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Submitted Via Email

Ms. Nicole M. Argentieri
Acting Assistant Attorney General
U.S. Department of Justice
Criminal Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: DOJ Whistleblower Rewards Pilot Program

Dear Ms. Argentieri,

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Department of Justice's ("DOJ's") proposed whistleblower rewards pilot program (the "Pilot Program"). We understand the DOJ is seeking comments as it looks to further develop the Pilot Program, which was announced by Deputy Attorney General Lisa Monaco on March 7, 2024,[2] and we provide our initial comments herein.

In her March 7, 2024 speech, DAG Monaco announced that the DOJ was launching a "90-day sprint" to develop the Pilot Program with an intended formal start date later this year. DAG Monaco stated that the Pilot Program is intended to "fill gaps" in the existing frameworks of other federal whistleblower programs, particularly in the areas of foreign corruption cases outside the jurisdiction of the SEC, domestic corruption cases, and criminal abuses of the U.S. financial system. She also outlined some basic guardrails for receiving payments under the

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Deputy Attorney General Lisa O. Monaco, Remarks at the 39th Annual ABA 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 ("DAG Monaco's March 7 Remarks").

program, which would be limited to those who submit truthful information not already known to the government, are not involved in the criminal activity itself, and do not have an existing financial disclosure incentive under another federal whistleblower program.

SIFMA supports efforts to identify and address potential violations of federal laws and regulations that impact the financial sector, and we recognize the value of robust and effective whistleblower rules in accomplishing those goals. Other federal regulators in the financial sector already have established whistleblower programs, and SIFMA has generally supported their implementation, such as the program created at the Securities and Exchange Commission ("SEC").[3] Consistent with this position, SIFMA submits these comments concerning certain elements it believes the DOJ should consider as it further develops its Pilot Program.

I. The DOJ's Pilot Program Framework Should Be Harmonized with Existing Federal Whistleblower Programs

In her March 7 remarks, DAG Monaco expressly stated that the DOJ intends for the Pilot Program to "fill gaps" in existing federal whistleblower programs. To achieve that goal, SIFMA urges the DOJ to work carefully to harmonize the Pilot Program with—and to avoid creating a program that is contrary to the spirit of—existing whistleblower frameworks.

Financial services firms are currently subject to the federal whistleblower programs created by statute and administered by their primary regulators, including the SEC and CFTC (and potentially FinCEN in the near future). The IRS also has its own statutory whistleblower program. Notably, as the DOJ itself has recognized, these existing whistleblower programs have been highly effective in incentivizing reporting violations in the corporate sector. The SEC and CFTC's programs alone have received "thousands of tips, paid out many hundreds of millions of dollars, and disgorged billions in ill-gotten gains from corporate bad actors."[4] The agencies administering these programs (certainly in the case of the SEC and CFTC) over the past 15 years have accordingly developed experienced and effective offices to oversee and administer the programs, as well as specialized expertise in the areas they regulate. And, under both the SEC and CFTC whistleblower programs, a whistleblower who provides information that leads to a successful action by either of those agencies may also be eligible for an additional award if the same information leads to a related action by the DOJ, which provides ample incentives for

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[3] *See* Letter from Ira D. Hammerman, Executive Vice President and General Counsel, SIFMA, to Brent Fields, Secretary, SEC, re: Whistleblower Program Rules (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4373269-175549.pdf; Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA to Ms. Elizabeth Murphy, Secretary, SEC re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10/s73310-161.pdf.

[4] DAG Monaco's March 7 Remarks; *see also* SEC Office of the Whistleblower, Annual Report to Congress for Fiscal Year 2023, at pp. 1, 5 (Nov. 14, 2023), https://www.sec.gov/files/fy23-annual-report.pdf (stating that the SEC has awarded more than $1.9 billion to individual whistleblowers and received over 82,000 whistleblower tips since the inception of its whistleblower program in 2011); CFTC, 2023 Annual Report on the Whistleblower Program & Customer Education Initiatives, at p. 3 (Oct. 2023) (stating that the CFTC has awarded almost $350 million since the inception of its whistleblower program in FY 2010 and received 1,530 whistleblower tips and complaints in FY 2023).

whistleblowers to cooperate with the DOJ in addition to the civil enforcement agencies.[5] It is therefore clear that the legislation creating these statutory whistleblower programs carefully balances the demands of an effective enforcement program, the rights of whistleblowers, and the obligations of regulated individuals and entities.

We agree with DAG Monaco that a DOJ whistleblower program (which is not mandated by any statute) should "fill the gaps" where there is no existing whistleblower program. But the Pilot Program should not compete with or displace the existing whistleblower programs created by statute. Specifically, the Pilot Program should not incentivize or permit whistleblowers to come to the DOJ in the first instance when these other statutory programs are already available. Having to respond to multiple whistleblower inquiries on the same underlying facts from multiple agencies will be burdensome, inefficient, and expensive for financial services firms and will result in unnecessary duplication of effort within the government. Such a scenario could further result in inconsistent awards to similarly situated whistleblowers. As a potential safeguard, the Pilot Program could provide that where a whistleblower tip suggests the existence of a possible violation within the jurisdiction of the SEC, CFTC, IRS, or other similar agency with its own statutory whistleblower program, the DOJ should refer that tip to that agency for review in the first instance.

Finally, SIFMA urges the DOJ to establish a centralized whistleblower complaints tracking mechanism that can accept anonymous and confidential complaints and route them to the appropriate office. Notably, one of the core elements of the whistleblower programs at the SEC and CFTC has been coordination through a central whistleblower office, which can then refer tips to the appropriate unit or regional office for investigation. We also observe that several U.S. Attorney's offices, such as the Northern District of California and Southern District of New York, have already announced their own whistleblower programs, but focused on non-prosecution agreements or deferred prosecution agreements rather than on monetary awards. These announcements suggest the possibility of proliferating and potentially inconsistent programs in different jurisdictions. For these reasons, we encourage the DOJ to follow the SEC and CFTC examples for creating a centralized reporting process. Such a process will be easier for whistleblowers and their counsel to navigate, and it will help provide standardization and consistency in the prioritization and treatment of whistleblower tips across the DOJ. And, from the perspective of regulated firms, a single, centralized DOJ process will reduce the likelihood of competing, uncoordinated investigations by different U.S. Attorney's offices into related facts—an issue that already exists in certain circumstances without financial incentives for whistleblowers. A single, centralized DOJ whistleblower office will also be more effective at coordinating with agencies such as the SEC, CFTC and IRS that have their own whistleblower programs. Accordingly, we believe a central DOJ whistleblower reporting process is essential to handle complaints appropriately and efficiently.

[5] *See* 17 CFR § 240.21F-3 (SEC awards for related actions); 17 CFR §165.11 (CFTC awards for related actions).

II. The DOJ Should Incentivize Employees to Report Internally

In her March 7 remarks, DAG Monaco stated said that, under the Pilot Program, whistleblower rewards would only be available to individuals who were "first in the door" and provided information otherwise unknown to the government. While SIFMA supports the DOJ's efforts to establish guardrails for whistleblower reward eligibility, the Pilot Program should not undercut internal corporate compliance reporting systems. We urge the DOJ to provide incentives for strong internal compliance programs as a component of the Pilot Program and not to preclude eligibility for a whistleblower reward where an individual also reports internally. In particular, the Pilot Program should treat a whistleblower tip to an internal corporate compliance program that leads to a successful prosecution as triggering the "first in the door" eligibility requirement, rather than providing whistleblowers with an incentive to bypass internal compliance programs and report to DOJ in the first instance.

As multiple DOJ officials have recognized for at least the past 15 years, internal corporate compliance reporting systems are the first line of defense companies have against legal and regulatory violations. The DOJ has recognized that incentivizing strong internal reporting systems furthers compliance with the prevention and detection of wrongdoing, and it has repeatedly expressed strong support for robust internal reporting systems.[6] Indeed, internal reporting is necessary for companies to effectively self-report and thus should be encouraged.[7] As the SEC and CFTC have found in administering their programs, most whistleblowers do first report internally, and then proceed to go to the government when they believe their reports are not taken seriously or ignored. This is critical because the DOJ does not want to incentivize

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[6] *See, e.g.*, U.S. Department of Justice, Justice Manual 9-28.300 (updated Apr. 2023), https://www.justice.gov/jm/jm-9-28000-principlesfederal-prosecution-business-organizations (listing factors to be considered in determining whether to charge a corporation, which include the "adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision"); Brian A. Benczkowski, Assistant Att'y Gen., Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019) ("And when companies are incentivized to avert at the front end – through effective internal controls and compliance programs – the very violations that we would have to prosecute at the back end, that inures to the benefit of both government and industry."); John P. Cronan, Principal Deputy Assistant Att'y Gen., Remarks at Practising Law Institute Event (Nov. 28, 2018) ("[W]e all stand to benefit from companies that build effective compliance programs and internal controls that not only prevent and deter criminal incidents from occurring in the first instance, but also pave the way for more open channels of communication between government and industry."); Stephen Cox, Deputy Associate Att'y Gen., Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 27, 2020) ("It is good for everyone when companies police themselves, detect problems early, conduct internal investigations, take corrective measures, and cooperate with law enforcement, and we want to reward companies that do these things."); Eric Holder, U.S. Att'y Gen., Remarks at the Organisation for Economic Co-Operation and Development (May 31, 2010) ("[P]rosecution is not, nor should it be, the only means of increasing our efforts to curb global corruption. We will continue to work with companies that pursue good-faith internal investigations and voluntarily reform their practices.").

[7] *See* Kenneth A. Polite, Jr., Assistant Att'y Gen., Keynote at the ABA's 38th Annual National Institute on White Collar Crime (Mar. 3, 2023) ("Companies that self-report their misconduct set the right tone for their employees and lead by example – showing them with actions that criminal conduct will not be tolerated and will be reported to the authorities. Those are the companies that 'walk the walk' when it comes to culture and tone at the top.); Nicole M. Argentieri, Acting Assistant Att'y Gen., Remarks at the American Bar Association 10th Annual London White Collar Crime Institute (Oct. 10, 2023) ("[S]elf-reporting late is always better than never. . .").

employees to bring complaints to the government *instead of* companies, given that the DOJ is not likely to act on the vast majority of such complaints, but companies with good compliance programs are, in fact, well situated to do so. Other federal regulators have similarly highlighted the importance of encouraging internal reporting for these and other reasons.[8] The DOJ should therefore implement a whistleblower program that protects this critical role played by internal corporate compliance reporting systems.

Internal corporate compliance reporting systems are particularly important in the financial services industry, where firms have mandatory compliance programs under the watchful supervisory eye of their primary regulators, and firms in the industry have devoted substantial resources to developing and improving their internal reporting systems. In order for these systems to work effectively, employees must have sufficient incentives to make the firms aware of potential violations. Internal compliance reporting systems are far better suited to handling the majority of complaints that the DOJ will never be able to address (jurisdiction notwithstanding), and they will be undermined if firms are deprived of the opportunity to respond appropriately to reports of wrongdoing and address compliance issues.

Therefore, to further support the DOJ's objective of rewarding companies with strong internal compliance reporting systems, SIFMA urges the DOJ to permit individuals who first—or simultaneously—report violations internally before reporting them to the DOJ to be eligible for a whistleblower reward under the Pilot Program. The SEC's whistleblower rules are instructive on this point, as they allow whistleblowers to be eligible for an award if they first report the information internally, so long as the whistleblowers also report the information to the SEC within 120 days of their internal report.[9] SIFMA also encourages the DOJ to consider any other incentives that may encourage companies to maintain strong internal compliance reporting systems. For example, under the SEC's whistleblower rules, the SEC considers employee participation in an internal corporate compliance program as a positive factor when determining the appropriate award amount.[10]

While the DOJ may want to encourage potential whistleblowers to be "first in the door" relative to other whistleblowers, incorporating these features in the Pilot Program will appropriately balance the DOJ's interest in incentivizing individuals to swiftly report potential wrongdoing

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[8] *See, e.g.*, Adopting Release, Implementing Whistleblower Provisions of Section 21F of the Securities Exchange Act, Exch. Act Rel. No 64545, at p. 90 (May 25, 2011), https://www.sec.gov/rules/final/ 2011/34-64545.pdf ("[C]ompliance with the federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees.").

[9] SEC Office of the Whistleblower, Frequently Asked Questions, Question No. 14 (updated Apr. 6, 2023), https://www.sec.gov/whistleblower/frequently-asked-questions ("If you choose to report internally, but also report the information to us within 120 days of reporting it internally, then (i) we will consider your information to be reported to the SEC on the date you reported it internally.").

[10] *Id.* ("If the company conducts an investigation based on your internal report and then reports the results to us, you will benefit from all the information the company's investigation uncovers. Also, participation in your internal compliance program may be considered in determining the appropriate reward amount.")

with its interest in the continued promotion and support of strong corporate compliance programs.

III. SIFMA Supports the Exclusion of Culpable Whistleblowers from Eligibility in the DOJ's Pilot Program

In her March 7 remarks, DAG Monaco stated that payments would be offered "only to those not involved in the criminal activity itself." SIFMA agrees that an individual who has participated in the violation at issue should not be eligible to profit from that violation through the Pilot Program. Our view is based on the common sense notion that crime should not pay, and the DOJ should not provide financial incentives through which individuals can profit from their own misconduct.

Notably, if wrongdoers themselves go to the DOJ rather than to internal compliance programs, there may be a substantial cost on firms imposed by the very people whose conduct is at issue. Indeed, such actions deprive firms of immediate opportunities to remediate before the conduct gets worse, with the potential result that wrongdoers may benefit. Financial awards to people who participate in misconduct also have the potential to erode public trust in the fair administration of those laws. SIFMA applauds the DOJ for appearing to share this view and excluding culpable whistleblowers from payments under the Pilot Program.

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SIFMA appreciates the opportunity to submit this comment letter on these important issues. We would also like to request an opportunity to meet with the DOJ to discuss the issues in this letter at your earliest convenience. Please contact me at (212) 313-1015, or Alyssa Pompei, Vice President and Assistant General Counsel at (212) 313-1018, if you have any questions or to discuss these issues further.

Sincerely,

Saima S. Ahmed
Executive Vice President and General Counsel

cc: Molly Moeser, Acting Chief, Money Laundering and Asset Recovery Section
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