

**Davis Polk**

# **DOJ's new whistleblower policies and their impact on companies**

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# Introductions



**Greg D. Andres, Partner**

Greg is co-head of our White Collar Defense & Investigations practice and one of *Benchmark Litigation's* "Top 100 Trial Lawyers." He focuses on white collar defense, congressional investigations, complex civil litigation and crisis management. In forums including federal and state court, mediation and arbitration, Greg represents financial institutions, hedge funds, private equity firms and companies in multiple industries.

As a member of Special Counsel Robert Mueller's team in 2017-2019, Greg was the lead trial lawyer in the successful prosecution of Paul Manafort. Earlier, he was a federal prosecutor and a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice and the Chief of the Criminal Division in the U.S. Attorney's Office for the EDNY. At DOJ, Greg supervised the Department's FCPA practice nationwide.



**Uzo Asonye, Partner**

Uzo is a partner in Davis Polk's White Collar Defense & Investigations group, practicing in Washington, D.C. He has spent more than a decade prosecuting complex financial crimes and public corruption. He advises companies and individuals in connection with government, grand jury and internal investigations, and represents clients in criminal and civil trials. He has deep experience in matters involving insider trading, market manipulation, public corruption and other areas of financial fraud. He was previously the Acting Chief of the Financial Crimes and Public Corruption Unit in the U.S. Attorney's Office for the Eastern District of Virginia. Uzo served as a member of Special Counsel Robert Mueller's team in the successful prosecution of Paul Manafort.



**Daniel S. Kahn, Partner**

Dan represents clients in criminal and regulatory investigations and in civil and criminal trials. A former prosecutor, he served for 11 years in senior roles at the Department of Justice.

The *Wall Street Journal* described Dan as DOJ's "most recognizable expert on the Foreign Corrupt Practices Act." At DOJ, Dan was acting Deputy Assistant Attorney General of the Criminal Division and, earlier, head of the Fraud Section and FCPA Unit. He supervised matters involving FCPA violations, money laundering and sanctions violations, and fraud related to digital currency, fintechs, commodities, securities, healthcare and procurement.

Dan represents clients in internal investigations and government investigations, including corruption, healthcare fraud, securities fraud, commodities fraud, and compliance matters.



**Tatiana R. Martins, Partner**

Tatiana represents companies and individuals in white collar defense and regulatory enforcement matters and conducts internal investigations involving bribery, money laundering, financial frauds, criminal antitrust and workplace misconduct. She also advises companies and boards on governance and compliance.

An experienced trial lawyer, Tatiana has tried multiple cases to jury verdict. As an Assistant U.S. Attorney for the SDNY, she tried high-profile cases, including that of former N.Y.S. Assembly Speaker Sheldon Silver. As Chief of the SDNY Public Corruption Unit, she oversaw major cases against Michael D. Cohen, NCAA basketball coaches, and high-level U.N. officials.

# Agenda and Overview

1. DOJ Whistleblower Rewards Pilot Program
2. New Incentives
3. Award Criteria
4. Potential Impacts and Key Takeaways

# The DOJ Whistleblower Rewards Pilot Program

- On August 1, 2024, the DOJ launched its pilot program to pay individual whistleblowers who report significant corporate or financial misconduct to the DOJ
- Whistleblowers may receive a portion of any forfeiture obtained by the DOJ if the following are met:
  - 1) All victims are properly compensated
  - 2) The whistleblower submits truthful information not already known to the government
  - 3) The whistleblower is not meaningfully involved in the criminal activity
  - 4) The information is provided voluntarily and not in response to a government inquiry
  - 5) There is not an existing financial disclosure incentive such as qui tam or another federal whistleblower program available to the whistleblower
  - 6) The whistleblower cooperates in any subsequent investigation and civil or criminal action initiated by the DOJ

***“We’ll take them  
[whistleblowers] in any  
shape or form”***

**DOJ Foreign Corrupt Practices Unit  
Prosecutor**

## **New Incentives**

- **Financial incentives for any “new” information**
  - The DOJ is incentivizing whistleblowers to continue to deliver information to the DOJ even when matters are already under investigation
- **Acknowledging potentially fraudulent or frivolous tips**
  - The DOJ has noted that it *may* impose a permanent bar on a whistleblower for making fraudulent or frivolous reports but would only do so after three or more submissions that it finds hinder the effective and efficient operation of the program
- **Financial incentives for “minimal participants”**
  - Individuals with some culpability for the underlying conduct may still be eligible for financial awards

# Award Criteria

- Factors Related to Award Increases
  - The significance of the information the whistleblower provides
  - The level of assistance provided by the whistleblower
  - Whether the whistleblower reported the misconduct internally and any subsequent participation by the whistleblower in any internal investigation
- Factors Related to Award Decreases
  - The culpability of the whistleblower in the underlying action
  - Whether there was any unreasonable delay in reporting by the whistleblower
  - Whether the whistleblower interfered with the internal reporting channels in place or otherwise interfered with any related internal investigation
  - Whether the whistleblower held a management role over any of the individuals involved in the misconduct
- The information the whistleblower provides must lead to a successful civil or criminal forfeiture of at least \$1,000,000.
- The award is capped at 30% of the first \$100 million of the net proceeds forfeited and 5% of the net proceeds forfeited between \$100 million and \$500 million

# Amendment to the Corporate Enforcement Policy

- DOJ created a three-year “pilot amendment” to its Corporate Enforcement Policy governing corporate disclosures as part of its whistleblower rewards pilot program
- The amendment allows the companies to get the full benefits of the Corporate Enforcement Policy even if a whistleblower reports to the DOJ first, provided that:
  - The company self-reports to DOJ within 120 days of receiving the whistleblower report
  - The disclosure occurs before DOJ reaches out to the company

# Key Takeaways

- Continue to evaluate internal reporting functions to ensure that reports are being flagged and analyzed promptly
- Continue to evaluate how internal investigations are conducted and how to engage with the DOJ and other agencies in ongoing investigations
- Continue to monitor, assess, and enhance compliance programs in response to DOJ guidance regarding whistleblower protections and incentives