March 22, 2024

VIA E-MAIL

Andrew Bruck, Chief of Staff, Associate Deputy Attorney General
Molly Moeser, Acting Chief, Money Laundering and Asset Recovery Section
Brent Wible, Acting Senior Counselor, Office of the Assistant Attorney General
Kevin Driscoll, Deputy Assistant Attorney General
Lisa Miller, Deputy Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Bruck, Ms. Moeser, Mr. Wible, Mr. Driscoll, and Ms. Miller:

We are the leadership and constituents of The Anti-Fraud Coalition (“TAF Coalition”). Representatives of TAF Coalition have been intimately involved in both the formation of and the revisions to the various whistleblower programs promulgated by the SEC, CFTC, FinCEN and the Department of Justice. We are pleased to know that the Department is considering using its authority under 28 U.S.C. § 524 (c)(1)(C) to create a whistleblower program.

We write to provide our thoughts on how to successfully structure a whistleblower program of the sort contemplated by the Department. We thank you for the opportunity to provide input into your process.

The Current Outlines of the Department’s Contemplated Whistleblower Program

Based on publicly disclosed information by the Department we understand the following:

- The Department is creating a “targeted [whistleblower] program”;
- The Department currently plans to compensate whistleblowers only after all victims have been fully compensated;
- Only whistleblowers who submit truthful information not already known to the Department will be entitled to receive awards;
- Only whistleblowers not involved in the criminal activity itself will receive awards; and
- The Department will only offer payments in cases where there is not an already existing financial disclosure incentive – including qui tam or another federal whistleblower program.

This information is taken from the recent speech of Lisa Monaco, the Deputy Attorney General of the Department. See https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-
delivers-keynote-remarks-american-bar-associations. This position was updated in a subsequent speech by Acting Assistant Attorney General Nicole M. Argentieri. In this speech, Ms. Argentieri described the Department’s contemplated whistleblower program in the following terms:

- The Department will be establishing a “pilot program”;
- In order to be considered for an award, “[y]ou have to be first in the door”;
- The Department’s current priorities for the whistleblower program are:
  - Criminal abuses of the US financial system;
  - Foreign corruption cases outside the jurisdiction of the SEC, including FCPA violations by non-issuers and violations of the recently enacted Foreign Extortion Prevention Act; and
  - Domestic corruption cases, especially involving illegal corporate payments to government officials.
- The SEC, CFTC and FINCEN whistleblower programs will be used as loose models;
- The Money Laundering and Asset Recovery Section (“MLARS”) will be at the forefront of the Department’s whistleblower program because the funds are likely to come from the forfeiture program overseen by MLARS.


**TAF Coalition’s Recommendations for a Successful Whistleblower Program**

Members of TAF Coalition have experience in helping amend provisions of the False Claims Act and the FinCEN whistleblower statutes as well as in establishing and improving the whistleblower programs established at the SEC and CFTC pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). We have learned from this experience that there are certain ingredients that can contribute to a whistleblower program’s overall success. The most important of these, in our view, are provided below:

- **INSTITUTIONAL BUY IN**
  - Even a well-crafted whistleblower program requires the prosecutors interacting with whistleblowers and their counsel to understand their value and support the mission of the program.
  - In order to have institutional buy in, there should be:
    - Continual support for the program throughout the agency, and particularly by leadership;
    - Education to prosecutors about the value of whistleblowers and how they can be incentivized; and
    - Education on how to protect whistleblowers from retaliation.

- **DEDICATED OFFICE/TEAM**
  - A whistleblower program cannot work effectively if there are not sufficient resources dedicated to overseeing and operating the program. A team dedicated to managing the whistleblower intake, protection, and awards is necessary to assure the viability of the program. Without this staff, the continuity and longevity of the program will be at risk. Our recommendation is that the program have a complete office or, at
minimum, a designated team of authorized Department employees whose primary purpose would be to oversee the whistleblower program.

- A dedicated office or team would be entrusted with ensuring the success of the whistleblower program by:
  - Facilitating proper and efficient intake and distribution of whistleblower information;
  - Protection of whistleblowers from retaliation;
  - Protecting whistleblower privacy; and
  - Ensuring fair compensation of whistleblowers.

- **DEDICATED FUNDS FOR THE PROGRAM AND WHISTLEBLOWERS**
  - A successful whistleblower program should have sufficient and dedicated funds both for itself and to pay whistleblowers:
  - There should be a fund or line item to pay for the Department staff overseeing the whistleblower program; and
  - There should be a clear way to pay the whistleblower from the awards obtained from the whistleblower’s information, or from a dedicated fund (see below).

- **UNAMBIGUOUS INCENTIVES FOR (AND DIRECTIVES TO PAY) WHISTLEBLOWERS**
  - At this point the Department has stated that whistleblowers will only be compensated after victims. We believe this provides a disincentive for whistleblowers to report misconduct. We recommend that:
    - The Department recognize when the whistleblower is responsible for helping obtain the funds that are being used to compensate victims it would be unfair and a disincentive to future whistleblowers if the Department compensated victims to the exclusion of the whistleblower;
    - A possible solution for this situation would be to establish a whistleblower fund that can provide whistleblower awards even in situations in which the victims are taking a large portion of the recovery.
  - Minimum award percentage of 10%.
    - TAF Coalition has found that when a whistleblower program has total discretion in making awards, there frequently is an adverse consequence to

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1. *See 15 U.S.C. § 78u–6(g)(1) (establishing Securities and Exchange Commission Investor Protection Fund); 17 CFR § 240.21F-14(a) (“Any award made pursuant to these rules will be paid from the Securities and Exchange Commission Investor Protection Fund”); 7 U.S.C. § 26(g)(1) (establishing Commodity Futures Trading Commission Customer Protection Fund); 17 CFR § 165.12(a) (“The Commission shall pay awards to whistleblowers from the Fund.”).*

2. *See 15 U.S.C. § 78u–6(g)(3)(A)(i) (“There shall be deposited into or credited to the Fund an amount equal to—any monetary sanction collected by the Commission”); 17 CFR § 165.12(b)(1) (“The Commission shall deposit into or credit to the Fund: Any monetary sanctions collected by the Commission”).*

3. *See 15 U.S.C. § 78u–6(g)(3)(A)(i) (“There shall be deposited into or credited to the Fund an amount equal to—any monetary sanction . . . not added to a disgorgement fund or other fund . . . or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder”); 17 CFR § 165.12(b)(1) (“The Commission shall deposit into or credit to the Fund: Any monetary sanctions collected by the Commission . . . that is not otherwise distributed . . . to victims of a violation of the Commodity Exchange Act”).*
whistleblower award amounts and timing, which in turn disincentivizes whistleblower applications;

- Such a negative dynamic can be overcome with clear, mandatory minimum awards for whistleblowers;
- Taking from the SEC and CFTC programs, we believe the minimum should be 10%.4

- Pay an award at the time that the DOJ takes the enforcement action (as the Department does in qui tam actions).
  - Delay and post-hoc evaluation of claims by Department personnel not involved in the prosecution of an action generally makes the awards assessment potentially more complicated and capricious;
  - The False Claims Act model, in which the prosecutors involved in the matter being resolved dictate which whistleblower is entitled to an award, is a way to promote speed, efficiency and certainty;
  - A concomitant point is that whistleblowers will then receive compensation from the funds derived from the matter at issue, rather than from some fund subsequently established;
  - The SEC and CFTC provide notices of covered actions (“NOCAs”) to alert potential whistleblowers that there is a claim5;
  - We do not believe that NOCAs are necessary when the relevant prosecutors are evaluating whether a whistleblower assisted with the matter;
  - This process is more efficient as NOCAs can result in frivolous award applications, which delays the award process.

- Existence of a coextensive whistleblower programs:
  - We believe a categorical exclusion of awards if a coextensive whistleblower program exists for an action is problematic;
  - A fair approach (perhaps one intended already by the Department) is to ensure that no “double dipping” from the same funds from two different programs occurs;
  - Absent double dipping, however, whistleblowers should be able to receive awards from two programs because they will not take a share of the same funds more than once.
  - As an example: simply because a FCPA claim is partially covered by an SEC action, excluding a whistleblower from an award if there is related conduct related to a non-issuing entity would dissuade whistleblowers from making disclosures about a significant Department enforcement priority.

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4 See 17 CFR § 240.21F-5(b) (“The amount will be at least 10 percent . . . of the monetary sanctions that the Commission and the other authorities are able to collect.”); 17 CFR § 165.8(a)(1) (“Whistleblower awards shall be in an aggregate amount equal to—Not less than 10 percent, in total, of what has been collected of the monetary sanctions”).

5 See 17 CFR § 240.21F-10(a) (“Whenever a Commission action results in monetary sanctions totaling more than $1,000,000, the Office of the Whistleblower will cause to be published on the Commission’s website a ‘Notice of Covered Action.’”); 17 CFR § 165.7(a) (“Whenever a Commission judicial or administrative action results in monetary sanctions totaling more than $1,000,000 . . . the Commission will publish on the Commission’s Web site a ‘Notice of Covered Action.’”).
Limitations on subsequent whistleblowers:

- The False Claims Act generally prevents subsequent whistleblowers from collecting awards;
- The SEC and CFTC whistleblower programs allow for subsequent whistleblowers to receive awards if they have significantly contributed to the outcome of a matter;  
- We believe that the SEC and CFTC have the right approach, which requires an evaluation of the scope of aid a particular whistleblower gave, regardless of whether the whistleblower was a first or subsequent filer;
- We also believe that limiting eligibility to disclosures of non-public information is too narrow. As with the SEC and CFTC programs, the Department could authorize awards for independent analysis of public information as such independent analysis has been highly effective in advancing the objectives of these other programs.

Award whistleblowers for internal whistleblowing that leads to a company’s disclosure to the DOJ resulting in forfeiture:

- The SEC and CFTC regulations provide avenues for whistleblowers to obtain awards through internal reporting;
- This policy is salutary for corporations as well as whistleblowers as it encourages internal reporting.

Culpable conduct of whistleblowers:

- Although it is understandable that the Department would not want to provide awards to those potentially involved in the reported criminal activity, we believe that the SEC and CFTC whistleblower programs strike the correct balance;
- These programs provide that as long as the whistleblowers are not found criminally liable for the conduct they report, then they are able to receive an

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6 See 17 CFR § 240.21F-4(c)(2) (whistleblower eligible for award where they “gave the Commission original information about conduct that was already under examination . . . and [the] submission significantly contributed to the success of the action”); 17 CFR § 165.2(i)(2) (whistleblower eligible for award where they “gave the Commission original information about conduct that was already under examination . . . and the whistleblower’s submission significantly contributed to the success of the action”).

7 See 17 CFR § 240.21F-4(b)(1), (3) (“original information” can be “derived from . . . [the whistleblower’s] independent analysis” where “analysis means [the whistleblower’s] examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public”); 17 CFR § 165.2(c), (k)(1) (“original information” can be “derived from . . . independent analysis of a whistleblower” where “‘analysis’ means the whistleblower’s examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public”).

8 See 17 CFR § 240.21F-4(c)(3) (whistleblower eligible for award where they “reported original information through an entity’s internal whistleblower, legal, or compliance procedures . . . [and] the entity later provided [the whistleblower’s] information to the Commission”); 17 CFR § 165.2(i)(3) (whistleblower eligible for award where they “reported original information through an entity’s internal whistleblower, legal, or compliance procedures . . . [and] the entity later provided the whistleblower’s information to the Commission”).

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award, although that award can be reduced discretionarily based on the level of contributory misconduct.\textsuperscript{9}

- A monetary threshold below $1 million may make sense to incentivize whistleblowers to come forward for egregious frauds.
- An ability to appeal a Department’s award decision:
  - All the successful whistleblower programs provide for some level of appeal of an agency’s decision on an award application\textsuperscript{10};
  - We believe that the Department should also allow for an appeal process for its program as it will demonstrate a commitment to fairness and provide incentives for Department personnel to prioritize accurate award decisions.

**PROTECTION OF WHISTLEBLOWERS, CONFIDENTIALITY/ANONYMITY**
- We believe, to the extent possible, the Department should adopt measures to protect whistleblowers;
  - We understand that this may be challenging in the context of criminal prosecutions in which prosecutors must comply with the discovery obligations established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). See Section 9-5.001 of the United States Attorney’s Manual describes the Department’s policy for disclosure of exculpatory and impeachment information;
  - However, to the extent that the Department only uses information to initiate actions but does not rely on the information for prosecuting a criminal defendant, and there is no exculpatory evidence, is it possible to protect a whistleblower from disclosure?
  - Likewise, as with the SEC and CFTC programs\textsuperscript{11}, can whistleblowers be allowed to retain counsel and file information anonymously?
    - Perhaps there could be anonymity until actual charging?
- We also believe that the Department should adopt an anti-impedance rule similar to Exchange Act Rule 21F-17, which makes illegal any attempt to prevent whistleblowers from providing good faith information to the agency.

**TIMING AND EFFICIENCIES**
- We believe, to the extent possible, the Department should adopt measures to ensure that award applications are processed in a timely manner. The whistleblower programs at the SEC and CFTC often grapple with longer than anticipated processing times concerning award applications. Possible solutions may be imposing shorter

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\textsuperscript{9} See 17 CFR § 240.21F-8(c)(3) (whistleblower ineligible for an award if “convicted of a criminal violation that is related to the . . . action . . . for which you otherwise could receive an award”); 17 CFR § 240.21F-6(b)(1) (listing “culpability” as a factor “that may decrease the amount of a whistleblower’s award”); 17 CFR § 165.6(a)(2) (whistleblower ineligible for an award if “convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award”); 17 CFR § 165.9(c)(1) (listing “culpability” as a factor “that may decrease the amount of a whistleblower’s award”).

\textsuperscript{10} See 17 CFR § 240.21F-13 (regarding appeals); 17 CFR § 165.13 (same).

\textsuperscript{11} See 17 CFR § 240.21F-7(b) (regarding submitting information anonymously); 17 CFR § 165.4(b) (same).
time periods in the rules themselves and having deadlines, at least aspirational in nature, to help ensure that matters are handled expeditiously.

Thank you again for your consideration. Our team at TAF Coalition is happy to assist your rulemaking process in any way that we can.

Sincerely,

 /s/ Jacklyn DeMar
Jacklyn DeMar
TAF Coalition