Kohn, Kohn & Colapinto LLP

April 10, 2024

URGENT MATTER

The Honorable Lisa Monaco
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: DOJ-Run Whistleblower Rewards Program

Dear Ms. Monaco:

Thank you again for your commitment to set up a new DOJ-Run Whistleblower Rewards Program (Program). We had the opportunity to meet with the officials working on the Program in an extremely helpful "listening session." Based on that session we hereby supplement our initial letter and offer the following additional comments:

A. DOJ Asset Forfeiture Fund

Despite the weaknesses in the Asset Forfeiture Fund's whistleblower provisions, you have the opportunity to implement operating procedures that will conform the management of the Asset Forfeiture Fund to those of other highly successful whistleblower laws. By conforming the administration of the Fund to those successful laws, the Justice Department will significantly enhance the ability of whistleblowers to assist in the detection and prosecution of corrupt actors worldwide.

Conforming the management of the Fund to existing successful whistleblower laws is the single most important reform the Department can undertake to incentivize whistleblowers, deter frauds, and enhance accountability. It is a critical reform, given the relationship between the asset forfeiture law and the ability to maximize the impact of the anti-money laundering (AML) whistleblower law.

When considering whether to conform the Asset Forfeiture whistleblower law to successful whistleblowers laws such as the False Claims, Securities Exchange and Commodities Exchange Acts, and the IRS and AML whistleblower laws, it is very

important to keep in mind that Congress has already approved the "best practices" in all of these laws. For example, the AML whistleblower law was recently amended to ensure that all qualified whistleblowers obtain a minimum award of 10%. Congress' actions in approving the AML Whistleblower Protection Enhancement Act, which conformed the AML/sanctions law to the "best practice" of the award laws identified above, should guide the Department's actions in crafting the new DOJ whistleblower program.

The background to the amendments to the AML whistleblower law are helpful in understanding Congress' support for mandatory awards paid to qualified whistleblowers.

The original AML whistleblower law, passed on January 1, 2021, did not require the Secretary of Treasury to pay awards, and set no mandatory minimum. Like the forfeiture law, payment of awards was strictly discretionary. When Congress was made aware of the discretionary nature of the AML law, and how this was counter to the other highly successful whistleblower award laws, there was a timely and aggressive bi-partisan effort to fix the AML whistleblower law. On July 22, 2022, amendments to the AML law mandating a minimum award for all qualified whistleblowers was approved *unanimously* by the House Financial Services Committee, and the bill was "marked-up" for an immediate vote on the House floor.[1] The amendment made the award-granting requirements in the AML law identical to those in the Dodd-Frank Act.

In its report marking-up the AML amendments the House Financial Services Committee directly addressed this issue:

> To combat abuse of anti-money laundering (AML) laws and to bolster enforcement of Bank Secrecy Act (BSA) regulations, AMLA included a program that requires Treasury to pay awards to whistleblowers who provide original information leading to successful enforcement actions for violating the BSA and AML requirements.
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> As currently written in the statute, awards are capped at 25% with no minimum for a successful claim. According to the National Whistleblower Center, ''It is highly unlikely that persons with relevant information relating to illegal money laundering and financing terrorism will risk their livelihoods, reputations and the potential of high litigation costs without

[1] See https://www.congress.gov/bill/117th-congress/house-bill/7195

> reasonable financial assurances.'' Further, without a guaranteed fee-covering incentive, it was reported that lawyers who specialize in representing potential whistleblowers were declining the cases. This bill remedies this issue by ensuring that whistleblowers who reveal information on money laundering receive awards of 10% to 30% of the fines imposed due to their information.[3]

Thereafter, on December 8, 2022 the Senate unanimously approved a bill identical to the House bill.[4] The central reform of both the House and Senate bills was to make the payment of awards mandatory, thus conforming the AML whistleblower law to the key provisions in the False Claims Act, Dodd-Frank, and the IRS whistleblower laws.

Both the House and Senate sponsors of the AML Whistleblower Enhancement Act were provided extensive information and briefings on the critical importance of having a minimum award for qualified whistleblowers.

Thereafter, Congress took the time at the very end of the 117th Congress, in the midst of conflicting agendas and priorities, to unanimously work toward ensuring that the AML whistleblower law conformed to the Dodd-Frank Act inasmuch as awards to qualified whistleblowers would be mandatory, and within the range contained in Dodd-Frank (i.e. 10-30%). Based on the empirical data, and the opinion of experienced experts, and the overwhelming and unanimous bipartisan support for ensuring that the money laundering and sanctions whistleblower law worked, the AML Whistleblower Enhancement Act was attached to the 2022 federal budget (without opposition) and became law as part of the federal budget approved as the last action of the 117th Congress.

The actions of Congress in passing the AML Whistleblower Enhancement Act, combined with the empirical data demonstrating the effectiveness whistleblower award laws with a minimum payment of 10%, provides compelling support for the Department of Justice to follow these precedents when exercising its discretion to create a DOJ whistleblower program based on the Department's authority to pay awards under the Asset Forfeiture law.

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[3] House Rep. 117-423, online at https://www.congress.gov/117/crpt/hrpt423/CRPT-117hrpt423.pdf.

[4] See https://www.congress.gov/bill/117th-congress/senate-bill/3316/cosponsors

B. Concerns Regarding Awarding Culpable Whistleblowers can be Addressed without Prejudicing the Award Program

You expressed concern regarding compensating criminally culpable whistleblowers. As you know, Congress has addressed this concern in all of the successful whistleblower laws. Congress has empowered the courts and agencies with the authority to reduce or deny awards to culpable whistleblowers. But instead of taking a sledgehammer to these laws in a manner that would prevent very important and credible whistleblowers from stepping forward, Congress has taken a scalpel and carefully addressed this issue.

We strongly urge you to conform your regulations to those that Congress has repeatedly approved in every successful whistleblower award law, including the False Claims Act, Dodd-Frank (both the securities and commodities laws), the IRS, and most recently the AML laws.

A good model for addressing this issue can be found in both the False Claims and IRS whistleblower laws. These laws blanketly prevent culpable whistleblowers from obtaining any awards in certain circumstances and permit the courts or agencies to reduce the awards in other instances.

We recommend following the limits placed on culpable whistleblowers as established by Congress in the False Claims and IRS whistleblower laws. These criminal exclusions are set forth as follows:

<u>False Claims Act</u>

> Whether or not the Government proceeds with the action, if the court finds that the action was **brought by a person who planned and initiated the violation** of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, **reduce the share of the proceeds** of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the **person bringing the action is convicted of criminal conduct** arising from his or her role in the violation of section 3729, **that person shall be dismissed** from the civil action and shall not receive any share of the proceeds of the action.

> Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.[5]

IRS Whistleblower Law

> If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is **brought by an individual who planned and initiated the actions** that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office **may appropriately reduce such award**. **If such individual is convicted of criminal conduct** arising from the role described in the preceding sentence, the Whistleblower Office **shall deny any award**.[6]

Significantly, these provisions of law have not been controversial and have not led to any Congressional action to further restrict culpable whistleblowers from obtaining an award. The opposite is true. In Dodd-Frank, similar exclusions were approved by Congress in two separate whistleblower award laws (commodities and securities), and a similar provision was included in the AML whistleblower law.

The Justice Department should pay particular attention to how Congress addressed this issue – without any dissent whatsoever – in the AML whistleblower law. Not only is this the most recent example of Congress' intent on covering potentially culpable whistleblowers, but the AML whistleblower law was explicitly acknowledged and affirmed in the White House Strategy on Countering Corruption, an "all government" statement of policy and objectives.[7] This Strategy addressed both domestic law enforcement priorities of the United States *and* compelling national security interests. Both the Justice and Treasury Departments were consulted in drafting this Strategy.

The AML whistleblower law's criminal exclusion is consistent with that of the False Claims Act, Dodd-Frank, and IRS whistleblower laws. The AML Whistleblower Enhancement Act, which was debated in Congress as free-standing legislation, was approved unanimously by the U.S. Senate, approved (and marked-up) unanimously by the House Financial Services Committee, and ultimately attached as an amendment to the U.S. Budget without opposition. Congress did not use this amendment to change the criminal exclusion provision in the original AML law, and there was no criticism of

[5] 31 U.S. Code § 3730(d)(3)(emphasis added).

[6] 26 U.S.Code § 7623(b)(3)(emphasis added).

[7] See STRATEGIC OBJECTIVE 3.1: Enhance enforcement efforts https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf

that provision during all of the debates and discussions surrounding the AML Whistleblower Enhancement Act.

We strongly believe that the concerns you expressed regarding awarding potential criminals with financial awards have been properly addressed by the U.S. Congress on numerous occasions, and without opposition. The exclusions set forth in the IRS whistleblower law and False Claims Act provide your agency with the discretion it needs to reduce awards to those who planned and initiated violations of law, and provide you with authority to fully deny anyone convicted of these crimes from any compensations.

This compromise represents a balance that has been acceptable to Congress, whistleblowers, and experts in the area.

C. Mandatory Minimum Awards

As explained in our earlier letter, and outlined in part "A" of this letter, the Justice Department should exercise its discretion and establish procedures that *require* qualified whistleblowers to be paid a minimum award of 10% and a maximum award of 30% on monies placed in the Asset Forfeiture Fund. This is, unquestionably, the most important step that the Justice Department can take to use its current authorities in granting awards from the Asset Forfeiture Fund to whistleblowers.

As explained above, the original AML whistleblower law passed on January 1, 2021 vested discretion with the Secretary of Treasury regarding whether or not to pay an award. Unlike all other modern whistleblower laws, such as the Securities and Exchange Act, Commodity Exchange Act, False Claims Act, and IRS whistleblower laws, the original AML reward law, like the current Asset Forfeiture Fund whistleblower provision, did not require a mandatory minimum award. However, in December 2022, Congress corrected this grave defect in the AML law and conformed the award-granting authorities in the AML law to those of the other successful whistleblower laws.

The Department of Justice, by rule, regulation, or operating procedure, should likewise conform the Asset Forfeiture whistleblower provision to that of the AML and related laws. Support for this action is supported not only by the Congressional history behind the passage of the AML Whistleblower Enhancement Act, but by the history behind the other successful award laws.

Starting with the False Claims Act: the failure to require a minimum reward payment was one of the major problems with the 1943 version of the law, and was one of the major reforms approved by Congress in 1986. The 1943 law contained language that is substantially identical to the original discretionary AML whistleblower law. The failure to include a minimum reward in the 1943 version of the FCA was one of the principal reasons the law did not work. Billions were lost to frauds, many potential whistleblowers never filed any cases, and those that did were not paid.

The 1986 Senate Report explained why Congress was amending the law:

> *"The new percentages . . . create a guarantee that relators [i.e., whistleblowers] will receive at least some portion of the award if the litigation proves successful. Hearing witnesses who themselves had exposed fraud in Government contracting, expressed concern that current law fails to offer any security, financial or otherwise, to persons considering publicly exposing fraud.*
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> *"If a potential plaintiff reads the present statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds to the person who brought the action, the potential plaintiff may decide it is too risky to proceed in the face of a totally unpredictable recovery.*
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> *"The Committee acknowledges the risks and sacrifices of [whistleblowers] . . . The setting of such a definite amount is sensible . . . the Government will still receive up to 90 percent of the proceeds—substantially more than the zero percent it would have received had the person not brought the evidence of fraud.*[8]

Prior to the passage of the Dodd-Frank Act, the Securities and Exchange Commission (SEC) also had a fully discretionary whistleblower award law. The SEC's Inspector General's audit No. 474 found that in its 20-year history that discretionary law resulted in payments to only five whistleblowers, who collectively obtained only $159,537 in awards. The audit was highly critical and led to an outright repeal of the law. By contrast, since Dodd-Frank created the SEC Whistleblower Program, which mandates the payment of

[8] https://kkc.com/wp-content/uploads/2020/03/FCA_Senate-Judiciary-Committee-report_July-28-1986.compressed.pdf

awards to qualified whistleblowers, the Commission has awarded more than $1.9 billion to whistleblowers in the past fifteen years.

Like the current asset forfeiture whistleblower law, the SEC's old reward law did not require a minimum reward.[9] Because of the complete failure of the older SEC reward law, Congress repealed that law in its entirety in 2010. It was replaced by the current Dodd-Frank Act reward law. Like the 1986 amendments to the FCA, the DFA requires the SEC and CFTC to pay a minimum reward to all fully qualified whistleblowers.

If a whistleblower follows the law, and his or her disclosure triggers a successful enforcement action, the whistleblower is entitled to a minimum reward. This ensures that whistleblowers are not prejudiced by government officials who may simply believe that whistleblowers should not obtain significant rewards. Additionally, employees now understand that if they take the considerable risk of becoming a whistleblower, they will be entitled to a minimum sum certain. Without this guarantee, whistleblower reward laws do not work, and do not fully incentivize potential informants to step forward.

Finally, the IRS' original whistleblower law was completely discretionary. The key reform to that law, enacted without opposition, once again made awards mandatory for qualified whistleblowers. Under the 2006 amendments to the IRS law, the Treasury Department is required to pay qualified whistleblowers a minimum award of 15%.

The actions of Congress provide strong and compelling support for the Justice Department to follow these precedents – all of which were overwhelmingly approved by Congress – and conform the new DOJ program to the proven award practices under the other successful award laws.

D. Whistleblower Office

A successful whistleblower program needs a dedicated Whistleblower Office. Numerous functions, such as coordinating intakes, processing applications, providing training and advice to various department components, and interacting with other agencies working with the same whistleblowers that are participating in the new DOJ program, all will benefit from having a dedicated office. Given the large number of whistleblowers using the SEC's Dodd-Frank whistleblower program (i.e. 18,000 in FY 2023), a Whistleblower Office is a necessary component to a successful program.

[9] See, Public Law 100-704 (Nov. 18, 1988).

E. Confidentiality

The Asset Forfeiture whistleblower law does not require the Justice Department to accept confidential or anonymous submissions. However, the AML whistleblower law does require the Justice Department to accept initial complaints alleging violations of money laundering or sanctions on a confidential or anonymous basis.

Regardless of the statutory provisions that may be applicable to the new DOJ program, the arguments for providing whistleblowers who report violations of law that could result in asset forfeiture clearly justify granting whistleblowers the maximum confidentiality permitted under law. Many of those providing information on asset forfeiture will be non-U.S. persons and/or in highly vulnerable positions, especially given the persons they may be reporting to the U.S. government.

We request that the Justice Department carefully consider the benefits to permitting confidential and/or anonymous reporting under the asset forfeiture program, and create procedures and rules that maximize this filing method.

F. Conclusion

Thank you in advance for taking the time to listen to stakeholders in crafting this very significant program. The program you envision has the potential to have significant impact on combatting fraud and corruption. Likewise, if properly implemented it will greatly enhance the national security of the United States consistent with the objectives and policies of the United States Strategy Countering Corruption.

Please do not hesitate to contact us if you have any questions.

Respectfully submitted,

/s/

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