New Concerns, Same Tune At This Year's SIFMA Conference

By **Ilan Graff, Nicole Love and Rachel Demma** (March 28, 2024)



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In late March, hundreds of compliance professionals, in-house and outside counsel, and regulatory and industry leaders convened at the Securities Industry and Financial Markets Association's annual compliance and legal seminar in Orlando, Florida, to discuss legal developments affecting the financial services industry.

Arriving in the midst of election season and on the heels of the U.S. Department of Justice's announcement of multiple whistleblower pilot programs, the SIFMA conference offered a simultaneous opportunity to reflect on the first term of the Biden administration's emerging enforcement legacy and assess the near-term implications of policies aimed at refining and advancing the foundation regulators have laid over the last three-plus years.

Over the course of the four-day conference, enforcement leaders from the DOJ, the U.S. Securities and Exchange Commission, and the U.S. Commodity Futures Trading Commission all echoed and expanded a theme that the industry has become intimately familiar with in recent years: the importance of cooperation and timely self-disclosure.

Citing data points from the past year to underscore the incentives underlying such cooperation, regulators also highlighted the role of whistleblower programs — new and old — in driving prompt reporting and remedial action.

Although the emergence of so-called AI washing as an addition to the enforcement lexicon highlighted regulatory scrutiny of cutting-edge technologies, this year's emphasis on whistleblowing represented a new refrain in an increasingly familiar chorus of voices calling for prompt and thorough cooperation.

Whistleblower Programs: An Additional Cooperation Incentive

Throughout SIFMA, there was much discussion about the SEC whistleblower program's blockbuster year. In fiscal year 2023, the SEC received over 18,000 whistleblower tips — an almost 50% increase from the then-record 12,300 whistleblower tips received in fiscal year 2022 — and issued a historic high of nearly $600 million in whistleblower awards.[1]

The CFTC's whistleblower program also remains active, including a recent $18 million award, which singlehandedly exceeded the roughly $16 million the program had issued in fiscal year 2023.[2]

The DOJ has clearly taken note of other agencies' successes, and was eager to tout whistleblower pilot programs in development for DOJ components and at least two U.S. attorney's offices.

After the DOJ's notable absence from SIFMA last year,[3] DOJ leadership joined this year's

conference in full force, with U.S. Attorney Damian Williams of the Southern District of New York, Deputy U.S. Attorney Andrea Griswold of the Southern District of New York and DOJ Fraud Section Chief Glenn Leon participating as speakers.

In their remarks and presentations, Williams, Griswold and Leon each touched on the new whistleblower initiatives.

Williams' comments during a fireside chat on the conference's last day featured extensive discussion of the Southern District of New York's first-of-its-kind whistleblower pilot program.

The program, which was announced in January and went into effect last month, clarifies what Williams said has always been available in the Southern District of New York — a path to a nonprosecution agreement for whistleblowers who provide new information and are able to offer substantial assistance against those of equal or greater culpability.[4]

Although the Southern District of New York was the first U.S. attorney's office to roll out such a program, it has not been the last. In March, U.S. Attorney Ismail Ramsey of the Northern District of California announced that his office would be deploying a program that closely mirrors that of the Southern District of New York.[5]

More U.S. attorney's offices will likely follow suit. Williams noted at SIFMA that other U.S. attorneys have reached out about developing similar programs.

And as Leon discussed at his SIFMA panel, the DOJ has also recently announced its own, more far-reaching whistleblower initiative. In early March, Deputy Attorney General Lisa Monaco kicked off "a 90-day sprint to develop and implement a [whistleblower] pilot program."[6]

While the details are yet to be determined, it is clear that the DOJ is looking to fill the jurisdictional gaps left by other successful whistleblower programs, with an initiative that similarly uses monetary incentives to encourage individual reporting of bad acts.[7]

These new efforts build on a series of DOJ policies aimed at incentivizing voluntary self-disclosure of corporate misconduct and reinforce the voluntary self-disclosure program Monaco announced early last year.[8]

As cited repeatedly throughout SIFMA, companies must ensure that their compliance and legal departments have the necessary resources to detect issues early and cultivate robust internal reporting mechanisms.

The DOJ joining the SEC's and CFTC's long-standing focus on encouraging whistleblowers represents a further ratcheting of the corporate incentive structure toward disclosure, as companies must now weigh an enhanced risk of whistleblower reporting.

SEC Turns Enforcement Focus to AI Washing

Another frequently discussed topic throughout the SIFMA conference was artificial intelligence, with AI washing emerging as an area of enforcement attention. AI washing refers to the practice of companies making false, misleading or exaggerated claims concerning their businesses' use and development of AI systems.[9]

SEC Enforcement Director Gurbir Grewal used his time on SIFMA's main stage to underscore

the SEC's continued application of the traditional disclosure regime to new technologies.

Grewal called attention to two AI washing settlements announced that same day.[10] These settlements likely arose from the SEC's December 2023 sweep of investment advisers and their AI-based tools, and reflect the first-ever charged violations of the federal securities laws' antifraud provisions in connection with AI-related statements.

Grewal underscored that AI-related statements were no different from any other representations to the market, which the SEC expects to be full, fair and truthful in all material respects.

Conclusion

The wave of newly announced whistleblower pilot programs is the latest iteration of enforcement agencies' efforts to incentivize prompt disclosure and robust cooperation. These initiatives make sense at a time when DOJ resources continue to be stretched thin, with white collar cases competing for criminal enforcement attention with a host of other pressing priorities.

As the Biden administration moves past its three-year mark, these incentive structures appear to be moving the needle on enforcement outcomes. Within a year of launching its voluntary self-disclosure program, the DOJ issued
criminal declinations to three corporations and issued a 45% reduction from the low end of the applicable penalty range to a fourth after they came forward under the program.[11]

This treatment mirrors that of companies that self-reported violations to the SEC, and — combined with robust cooperation — received notably lower and, in some cases, no financial penalties.[12]

It remains unclear how the looming election could affect this emerging enforcement paradigm and whether the incentive structures will be developed and reinforced over the course of a second Biden term, or revisited by a second Trump administration's potentially skeptical political appointees.

In the near term, regulators' message to SIFMA attendees was clear: Whether potential misconduct arises from familiar challenges or new technologies, the route to enforcement lenience runs through prompt and robust disclosure and cooperation.

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[1] See Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov.

14, 2023), https://www.sec.gov/news/press-release/2023-234.

[2] See Press Release, CFTC, CFTC Awards Whistleblower Over $18 Million (Oct. 12, 2023), https://www.cftc.gov/PressRoom/PressReleases/8806-23; Press Release, CFTC, CFTC Releases FY 2023 Enforcement Results (Nov. 7, 2023), https://www.cftc.gov/PressRoom/PressReleases/8822-23.

[3] See Ilan Graff, Richard Powers and Gina Boone, Parsing The New Enforcement Moment At SIFMA Conference, Law360 (March 23, 2023).

[4] SDNY's Whistleblower Pilot Program has specific eligibility criteria. An individual must, for instance, voluntarily provide to SDNY "actionable and timely" information that it was not previously aware of regarding certain types of corporate criminal offenses, and cooperate fully. The individual must also be able to provide substantial assistance against one or more equally or more culpable individuals. See Press Release, DOJ, SDNY Whistleblower Pilot Program (Feb. 13, 2024), https://www.justice.gov/usao-sdny/sdny-whistleblower-pilot-program.

[5] See Press Release, DOJ, U.S. Attorney Ismail Ramsey Announces Policies Underlying Whistleblower Pilot Program (Mar. 18, 2024), https://www.justice.gov/usao-ndca/pr/us-attorney-ismail-ramsey-announces-policies-underlying-whistleblower-pilot-program.

[6] See Lisa Monaco, Deputy Attorney General, DOJ, 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.

[7] Id.

[8] The DOJ's voluntary self-disclosure (VSD) program, which was rolled out last year, offers companies who voluntarily self-disclose the possibility of a declination, non-prosecution agreement, or deferred prosecution agreement in lieu of a guilty plea along with a reduction in financial penalties (and possibly no fines at all). See, e.g., supra note 3.

[9] See Ilan T. Graff, Amir R. Ghavi, and Daniel Liberman, Fried Frank, SEC Targets Investment Firms Over "AI-Washing" Claims (Mar. 21, 2024), https://www.friedfrank.com/news-and-insights/sec-targets-investment-firms-over-ai-washing-claims.

[10] See Press Release, SEC, SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence (Mar. 18, 2024), https://www.sec.gov/news/press-release/2024-36; see also Delphia (USA), Inc., Investment Advisors Act Release No. 6573 (SEC Mar. 18, 2024), https://www.sec.gov/files/litigation/admin/2024/ia-6573.pdf; see also Global Predictions, Inc., Investment Advisors Act Release No. 6574 (SEC Mar. 18, 2024), https://www.sec.gov/files/litigation/admin/2024/ia-6574.pdf.

[11] See DOJ, CEP Declinations (Nov. 17, 2023), https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-policy/declinations; see also Press Release, DOJ, Albemarle to Pay Over $218M to Resolve Foreign Corrupt Practices Act Investigation (Sep. 29, 2023), https://www.justice.gov/opa/pr/albemarle-pay-over-218m-resolve-foreign-corrupt-practices-act-investigation.

[12] In its year-end enforcement results announcement, the SEC highlighted three cases in 2023 in which the Commission rewarded companies for their meaningful cooperation and self-reporting. See SEC, supra note 1; see also GTT Communications, Inc., Exchange Act Release No. 98491 (SEC Sep. 25, 2023), https://www.sec.gov/files/litigation/admin/2023/33-11241.pdf; Perella Weinberg Partners LP, Investment Advisors Act Release No. 6449 (SEC Sep. 29, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98632.pdf; see also View, Inc., Exchange Act Release No. 34-97830 (SEC Jul. 3, 2023), https://www.sec.gov/files/litigation/admin/2023/33-11208.pdf.