will consider in determining awards. The rules may also reflect how FinCEN balances competing interests, such as providing incentives for whistleblowers while promoting effective corporate compliance programs.

D. National Highway Traffic Safety Administration

In December, the National Highway Traffic Safety Administration (“NHTSA”) adopted the rule for its existing whistleblower program.³⁹ The Motor Vehicle Safety Whistleblower Act, which was part of the 2015 Fixing America’s Surface Transportation Act, included provisions for whistleblower incentives and protections.⁴⁰ Specifically, the statute authorized discretionary payments of monetary awards for voluntary reports of original information that lead to successful resolution of an enforcement action for violations of law resulting in over \$1 million in sanctions.⁴¹ While the NHTSA was in the process of drafting the rule for the program, it issued its first award in 2021.⁴² The rule provides information about the operation of the program, including definitions of

terms, procedures for submitting information and applying for awards, requirements for eligibility, and factors that the NHTSA will consider in determining awards. Consistent with the statute, the rule limits eligibility to a current or former “employee or contractor of a motor vehicle manufacturer, part supplier, or dealership.”⁴³ Bars to eligibility include a conviction by a federal or state court in the U.S. of a crime related to the enforcement action.⁴⁴

E. False Claims Act

Last year also saw an important development in the law relating to *qui tam* actions, a vehicle through which whistleblowers seek recovery for alleged violations of federal law. In September, the District Court for the Middle District of Florida held in *United States ex rel. Zafirov v. Florida Medical Associates, LLC* that the *qui tam* provision of the federal False Claims Act (“FCA”) violates the Appointments Clause of the Constitution.⁴⁵ The FCA’s *qui tam* provision allows a private party (a “relator”) to bring a lawsuit on behalf of the government for false claims and receive an award upon a successful outcome.⁴⁶ As the decision explained, statistics published by the DOJ in early 2024 show that whistleblowing relators file the majority of FCA lawsuits.⁴⁷

The court held that a relator qualifies as an officer of the United States who is subject to the Appointments Clause.⁴⁸ Comparing a relator to members of the Federal Election Commission, an independent counsel, SEC administrative law judges, and directors of two government agencies—whom the Supreme Court has

³⁵ 31 U.S.C. § 5323(b).

³⁶ 31 U.S.C. § 5323(a)(1).

³⁷ FinCEN Director Statement.

³⁸ *Id.*

³⁹ 49 CFR § 513.1.

⁴⁰ *Id.*

⁴¹ 49 CFR §§ 513.2, 513.6.

⁴² Press Release, NHTSA, NHTSA Makes Its First Ever Whistleblower Award (Nov. 9, 2021), *available at*

<https://www.nhtsa.gov/press-releases/first-whistleblower-award>.

⁴³ 49 CFR § 513.2.

⁴⁴ 49 CFR § 513.6.

⁴⁵ *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

⁴⁶ 31 U.S.C. § 3730(b)(1).

⁴⁷ *Zafirov*, 2024 WL 4349242, at *2.

⁴⁸ *Id.* at *6, *18.

deemed to be officers of the United States—the court concluded that a relator’s power to prosecute false claims cases on behalf of the government grants her significant authority pursuant to federal law.⁴⁹ The court also determined that based on the duties, powers, and compensation of a relator under the FCA, a relator is a continuing position established by law, like an independent counsel or bank receiver.⁵⁰ However, because relators are not appointed by the President, the courts, or heads of departments, the court held that their self-appointment under the FCA is unconstitutional.⁵¹ The court dismissed the case, emphasizing the need for proper appointment procedures to ensure accountability and adherence to the separation of powers.⁵² The government has filed an appeal, which is pending before the Eleventh Circuit. If affirmed, this decision could undermine the foundation of the *qui tam* process through which individual whistleblowers bring actions alleging FCA violations on behalf of the government.

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⁴⁹ *Id.* at *7.

⁵⁰ *Id.* at *11–12.

⁵¹ *Id.* at *1.

⁵² *Id.* at *1, *5.