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# More Whistleblowing Coming: Is Your Compliance Program Ready?



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# Agenda

1. SEC Whistleblower Program
2. DOJ Whistleblower Program
3. DOJ Voluntary Self-Disclosure
  - Individuals
  - Companies
4. Updates to DOJ Corporate Compliance Program Guidance
5. Best Practices for Addressing Whistleblower Activity

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# Presenters



**William J. Stellmach**  
**Partner, Co-Chair of Investigations & Enforcement & White-Collar Defense**  
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William Stellmach is a Partner in Willkie's Washington, D.C. office and Co-Chair of the firm's Investigations & Enforcement and White-Collar Defense Groups, where he leads a team that is consistently recognized as one of the world's most elite investigations practices.

He is a distinguished former federal prosecutor and regulator, and previously served as head of the Fraud Section of the U.S. Department of Justice's Criminal Division as well as in the Division of Enforcement at the Securities and Exchange Commission.

Drawing on a unique range of experience, he regularly represents a broad range of corporations and their boards and executives in matters involving securities and commodities fraud, foreign bribery, economic sanctions, the False Claims Act, antitrust, ESG, and international money laundering. He also has extensive experience representing corporations and individuals outside the United States in cross-border inquiries and investigations.

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**Andrew English**  
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Andrew English is a Partner in the Investigations & Enforcement Group in Washington, D.C. representing corporations and individuals in a variety of criminal and civil enforcement actions, including enforcement actions brought by the Department of Justice and the Securities and Exchange Commission. He has significant experience conducting worldwide internal and government-facing investigations.

Andrew has represented companies and individuals under investigation for alleged Foreign Corrupt Practices Act (FCPA), money laundering, False Claims Act, Anti-Kickback Statute, Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), and Securities Exchange Act violations.

He also regularly counsels clients on the development of compliance programs, policies, and trainings, and assists companies with anti-corruption due diligence.

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# Presenters



**Samantha Prince**  
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Samantha G. Prince is an associate in the Litigation Department. Samantha regularly counsels clients on regulatory and compliance matters, and has represented companies and individuals in connection with SEC, DOJ, and other government inquiries, investigations, and enforcement actions.

She also has significant experience on complex commercial litigation, including securities class actions, shareholder derivative actions, and other complex business disputes.

In addition to her commercial practice, Samantha maintains an active pro bono practice, including representation of asylum seekers from around the world.

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# SEC Whistleblower Program Update

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# SEC Whistleblower Program Developments

- Since 2011, the SEC has paid more than **\$2.2 billion in 444 awards** to whistleblowers.
- The SEC's Office of the Whistleblower (OWB) 2024 annual report highlighted another record-breaking year for the SEC's whistleblower program in various respects:
  - Highest number of whistleblower tips ever (24,980)
    - But as SEC acknowledged, two individuals accounted for over 14,000 tips this year, and nearly 7,000 tips last year
  - The most Rule 21-F17 enforcement actions ever brought in a single year (11) and the largest penalty on record for a standalone violation of the whistleblower protection rule (\$18M)



U.S. SECURITIES AND  
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ABOUT | DIVISIONS & OFFICES | ENFORCEMENT | REGULATION | EDUCATION

Divisions and Offices

Office of the  
Whistleblower

Submit a Tip

Claim an Award

Final Orders

Whistleblower  
Protections

Resources

FAQs

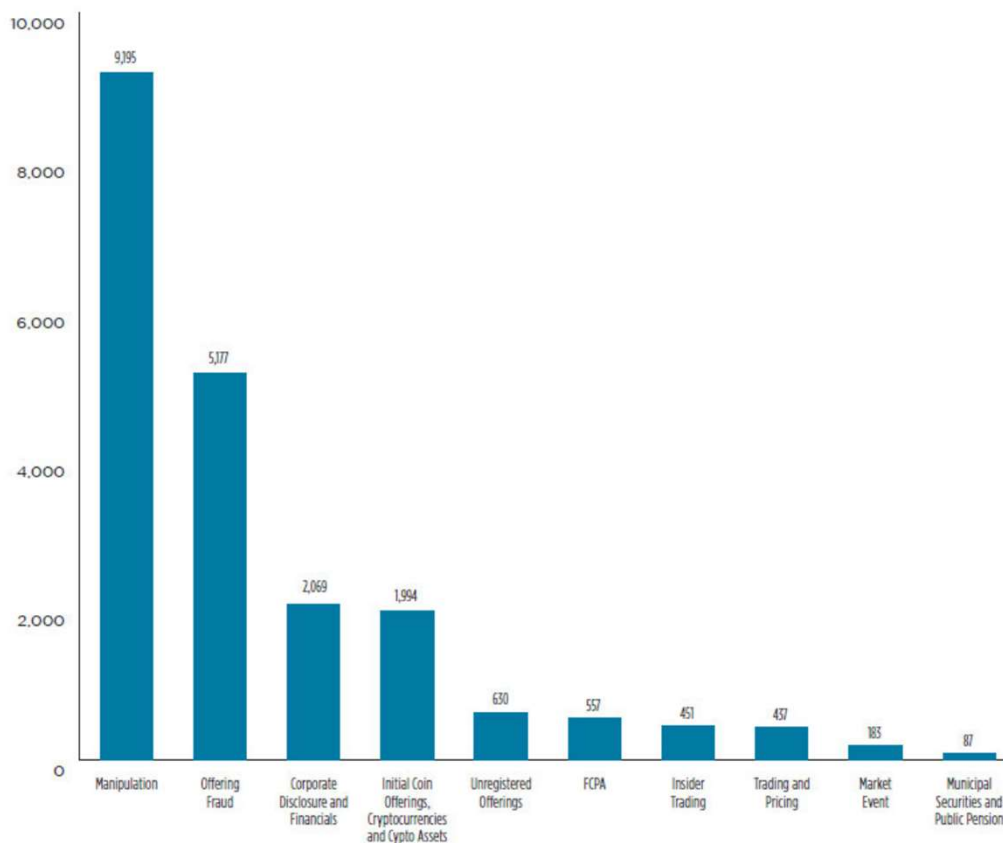
Office of the Whistleblower

Welcome



# Increase in Whistleblower Tips to SEC

- SEC fiscal year 2024 saw the most whistleblower tips ever (24,980)
  - **Nature of Whistleblower Allegations:** Manipulation (37%), Offering Fraud (21%), Initial Coin Offerings and Cryptocurrencies (8%), and Corporate Disclosures and Financials (8%).



## SEC Rule 21F-17(a): Protections Against Actions Taken to Impede Reporting

Conduct Found to Be Violative	Types of Documents in Scope
Restricting communication with the government	Employment agreements
Waivers of rights to monetary whistleblower awards	Separation agreements
Waivers affirming no complaints filed with any government agency	Confidentiality agreements/NDAs
Prohibiting government reporting	Retention agreements
	Settlement agreements
Limiting scope of permissible contact with government	Consulting agreements
Requiring waiver of whistleblower incentives	Internal policies/manuals/handbooks
	Training materials
	Client, customer, and investor agreements



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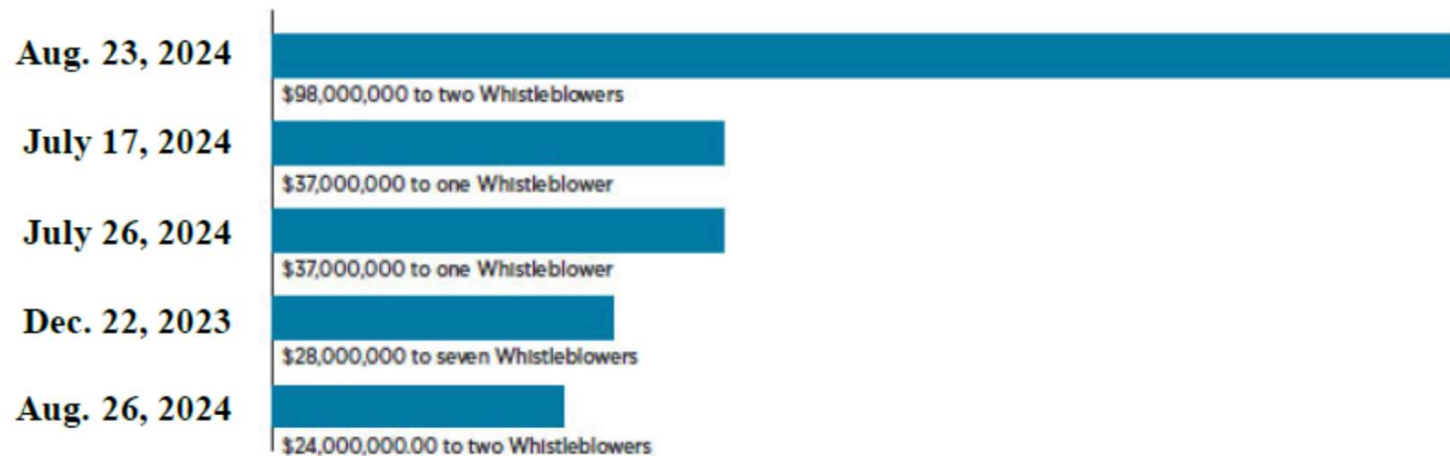
# SEC Whistleblower “Impeding” Cases

- **Recent Cases Based on Actions Taken to Impede Reporting**
  - ***In the Matter of Acadia Healthcare Company, Inc.*** (Sept. 9, 2024)
    - Public company charged for including language in 98 agreements, including employment agreements, separation agreements, retention agreements, and settlement agreements, that required employees to waive rights to monetary whistleblower awards. (\$1.4M)
  - ***In the Matter of JP Morgan Securities, LLC*** (Jan. 16, 2024)
    - Investment adviser charged for including language in settlement agreements with brokerage customers that required clients to keep the underlying facts of the settlement confidential. (\$18M).
  - ***GQG Partners LLC*** (Sept. 26, 2024)
    - Investment adviser charged for including language in non-disclosure agreements with 12 employment candidates and in a settlement agreement with a former employee affirming that they had not reported potential securities law violations to the SEC. (\$500K)

## FY '24 SEC Whistleblower Awards

- Third highest annual total in whistleblower awards (\$255M to 47 individual whistleblowers).
- Lowest maximum dollar amount to make it into the top 5 awards in FY 2024 was higher than the prior SEC fiscal year (\$24M in FY24 vs. \$20M in FY23)

**Top Five Awards of FY 2024<sup>4</sup> by Final Order**



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# DOJ Introduces Whistleblower Programs



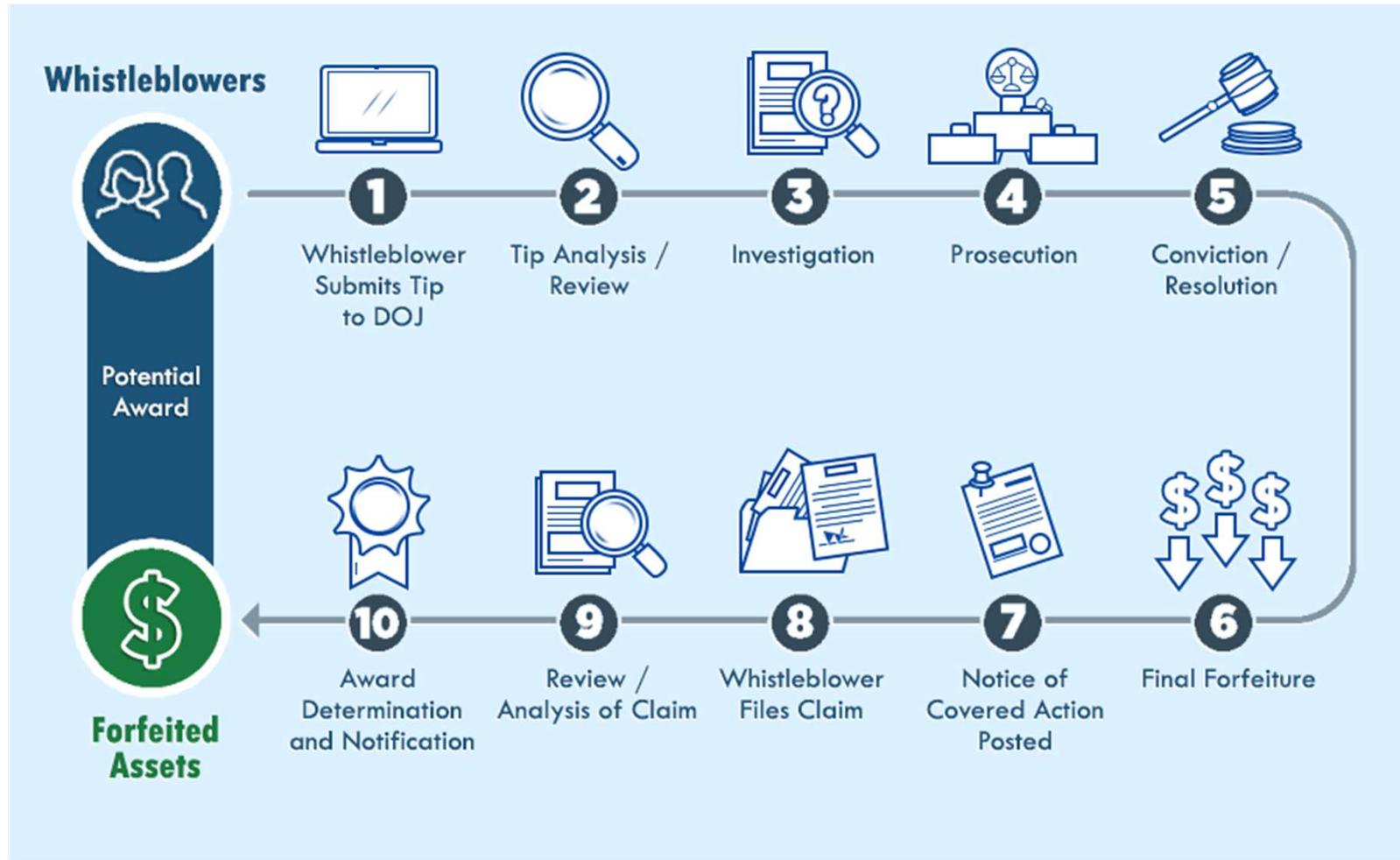
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## DOJ Whistleblower Programs

- In August 2024, the Department of Justice Criminal Division announced a new whistleblower program through which individuals can receive monetary awards
- Whistleblowers cannot have “meaningfully participated” in the criminal conduct
- Awards only given for reports of certain corporate misconduct:
  - Foreign and domestic bribery
  - Violations by financial institutions and their employees and agents
  - Health care-related frauds, excluding false claims submitted to gov’t insurance programs
    - False claims are already covered by a different DOJ rewards program
- Certain U.S. Attorneys’ Offices have launched their own programs, covering an even broader swath of misconduct, including:
  - Fraud
  - Money laundering
  - Theft of intellectual property
  - Obstruction of justice

# DOJ's Whistleblower Process

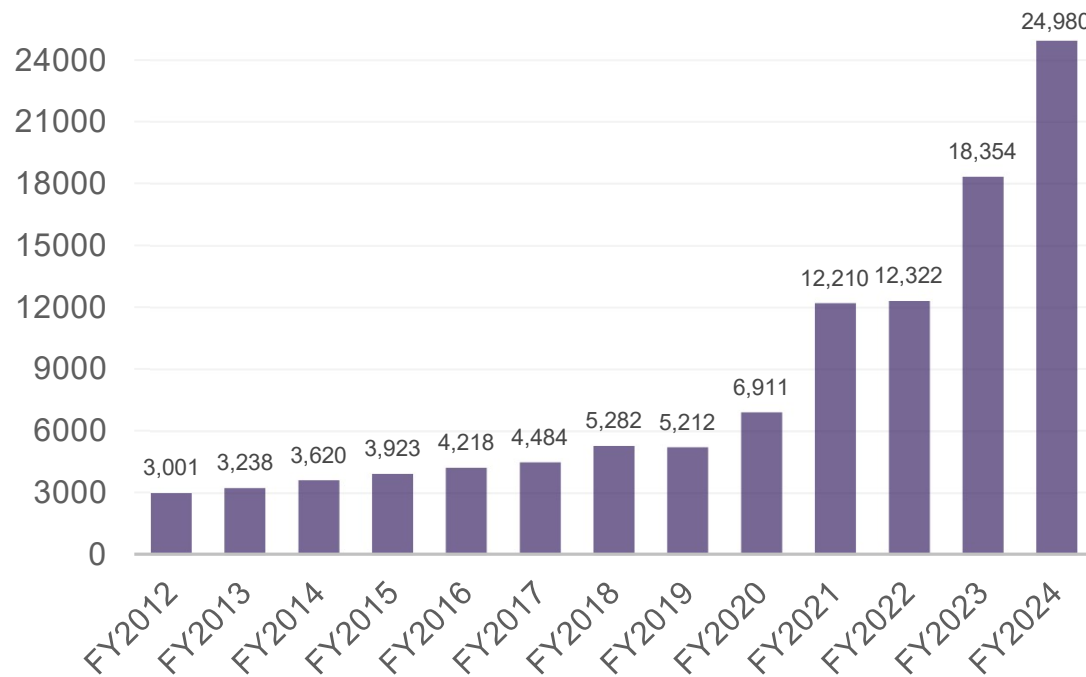


## DOJ Program vs. SEC and CFTC Programs

DOJ	SEC / CFTC
Covers bribery, healthcare fraud, and violations by banks	Covers federal securities law / Commodity Exchange Act
Violations by <u>any</u> company	Generally limited to violations by publicly-traded companies, registered investment companies and advisers, registered swap dealers
Up to 30% of forfeited assets	10% to 30% of monetary sanction
Not appealable	Limited appeals

# Expected Increase in Tips and Prosecution: Is SEC a Preview of What's to Come?

# of SEC Whistleblower Complaints by Fiscal Year



**\$6+ billion**

SEC RECOVERY FROM  
CASES AIDED BY  
WHISTLEBLOWERS

**\$2.2  
billion**

AWARDS PAID OUT TO  
WHISTLEBLOWERS

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# DOJ Voluntary Self-Disclosure Programs

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## DOJ Corporate Voluntary Disclosure Programs

- All DOJ components and offices that prosecute corporate crime have a corporate voluntary self-disclosure policy
- These policies adhere to three general principles, absent aggravating factors:
  - If the company (1) self-discloses, (2) fully cooperates, and (3) timely and appropriately remediates, DOJ will not seek a guilty plea
  - DOJ will not require the imposition of an independent compliance monitor *if* the company is found to have (1) implemented and (2) tested an effective compliance program
  - DOJ will apply a *presumption* in favor of declining prosecution if the company pays any disgorgement, forfeiture, and/or restitution arising from the misconduct
- Policies are designed to encourage corporate self-disclosure
- Companies that disclose may implicate other companies, triggering DOJ investigations

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## DOJ Cooperator Pilot Program

- In April 2024, the Department of Justice Criminal Division announced a “pilot program” through which individuals who disclose criminal violations of law may receive a non-prosecution agreement (NPA)
  - Generally applies to culpable individuals with certain exceptions. For example, the CEO/CFO of a company involved in misconduct and the ringleader of the criminal conduct are ineligible.
- Reporting individual must voluntarily provide original information, fully cooperate with the government, and pay restitution
- Only applies to certain misconduct:
  - Violations by financial institutions, their insiders, and agents
  - Violations related to the “integrity of financial markets”
  - Foreign or domestic bribery
  - Healthcare fraud involving companies with 50+ employees
  - Companies with 50+ employees defrauding the U.S. government

“ There’s a synergy to these disclosure programs: together, they create a multiplier effect that encourages both companies and individuals to tell us what they know — and to tell us as soon as they know it . . . .

Suddenly everyone is racing up the front steps, all hoping they’re the first to knock.

The result: these tips from whistleblowers . . . help us impose the most significant penalties on those who most deserve it. And as the costs of corporate crime go up, so do the benefits for companies that invest in effective compliance programs.

— Deputy Attorney General Lisa Monaco, August 1, 2024

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# Self-Disclosure to Enforcement Authorities?

- **Highly individualized and context-specific**
- DOJ, SEC, CFTC similar approach; DOJ more written guidance
- Benefits of Disclosure
  - DPA, NPA, or declination
  - More leeway in calculating appropriate penalty
  - Some greater ability to frame facts as presented in resolution



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# Self-Disclosure to Enforcement Authorities?

- Drawbacks of Disclosure
  - Enforcement authorities may not otherwise learn about conduct
  - Even without disclosure, significant benefits for cooperating and remediating
  - Collateral consequences (share price, follow-on litigation and investigations)



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# DOJ Compliance Program Guidance Updates

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# Highlights from DOJ's Latest Revisions to its Guidance on Compliance Programs

- DOJ's September 2024 revisions to its Evaluation of Corporate Compliance Programs memorandum maintains the overall structure of the previous edition
- The hallmarks of an effective compliance program also remain the same
- But, DOJ has added additional expectations within those hallmarks
  - Whistleblower Protections
    - Analysis of whether the company encourages or discourages reporting concerns
    - Companies should have an anti-retaliation policy and train employees on it
  - Risk Assessment
    - Greater emphasis on whether risk assessment program is “proactive” or “reactive” and that the risk assessment findings are incorporated into all aspects of the compliance program
    - Significant focus on the use of technology, and whether the company's risk assessment program appropriately manages risks created by the implementation of new technology, including AI

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# DOJ's Latest Revisions to its Guidance on Compliance Programs

## – Lessons Learned

- Similar to risk assessment, where the company engaged in past misconduct (or other companies in the same industry engaged in past misconduct), the “lessons learned” must be addressed through meaningful changes to all relevant aspects of the company’s compliance program

## – Testing, Metrics and Data Analytics

- Greater emphasis on testing all aspects of the effectiveness of the compliance program
- Greater emphasis on using data to monitor third-party risk
- Focus on companies using data analytics for a more efficient compliance program
- Analysis of whether the compliance program has access to sufficient data and receives the same resources, particularly technological resources, as the rest of the business
- Testing of the effectiveness and accuracy of technology used to assist the compliance program

## – M&A Compliance Integration

- Focus on companies having defined policies and procedures around post-acquisition integration
- Increased focus on integration of a company into the acquiring company’s compliance program

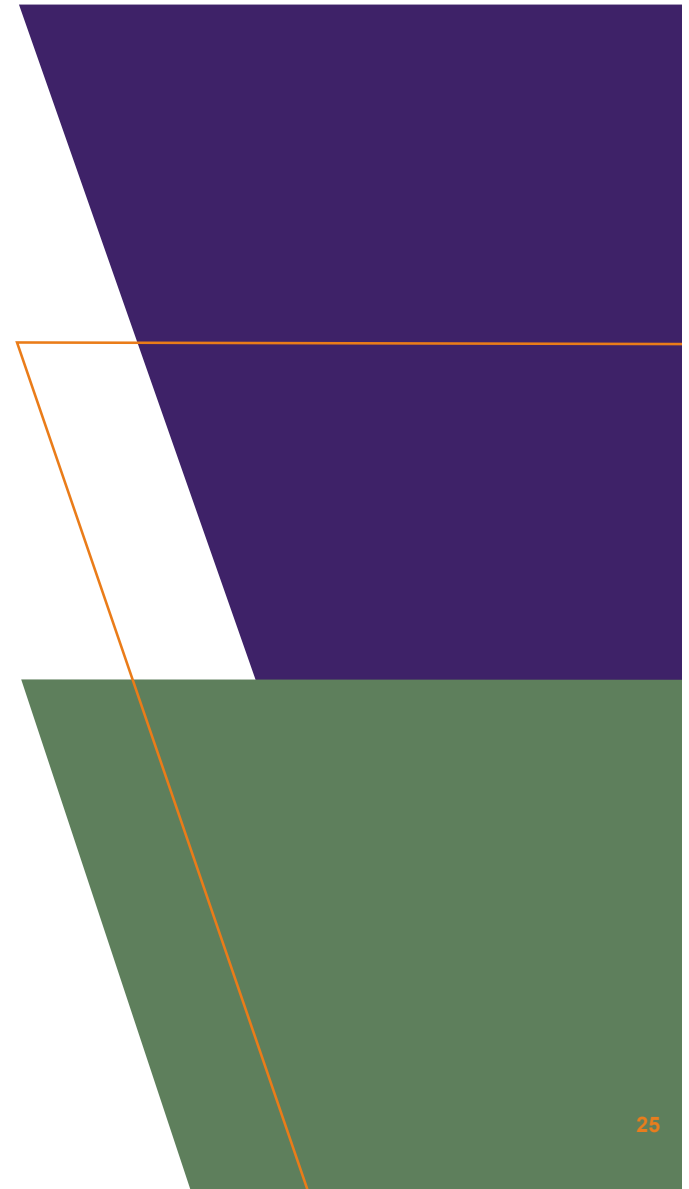


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# Best Practices for Addressing Whistleblower Activity



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# Requirements of a Whistleblower Program

- **Best Practices: Overview**

- Establish mechanisms, including confidential channels, and procedures for the submission of internal complaints
- Establish procedures for the receipt, retention, and appropriate review and response/remediation to complaints received
- Implement procedures to ensure employees are not retaliated against for making complaints



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# Addressing Whistleblower Activity

- (1) Maintain **reporting channels** that are independent, well-publicized, easy to access, and consistent.
- (2) Maintain **anonymity** of whistleblower.
- (3) Identify and **manage potential conflicts of interest**.
- (4) Adequately **train staff members to receive whistleblowing complaints**; determine a course of action; and competently manage any investigation, referral, or escalation.
- (5) Reports should be **investigated** promptly in accordance with local law.

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# Addressing Whistleblower Activity

- (6) Ensure **appropriate follow-up** to valid complaints.
- (7) Protect whistleblowers from retaliation. **No retaliation of any form.**
- (8) **Confidential** treatment.
- (9) Appropriate **oversight of the whistleblowing function** by senior management, internal and external auditors, and the Board of Directors.
- (10) A top-down **culture of support** for the whistleblowing function.
  - Do not impede reporting.
  - Ensure carve-out in confidentiality clauses in severance agreements.

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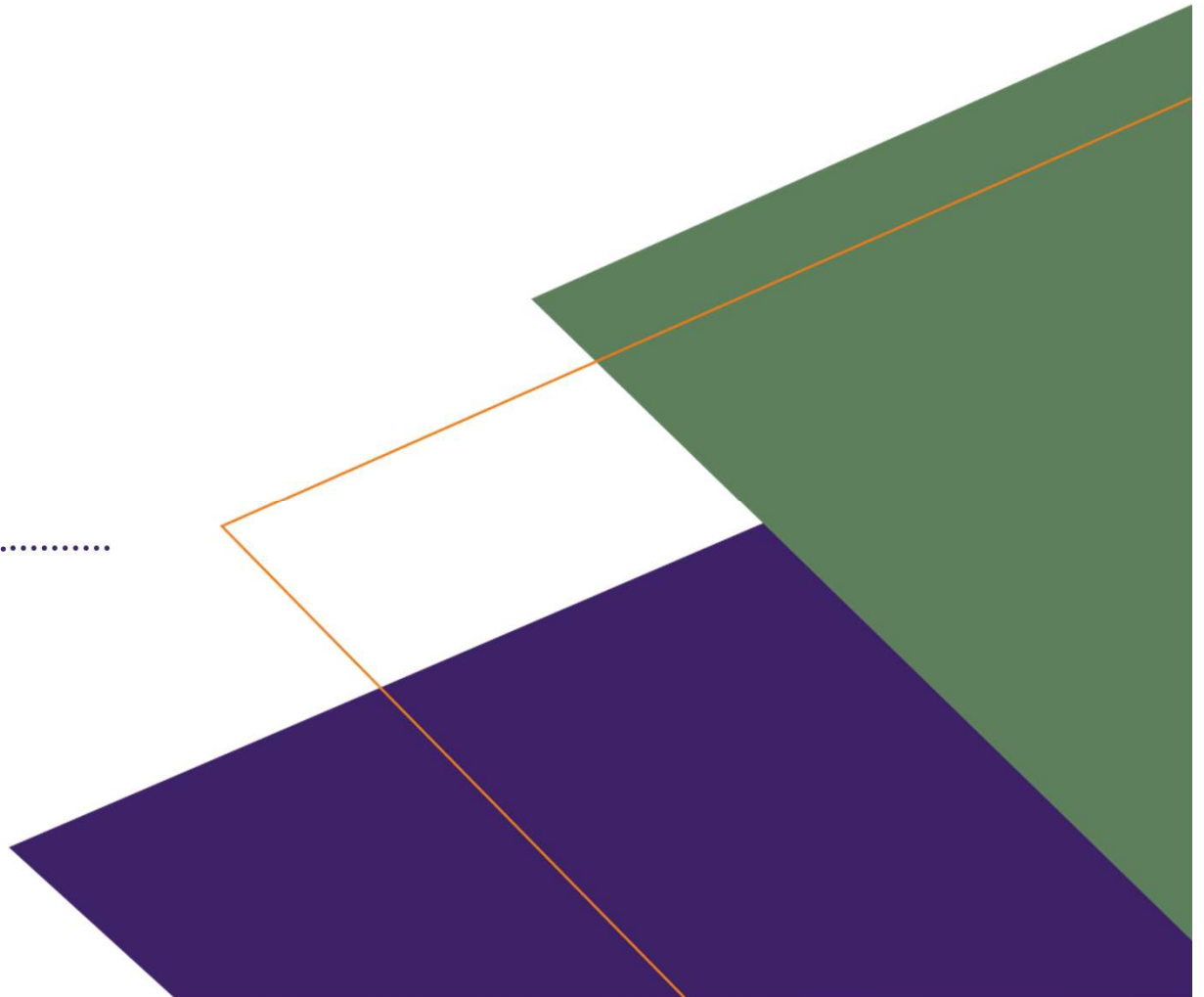
# Trump Administration Enforcement: Looking Ahead

- No crystal ball, but...
  - Volume of SEC whistleblower complaints likely to remain high
  - SEC enforcement likely to continue, but with different priorities
  - DOJ Whistleblower Pilot Program may expire; will depend on data re: effectiveness
  - DOJ enforcement priorities may shift, but certain areas may remain a focus (e.g., sanctions and export controls re: China)
  - Certain DOJ units have historically operated at largely the same levels, regardless of administration (e.g., FCPA)

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**Questions?**



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