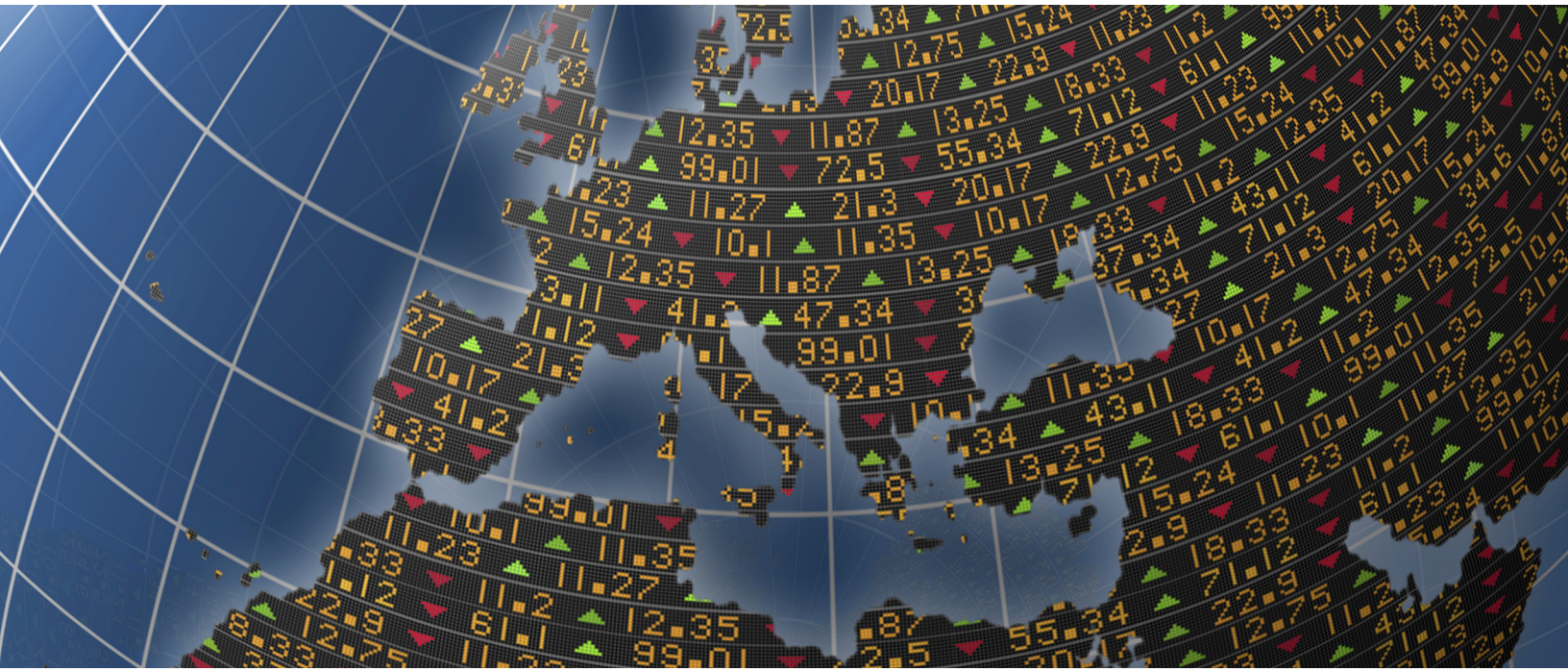
Debevoise & Plimpton

FCPA Update
March 2024
Volume 15
Number 8

FCPA Update

A Global Anti-Corruption Newsletter



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U.S. Department of Justice Announces Whistleblower Rewards Pilot Program

On March 7, 2024, Deputy Attorney General Lisa Monaco announced that the Department of Justice will launch a pilot program offering financial incentives for individual whistleblowers to report wrongdoing to DOJ.[1] This program will continue a longstanding effort by U.S. enforcement authorities to implement policies designed to incentivize voluntary disclosure of misconduct, and for the first time will create a DOJ counterpart to the whistleblower programs run by the SEC and other regulatory enforcement agencies such as the CFTC, IRS, and FinCEN.

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1. U.S. Dep't of Justice, "Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime" (Mar. 7, 2024), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations; *see also* U.S. Dep't of Justice, "Acting Assistant Attorney General Nicole M. Argentieri Delivers Keynote Speech at the American Bar Association's 39th National Institute on White Collar Crime" (Mar. 8, 2024), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-speech-american.

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In Monaco's announcement and subsequent remarks by Acting Assistant Attorney General Nicole M. Argentieri, DOJ outlined several key aspects of the new program, which will be launched later this year following a 90-day process to develop and implement the pilot:

- The core principle of the program is that "if an individual helps DOJ discover significant corporate or financial misconduct—otherwise unknown to [DOJ]—then the individual could qualify to receive a portion of the resulting forfeiture."
- Under DOJ's program, a whistleblower payment will be available only if certain conditions are met: (i) all victims have been appropriately compensated; (ii) the whistleblower provides truthful information not already known to DOJ; (iii) the whistleblower is not involved in the criminal activity; and (iv) no other relevant financial disclosure incentive exists (e.g., *qui tam* or other government whistleblower programs). The third condition contrasts significantly with the SEC's whistleblower program, under which a culpable individual is eligible to receive an award so long as they are not convicted of a criminal violation that is related to the matter for which they would receive an award. That said, an individual who was involved in criminal misconduct may decide to pursue a non-prosecution agreement through a program run by the U.S. Attorney's Office for the Southern District of New York or Northern District of California.[2]
- DOJ's goal is to use this program to "fill gaps" in existing whistleblower programs run by regulatory enforcement agencies.[3] Thus, DOJ is most interested in receiving information about: (i) criminal conduct involving the U.S. financial system; (ii) foreign corruption cases that are outside the SEC's jurisdiction, "including FCPA violations by non-issuers and violations of the recently enacted Foreign Extortion Prevention Act";[4] and (iii) domestic corruption cases. Argentieri's remarks placed particular emphasis on the development of foreign corruption cases.
- DOJ's Money Laundering and Asset Recovery Section will take a leading role in developing and administering the program, which, based on Monaco's and Argentieri's remarks, appears to be limited to cases involving forfeiture.

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2. Debevoise & Plimpton LLP, "SDNY Whistleblower Pilot Program Incentivizes Self-Disclosure and Cooperation" (Jan. 16, 2024), https://www.debevoise.com/insights/publications/2024/01/sdny-whistleblower-pilot-program-incentivizes.
3. Although Monaco stressed that this program is intended to "fill gaps" in other whistleblower programs and "create new incentives," she offered two hypothetical examples—of a startup paying bribes for regulatory approvals and doctoring its books and of a private equity firm whose CFO is forging loan documents—both of which likely would constitute securities violations that could be reported via the SEC's whistleblower program. Thus, it remains to be seen whether, and to what extent, DOJ's program overlaps with other whistleblower programs and whether it will lead to whistleblowers reporting to multiple enforcement authorities in order to maximize their chances of recovery.
4. Debevoise & Plimpton LLP, "Congress Passes Foreign Extortion Prevention Act, Targeting 'Demand Side' of Foreign Bribery" (Dec. 15, 2023), https://www.debevoise.com/insights/publications/2023/12/congress-passes-foreign-extortion-prevention-act.

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- Like the SEC and CFTC whistleblower programs, DOJ's program will allow whistleblower awards only in cases involving penalties above a certain monetary threshold—although the specific threshold has not yet been determined.

For companies, this pilot program will likely have several significant ramifications:

- Companies that identify potential criminal misconduct already face a highly complex and challenging decision in evaluating whether, and when, to self-report that conduct to DOJ. The launch of this pilot program adds to the complexity of that decision. We expect that the program will increase the likelihood of individual employees deciding to report the misconduct to DOJ without notifying their companies—which, in turn, would significantly decrease the benefits to the companies if they decide to self-report, as such benefits are available only if the government is not already aware of the misconduct. Thus, this program adds to the pressure on companies to self-report and to do so promptly.

"We expect that the program will increase the likelihood of individual employees deciding to report the misconduct to DOJ without notifying their companies—which, in turn, would significantly decrease the benefits to the companies if they decide to self-report …."

- This program—like whistleblower programs run by the SEC and other agencies—may create additional challenges for companies' efforts to encourage employees to report misconduct via internal channels, such as a compliance hotline. It is therefore all the more important for companies to ensure that their internal whistleblower systems are well designed and well understood by employees.
- Companies already face potential regulatory sanctions if they take actions that the SEC views as restricting employees from reporting misconduct to the SEC. But the launch of this program increases the risk that such actions could also result in serious criminal consequences. If DOJ adopts a position similar to the SEC, a company's interference with a whistleblower's communications with DOJ potentially could be deemed obstruction of justice.

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We expect to learn more details about this program in the coming weeks and months, and will be monitoring further developments closely.

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Australia Introduces Corporate Offence of Failure to Prevent Foreign Bribery

Following two unsuccessful attempts to update Australia's foreign bribery regime in 2017 and 2019, the Australian Parliament passed the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2024 (the "Bill") on February 29, 2024. This is a groundbreaking new anti-bribery law for Australia and will enter into force in the second half of this year, six months after it receives Royal Assent.

Prosecuting bribery committed abroad has been a major challenge for the Australian authorities; since the introduction of a foreign bribery offence in 1999, only seven individuals and three companies have been convicted. The Bill creates a new corporate criminal offence of failing to prevent bribery of a foreign public official, which is based on the UK Bribery Act 2010 ("UKBA"). It also widens the existing foreign bribery offence, including by removing the requirement that the foreign official must be influenced in the exercise of his or her duties and by covering situations where a personal advantage (rather than a business advantage) is sought.

New Failure to Prevent Foreign Bribery Corporate Offence

The failure to prevent foreign bribery offence applies where an "associate" of an Australian-incorporated company bribes a foreign public official for the profit or gain of the company. This is a strict liability (or in Australian terms, "absolute liability") offence – the prosecution does not need to prove that the company was at fault, or that it authorised or was involved in the misconduct. The Australian government has stated that it modelled the offence on UKBA section 7. However, unlike the UKBA, the Australian offence does not apply to bribery of domestic public officials or commercial parties, nor does it apply to foreign companies that carry on business in Australia.

An "associate" of the company is defined as an officer, employee, agent, or contractor; a subsidiary (including a foreign subsidiary); an entity controlled by the company; or anyone that otherwise performs services for or on behalf of the company. The "performs services for or on behalf of the company" test is a familiar one under the UKBA and potentially captures a broad range of third parties, but this requires a careful analysis of all the relevant circumstances in each case (including contractual proximity, control, supervision, and benefit), not simply the formal nature of the relationship between the company and the alleged associate.

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The company will have a complete defence where it can show, on the balance of probabilities, that it had "adequate procedures" in place to prevent foreign bribery by its associates, mirroring the terminology of the UKBA. The Explanatory Notes to the Bill indicate that what constitutes "adequate procedures" will be determined by the courts on a case-by-case basis, taking into account circumstances such as the nature of the company's business and the relevant sector and countries in which it operates. The government will publish guidance to assist companies in implementing adequate procedures. This is expected to be similar to the UKBA guidance, which sets out six key principles, namely: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training), and monitoring and review.

The maximum penalty under this offence is the greater of AUD 30 million, three times the value of the benefit received by the company, or 10 percent of its annual turnover.

Extension of Existing Foreign Bribery Offence

The Bill also makes a number of changes to the existing law prohibiting the bribery of foreign public officials by individuals or companies. It removes the requirement that the official must in fact be influenced in the exercise of his or her duties; it is sufficient that the defendant intended to influence a foreign public official improperly. Whether the influence is improper is a question of fact, however the court cannot take into account the fact that the benefit given by the defendant may be customary, necessary, or required in the situation, or that bribery is tolerated by the authorities in the relevant jurisdiction.

In addition, the foreign bribery offence (like UKBA section 6) was previously restricted to bribery intended to obtain or retain business or a business advantage. The Bill now captures bribery intended to obtain or retain a "personal advantage." This is not defined in the legislation, but the Explanatory Notes indicate that it is intended to be defined broadly to include the granting of visas or other residency benefits, and the bestowing of scholarships, personal titles or other honours.

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Deferred Prosecution Agreements

The absence of a Deferred Prosecution Agreement ("DPA") regime is the main difference between the Bill and the 2017 and 2019 proposals. Although there was support for the introduction of a DPA framework modelled on that of the United Kingdom, the Attorney-General noted in a speech to Parliament that it was premature to entertain the introduction of DPAs in Australia due to the "universal agreement" that the existing foreign bribery offence was "grossly inadequate." As such, the Attorney-General stated that a DPA scheme should "only be entertained after the measures in this Bill have been enacted and given time to work."

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FCPA Update is a publication of
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