Volume 3, Number 1 January–February 2025

THE JOURNAL OF FEDERAL AGENCY ACTION

Editor's Note: A Lot Is Happening (Still)
Victoria Prussen Spears

Department of Justice Launches Pilot Program to Reward Corporate Whistleblowers
Steven E. Fagell, Adam M. Studner, Addison B. Thompson, and Brendan C. Woods

Department of Agriculture Food Safety and Inspection Service Announces Proposed Rule Under Salmonella Framework for Raw Poultry Products
Peter Tabor and Patrick G. Selwood

Treasury Department Issues Final Investment Advisers AML/CFT Program Rule
Darshak S. Dholakia, Thomas C. Bogle, Meagan Cox, and Emily Towill

Federal Trade Commission's Enforcement Action Against Avast Signals Increased Focus on Consumer Web Data
Kirk J. Nahra, Ali A. Jessani, and Amy Olivero

Securities and Exchange Commission Adopts New Regulation NMS Rules on Tick Sizes, Access Fees, and Market Data
Andre E. Owens, Bruce H. Newman, Stephanie Nicolas, Tiffany J. Smith, and Kyle P. Swan

Tribal General Welfare Exclusion Proposed Regulations Are an Overdue Win for Indian Country
Kenneth W. Parsons and Rachel T. Provencher

Federal Agencies Begin to Implement the Financial Data Transparency Act
Michael Nonaka, David H. Engvall, David Fredrickson, and David B.H. Martin

The End of *Chevron* Deference Could Spell Trouble for the Environmental Protection Agency PFAS "Hazardous Substance" Rule
Reza Zarghamee and Steve R. Brenner

What's Next After the Private Fund Adviser Rules?
Robin Bergen and Rachel Gerwin

fastcase FULL COURT PRESS

The Journal of Federal Agency Action

Volume 3, No. 1 | January–February 2025

5 **Editor's Note: A Lot Is Happening (Still)**
Victoria Prussen Spears

9 **Department of Justice Launches Pilot Program to Reward Corporate Whistleblowers**
Steven E. Fagell, Adam M. Studner, Addison B. Thompson, and Brendan C. Woods

23 **Department of Agriculture Food Safety and Inspection Service Announces Proposed Rule Under Salmonella Framework for Raw Poultry Products**
Peter Tabor and Patrick G. Selwood

31 **Treasury Department Issues Final Investment Advisers AML/CFT Program Rule**
Darshak S. Dholakia, Thomas C. Bogle, Meagan Cox, and Emily Towill

37 **Federal Trade Commission's Enforcement Action Against Avast Signals Increased Focus on Consumer Web Data**
Kirk J. Nahra, Ali A. Jessani, and Amy Olivero

45 **Securities and Exchange Commission Adopts New Regulation NMS Rules on Tick Sizes, Access Fees, and Market Data**
Andre E. Owens, Bruce H. Newman, Stephanie Nicolas, Tiffany J. Smith, and Kyle P. Swan

51 **Tribal General Welfare Exclusion Proposed Regulations Are an Overdue Win for Indian Country**
Kenneth W. Parsons and Rachel T. Provencher

61 **Federal Agencies Begin to Implement the Financial Data Transparency Act**
Michael Nonaka, David H. Engvall, David Fredrickson, and David B.H. Martin

65 **The End of *Chevron* Deference Could Spell Trouble for the Environmental Protection Agency PFAS "Hazardous Substance" Rule**
Reza Zarghamee and Steve R. Brenner

69 **What's Next After the Private Fund Adviser Rules?**
Robin Bergen and Rachel Gerwin

EDITOR-IN-CHIEF

Steven A. Meyerowitz
President, Meyerowitz Communications Inc.

EDITOR

Victoria Prussen Spears
Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

Lynn E. Calkins
Partner, Holland & Knight LLP
Washington, D.C.

Helaine I. Fingold
Member, Epstein Becker & Green, P.C.
Baltimore

Nancy A. Fischer
Partner, Pillsbury Winthrop Shaw Pittman LLP
Washington, D.C.

Bethany J. Hills
Partner, DLA Piper LLP (US)
New York

Phil Lookadoo
Partner, Haynes and Boone, LLP
Washington, D.C.

Michelle A. Mantine
Partner, Reed Smith LLP
Pittsburgh

Ryan J. Strasser
Partner, Troutman Pepper Hamilton Sanders LLP
Richmond & Washington, D.C.

THE JOURNAL OF FEDERAL AGENCY ACTION (ISSN 2834-8818 (online)) at $495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. Copyright 2025 Fastcase, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: Leanne Battle
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

This journal's cover includes a photo of Washington D.C.'s Metro Center underground station. The Metro's distinctive coffered and vaulted ceilings were designed by Harry Weese in 1969. They are one of the United States' most iconic examples of the brutalist design style often associated with federal administrative buildings. The photographer is by XH_S on Unsplash, used with permission.

Cite this publication as:

The Journal of Federal Agency Action (Fastcase)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2025 Full Court Press, an imprint of Fastcase, Inc.
All Rights Reserved.
A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE JOURNAL OF FEDERAL AGENCY ACTION, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and anyone interested in federal agency actions.

This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Leanne Battle, Publisher, Full Court Press at leanne.battle@vlex.com or at 866.773.2782

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2834-8796 (print)
ISSN 2834-8818 (online)

Department of Justice Launches Pilot Program to Reward Corporate Whistleblowers

Steven E. Fagell, Adam M. Studner, Addison B. Thompson, and Brendan C. Woods*

In this article, the authors review the three-year Corporate Whistleblower Awards Pilot Program launched recently by the Department of Justice to incentivize and reward certain individuals who report corporate wrongdoing.

The Department of Justice (Department or DOJ) has launched a three-year, Department-wide Corporate Whistleblower Awards Pilot Program (the Pilot Program)[1] to incentivize and reward certain individuals who report corporate wrongdoing. The Pilot Program, which will be managed by the Criminal Division's Money Laundering and Asset Recovery Section, took effect on August 1, 2024, and is DOJ's first whistleblower rewards program.

Deputy Attorney General (DAG) Lisa Monaco and then-Acting Assistant Attorney General (Acting AAG) Nicole Argentieri previewed the Pilot Program in March.[2] The finalized Pilot Program reflects a significant evolution of the outline set out by the DAG and the Acting AAG, likely in response, at least in part, to questions and concerns raised by the whistleblower and defense bars.

Under the Pilot Program, eligible whistleblowers may receive a portion of the "net proceeds forfeited" as a result of "original" information provided. The award amount is at DOJ's discretion and is only available if the report:

1. Relates to specific subject matter areas identified by the Department and not covered by other federal whistleblower or qui tam programs;
2. Leads to the successful forfeiture of more than $1 million in net proceeds; and
3. Meets a number of other criteria (e.g., the whistleblower did not "meaningfully participate[]" in the criminal activity and the report is truthful and complete).

The Journal of Federal Agency Action / January–February 2025, Vol. 3, No. 1, pp. 9–22.
© 2025 Full Court Press. All rights reserved.
ISSN ISSN 2834-8818 (online).

The Pilot Program thus fills certain eligibility and subject matter gaps in existing federal whistleblower and qui tam regimes, which may necessitate enhancements to corporate compliance programs in the face of potentially heightened risks. For example, in the Foreign Corrupt Practices Act (FCPA) context, the Pilot Program expands the reach of whistleblower awards to reported conduct committed by a private company that qualifies as a U.S. "domestic concern" (but not as an "Issuer"), as the Securities and Exchange Commission's (SEC's) existing whistleblower program necessarily applies to Issuers but not to domestic concerns given limitations to the SEC's enforcement authority under the FCPA.

DOJ attempted to carve out space so that the Pilot Program does not undermine companies' internal reporting and investigative functions. For example:

- Personnel in compliance and legal functions—or personnel to whom information related to potential violations of law is reported—are generally ineligible to receive awards, although there are certain exceptions discussed below.
- The Pilot Program encourages internal reporting through existing channels by providing higher awards in cases where the whistleblower reports misconduct internally first and cooperates with the internal investigation.

Likewise, the Pilot Program ties in with the Criminal Division's voluntary self-disclosure initiative.

In particular, in parallel with announcing the Pilot Program, DOJ's Criminal Division temporarily amended[3] its recently revamped Corporate Enforcement and Voluntary Self-Disclosure Policy (the CEP)[4] to enable companies to obtain voluntary disclosure credit, in the form of a presumptive declination with disgorgement, even if the whistleblower provides information to the Department before the company does. Such an outcome would have been precluded under the prior version of the CEP. To remain eligible for a declination, a company must self-report misconduct to the "Department" within 120 days of receiving a whistleblower report, as well as meet other generally applicable criteria for receiving a declination (e.g., full cooperation and timely and appropriate remediation).

As with the CEP in general, this change applies only to matters involving the Criminal Division and does not apply to cases that

are prosecuted by other components, such as the National Security Division, the Civil Division's Consumer Protection Branch, and U.S. Attorneys' Offices. Whether those other DOJ components with their own voluntary self-disclosure policies will create similar safe harbor periods for companies remains an open question.

This 120-day clock creates a further incentive for companies to establish effective and nimble reporting and investigative mechanisms so they can consider timely disclosing misconduct to remain eligible for a potential declination with disgorgement. It will be important to watch to see if this 120-day clock becomes the new standard for meeting the Criminal Division's requirement of "reasonably prompt disclosure" for voluntary self-disclosure outside of the whistleblower context.

For companies weighing whether to disclose misconduct to DOJ, the Pilot Program raises the stakes, in the sense that it financially motivates whistleblowers to make disclosures to the Department. At the same time, it provides welcome breathing room to companies to investigate compliance reports without foreclosing the availability of benefits afforded to companies by the Criminal Division under the CEP.

The impact of the Pilot Program—particularly on companies—remains to be seen, but the Pilot Program, like all of DOJ's other voluntary disclosure frameworks, vests considerable discretion in the Department to determine how it will be implemented and applied. Nonetheless, the Pilot Program continues to incentivize companies to build compliance and investigations capabilities to promptly investigate allegations of corporate misconduct and quickly reach voluntary disclosure decisions.

The Corporate Whistleblower Awards Pilot Program

When Is an Award Available?

The Pilot Program includes a detailed set of criteria that whistleblowers must meet to receive a portion of the forfeiture amount. But even if these criteria are met, the decision to issue an award, and the award amount, remain within DOJ's sole discretion.

Who Is Eligible?

The Pilot Program imposes a number of eligibility requirements, which have generated significant commentary and controversy. Certain requirements are straightforward and obvious—for example, DOJ employees and other members of law enforcement are ineligible, as are elected officials and individuals who "meaningfully participated" in the activity that they are reporting, even if there will be questions about what that phrase actually means (i.e., what level of participation will be considered meaningful?).

Other requirements are more nuanced. For example, eligibility extends only to individuals who are not also eligible for an award through another U.S. federal whistleblower or qui tam program—a factor that may trip up whistleblowers who do not do their diligence and make disclosures to the right agencies. This factor may make the Pilot Program more obviously attractive to individuals with information about foreign and private companies that are outside of the jurisdiction of the SEC, as individuals reporting information that would be eligible under the SEC's Dodd-Frank whistleblower program, which generally provides for more lucrative awards, would be ineligible under the Pilot Program. Potential whistleblowers also must have provided their information on or after the Pilot Program's effective date of August 1, 2024 (and while the program is still in effect).

What Type of Information Qualifies?

Qualifying information must be "original," meaning non-public information based on the reporter's independent knowledge or analysis, not known to the Department, and not obtained through a communication that was subject to the attorney-client privilege or as part of a legal representation. The information may relate to a matter unknown to DOJ or to a subject that DOJ already possesses some information about, so long as the whistleblower's information "materially adds" to DOJ's information on the matter.

Significantly, information disclosed by certain categories of employees is deemed not to be original in certain circumstances. For example, information learned through the purported whistleblower's position as a company officer, director, trustee, or partner is not original if it was learned from another person or through the employer's processes for identifying, reporting, and addressing

potentially illegal conduct. Similarly, information disclosed by compliance professionals and internal audit employees is deemed not original if it relates to or is derived from their compliance or audit duties.

However, there is a potentially significant exception to these exclusion criteria, as reports from the above individuals can qualify as original information if the employee "has a reasonable basis to believe" that disclosure is necessary to prevent certain future misconduct, including conduct that may lead to "imminent financial harm." It remains to be seen whether this carveout will be interpreted by DOJ expansively or applied only in the most extraordinary circumstances.

What Crimes Are Covered?

In keeping with Acting AAG Argentieri's goal[5] to "fill gaps in the existing framework of federal whistleblower programs," qualifying information submitted through the Pilot Program must pertain to certain statutory subject areas—including money laundering, fraud, corruption and bribery (including under the FCPA and domestic bribery laws), and certain healthcare offenses—that are not otherwise subject to existing federal qui tam and whistleblower programs. Excluded from this list—and, presumably, from the Pilot Program—are offenses in other major areas of corporate enforcement, such as export controls, sanctions, and other fraud-based offenses.

What Is "Voluntary" Information?

A submission is eligible for an award only if it occurs prior to a request, inquiry, or demand from DOJ and the individual has no preexisting duty to disclose. In an apparent internal contradiction, the Pilot Program further defines "voluntary" to require that the submission be made "in the absence of any government investigation." This requirement seemingly contradicts the discussion of "original information" in the Pilot Program's policy guidance, which indicates that a submission may be successful "regardless of whether the Department did or did not already have an investigation open related to the information provided."

What Other Requirements Exist?

There are numerous other requirements embedded in the Pilot Program. Of note, qualifying information must represent the entirety of the individual's knowledge of the subject disclosed. In addition, to retain eligibility for an award, the individual must agree to cooperate with the Department in its related civil and criminal investigations, including potentially serving as a witness in a grand jury, trial, or other proceeding. This criterion goes beyond the level of assistance contemplated under the SEC's whistleblower program, which does not explicitly require in-court testimony by potential whistleblowers. This criterion also creates the possibility that a company's employees may be actively testifying in grand jury proceedings with the hope of a whistleblower award, before the company even becomes aware of the alleged misconduct.

What Outcome Must Result?

The whistleblower's information must lead to successful criminal or civil forfeiture exceeding $1 million in net proceeds to qualify for a potential award. "Net proceeds" is defined as the forfeited funds less the costs and expenses of forfeiture and any victim compensation. Notably, criminal and civil fines and restitution amounts do not count toward the $1 million threshold, nor are they considered in the calculation of the whistleblower award. Thus, the Pilot Program seems likely to pay out smaller awards than the SEC's and the Commodity Futures Trading Commission's (CFTC's) whistleblower programs, which also consider civil fines and other penalties in their award decisions. Moreover, although DOJ's statutory authority for granting awards only extends to information leading to forfeiture, many corporate enforcement resolutions with DOJ involve no or minimal forfeiture, potentially leaving whistleblowers with little or no actual award. It is important to watch to see if DOJ augments which monetary sanctions it seeks to impose in matters involving the prospect of a whistleblower reward. In addition, in cases involving a large number of victims who are entitled to compensation, there may be little leftover for whistleblowers.

What Is the Award Amount?

The decision to issue an award and the amount of the award are within DOJ's sole discretion, and the factors that DOJ says it

will use are fairly subjective. However, the Pilot Program guidance states a "presumption" that DOJ will award to the whistleblower 30 percent of the first $10 million in net proceeds forfeited, if it determines that an award is appropriate and none of the factors that may decrease an award (such as an individual's involvement in the conduct, unreasonable delay in reporting, or interference in an internal investigation) are present.

At the same time, the awards calculation appears likely to result in less lucrative awards than the whistleblower awards offered by other agencies. For instance, the policy makes clear that DOJ will fully compensate victims before paying a whistleblower award, meaning that whistleblowers may not see any reward at all in cases involving many victims or that result in the dissolution of the company. The Pilot Program also caps the award at 30 percent of the first $100 million forfeited and 5 percent of the next $400 million, for a maximum award of $50 million—a fraction of the largest awards that have been disbursed under the SEC's and the CFTC's whistleblower programs. And the Pilot Program uses a "net proceeds forfeited" amount to both determine eligibility for an award and to calculate the amount of the award, whereas the SEC and the CFTC use a total monetary sanctions amount that includes any civil penalty.

Discretionary Awards Scheme with Incentives—But No Requirements—for Internal Reporting to a Company

The Pilot Program identifies factors that may increase or decrease the award amount. Perhaps most relevant to companies, the Pilot Program embeds factors meant to encourage internal reporting to companies' compliance functions before or in parallel with reporting to DOJ. For instance, as part of its determination of the award amount, the Department will assess whether the conduct was reported to the company and whether the whistleblower, or the whistleblower's attorney, participated in internal compliance systems. This includes whether the whistleblower timely reported the conduct through the company's internal reporting mechanisms and whether the whistleblower assisted in any internal investigation concerning the reported conduct. On the other side of the ledger, the award may be decreased if the whistleblower interfered in any internal investigation of the issue.

These factors, while clearly intended to incentivize whistleblowers to work through internal compliance processes, apply only to a potential award increase or decrease and are not used to determine whether the whistleblower receives an award. In other words, under the Pilot Program's terms, whistleblowers may still receive an award if they do not report or cooperate through the companies' internal mechanisms. Whether DOJ's suggestion that it will increase the award size for whistleblowers who internally report is enough to influence reporter behavior is an open question, as the Pilot Program does not quantify how much of an impact internal reporting or cooperation in an internal investigation will have on the award. But these factors reflect an apparent effort to structure the Pilot Program in a way that does not completely undermine internal reporting and participation in companies' internal investigations and adds a measure of deference by DOJ to companies' internal reporting mechanisms and compliance functions.

One Hundred Twenty–Day Window for Companies to Disclose Internal Reports and Retain Eligibility for Voluntary Self-Disclosure Credit Under the Criminal Division's CEP

Complementing the Pilot Program, the Criminal Division also announced a safe harbor of sorts for companies receiving allegations from a whistleblower through its internal reporting channels. Specifically, a new Temporary Amendment to the Criminal Division's CEP (the Temporary Amendment) provides a 120-day window for companies to disclose whistleblower reports to the "Department" and still qualify for a presumption of a declination with disgorgement, even if the whistleblower has already gone to the Department. This policy shift allows companies to disclose to the Department conduct that the company learned from a whistleblower without having to be overly concerned that a whistleblower front-ran the disclosure to DOJ and thereby jeopardized the company's ability to qualify for voluntary self-disclosure credit from the Criminal Division. The Temporary Amendment did not amend the CEP's requirement that companies "pay all disgorgement/forfeiture" to qualify for a declination.

The Temporary Amendment represents a significant revision to the CEP, which previously provided for a presumed declination with

disgorgement only if companies voluntarily self-disclosed criminal conduct to the Criminal Division, the disclosure was "reasonably prompt," and the disclosure occurred prior to an imminent threat of disclosure or government investigation. Implicitly, companies had to be first in the door, without a risk of disclosure pushing them through the door. Now, companies that receive a whistleblower report may still receive voluntary self-disclosure credit from the Criminal Division if they disclose the allegation to the Department within 120 days of learning it, even if the whistleblower has already shared the allegation with the Department, and even if additional whistleblowers have come forward in the meantime. The upshot for companies is that, in connection with matters that might be disclosed to the Department and fall under the Criminal Division's purview, they have some degree of breathing room to investigate allegations and make a disclosure decision without worrying about being front run by reporters or worrying about additional whistleblowers coming forward, including those who might learn of the allegations through the company's investigation.

At the same time, the Criminal Division's Temporary Amendment creates some ambiguity in requiring that a company "meets the other requirements for voluntary self-disclosure and presumption of a declination under the [CEP]" in order to qualify for a presumption of a declination. As a threshold matter, the CEP required that disclosures be made to the Criminal Division to qualify for the benefits afforded by the CEP, while the Temporary Amendment will count as qualifying any self-disclosure to the Department that otherwise meets the Temporary Amendment's requirements. It is unclear what policy prerogatives would justify this apparent dissonance between the CEP and the Temporary Amendment. The upshot is that companies relying on the Temporary Amendment apparently should not be precluded from obtaining voluntary self-disclosure credit from the Criminal Division if they first disclose a matter to another DOJ component, removing the chance of a foot fault in this one circumstance.

It does seem clear that the 120-day window supplants the CEP's requirement for companies to disclose conduct to the Criminal Division within a "reasonably prompt time" after learning of it and removes or reduces the "burden . . . on the company to demonstrate timeliness." But does a disclosure by the company to DOJ within 120 days of receiving a whistleblower report also replace the separate requirement that the voluntary disclosure occur "prior

to an imminent threat of disclosure or government investigation," potentially including disclosure to the press? And if not, does an internal whistleblower report indicating that the whistleblower will go to DOJ or the media concurrently with the internal disclosure, or on a date soon thereafter, constitute an "imminent threat of disclosure"?

Separately, the Criminal Division's Temporary Amendment states that the 120-day window relates to cases otherwise qualifying for a presumption of a declination. But what about cases that do not qualify for the presumption for other reasons, such as the presence of aggravating circumstances? Can disclosure within 120 days also qualify as "immediate" disclosure necessary to receive a discretionary declination from the Criminal Division if aggravating circumstances are present, or is some shorter window expected or required?[6]

Time will tell how the Criminal Division resolves these nuances, ambiguities, and related questions, but the policy prerogatives behind creating the 120-day safe harbor suggest that DOJ should credit companies that timely come forward in response to whistleblower allegations.

So far, the Criminal Division is the only DOJ component to amend its voluntary self-disclosure policy in light of the Pilot Program. The Criminal Division being at the leading edge here is perhaps not surprising given that it has been at the forefront of Department policymaking in the voluntary self-disclosure space and has the most mature voluntary self-disclosure program. But other components may want to consider how their programs overlap with the Pilot Program.

The United States Attorneys' Offices Voluntary Self-Disclosure Policy,[7] in particular, deems a company's report to be a voluntary self-disclosure only if it occurred "prior to the misconduct being . . . known to the government." And the Civil Division's Consumer Protection Branch, which prosecutes several of the healthcare offenses covered by the Pilot Program, has not amended its Voluntary Self-Disclosure Policy for Business Organizations following the release of the Pilot Program.[8] The upshot is that companies confronted with whistleblower concerns may face drastically different enforcement outcomes related to conduct raised by whistleblowers depending on which component of DOJ is prosecuting the case. In creating this disparity, the Pilot Program and the Criminal Division's Temporary Amendment threaten to thwart the consistency that DOJ had been

seeking in its push for all Department components to implement voluntary self-disclosure policies.

A Race Against the Clock, But Not to Be "First in the Door"

The incentives for whistleblowers to report internally and the 120-day window for companies to disclose reported misconduct to the Department and still qualify for a presumption of a declination with disgorgement represent significant changes relative to the Pilot Program outline that DAG Monaco laid out in March. In her preview of the Pilot Program, DAG Monaco articulated a "first in the door" paradigm whereby corporate defendants and whistleblowers alike would have to "tell us something we didn't already know" in order to receive some benefit. The finalized Pilot Program departs from that principle and creates "room for credit to be shared," which many hoped would be the case, if both the whistleblower and company bring the allegations to DOJ. Still, the fact remains that internal reporters are now financially incentivized to also report potential misconduct to DOJ. Likewise, companies facing a weighty self-disclosure decision must consider the possibility that reporters have concurrently disclosed the misconduct to DOJ in light of the Pilot Program's incentives, potentially raising the stakes for a decision not to disclose.

Beyond its particular applicability in relation to the Pilot Program, the 120-day safe harbor feature in the Criminal Division's Temporary Amendment could set a standard—at least informally—for what constitutes "prompt" disclosure within the Criminal Division and potentially across the Department. The Department's enforcement programs and voluntary self-disclosure policies set various timeframes for companies to disclose, and address, wrongdoing.

For example, the Mergers and Acquisitions (M&A) Safe Harbor Policy[9] sets a 180-day window to self-disclose wrongdoing at an acquired company; the Justice Manual defines[10] "voluntary self-disclosure" for all components to require "promptly" disclosing misconduct; and the CEP calls for "reasonably prompt" disclosure after a company learns of wrongdoing. In cases involving whistleblowers, at least, the latter requirement has now been defined within the Criminal Division as within 120 days. But what of cases not

involving whistleblowers? The Department has not changed the "reasonably prompt disclosure" requirement for non-whistleblower cases, but companies and counsel may reasonably view 120 days as the standard there as well. And it stands to reason that the Criminal Division imposed a more stringent standard here than in the M&A Safe Harbor Policy because companies do not always have the same ready access to information in the acquisition context.

Looking Ahead

The Pilot Program follows in the footsteps of robust whistleblower award programs at other enforcement agencies and in other statutory contexts, and it signals DOJ's openness to making such a program a permanent part of its enforcement strategy.

The next three years may provide answers to a number of questions that remain with respect to the Pilot Program's design and function, including:

- How the Pilot Program's details—which, as mentioned, differ somewhat from other whistleblower programs'—will affect DOJ's ability to attract new tips, and whether DOJ, which currently lacks a dedicated Office of the Whistleblower, will devote the necessary resources to process, investigate, and prosecute a potential influx of new tips;
- Whether the Pilot Program's award calculation—which is discretionary, calculated based on the "net proceeds forfeited," only paid out after DOJ has fully compensated victims, and, unlike the SEC's and CFTC's programs, capped at $50 million—will provide sufficient incentives to attract whistleblowers;
- Whether the Pilot Program and the Temporary Amendment—which are the latest in a long run of new corporate enforcement policies and programs from DOJ and the Criminal Division over the past several years and introduce a further degree of inconsistency in DOJ components' treatment of voluntary self-disclosures—will risk policy fatigue and confusion; and
- Whether companies will receive voluntary self-disclosure credit under the Temporary Amendment for disclosures made prior to August 1, 2024, in light of the relevant policy

> prerogatives and the Criminal Division's history of issuing declinations to companies that voluntarily self-disclosed before a voluntary self-disclosure program went into effect.

Still, a couple of points are clear. First, companies are more incentivized than ever to build out their compliance and investigations capabilities to promptly conduct an initial investigation of inbound reports of wrongdoing and consider whether to disclose them to DOJ—and to do so within 120 days. The newly increased risk that an internal reporter may have disclosed the allegations to the Department adds additional considerations to the self-disclosure calculus, even if the 120-day window provides some breathing room, for matters that would be within the Criminal Division's purview, to conduct a preliminary investigation of the issues. And second, companies have an even greater incentive to ensure that their internal reporting systems are known and accessible to employees, in order to give whistleblowers every opportunity to disclose issues internally before or at least concurrently with going to the government. By doing so, companies will maximize their chances of positioning themselves to obtain a presumption of a declination if they choose to self-disclose.

Notes

* The authors, attorneys with Covington & Burling LLP, may be contacted at sfagell@cov.com, astudner@cov.com, athompson@cov.com, and bwoods@cov.com, respectively.

1. https://www.justice.gov/criminal/media/1362321/dl.
2. https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.
3. https://www.justice.gov/criminal/media/1362316/dl?inline.
4. https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline.
5. https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-speech-american.
6. Under the CEP, cases that do not qualify for a presumption of a declination with disgorgement due to aggravating factors, such as involvement by company executives in the misconduct, significant profits from the misconduct, or recidivism, may still, at the Criminal Division's discretion, result in a discretionary declination with disgorgement if the company demonstrates that it: (1) "immediately" voluntarily self-disclosed upon becoming aware of the allegation of misconduct; (2) at the time of the misconduct and the

voluntary self-disclosure, had an effective compliance program and system of internal accounting controls, which enabled identification of misconduct and led to the voluntary self-disclosure; and (3) engaged in "extraordinary" cooperation and remediation. Other DOJ components' self-disclosure policies, do not articulate a presumptive path to receiving a declination or specific criteria making companies eligible for either a presumptive or discretionary declination with disgorgement.

7. https://www.justice.gov/usao-edny/press-release/file/1569406/dl.
8. https://www.justice.gov/civil/media/1277181/dl.
9. https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.
10. https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.900.