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Biden Administration Rolls Back Sanctions in Africa, Creating New Commercial Opportunities and Potential Anti-Corruption Risks

Economic sanctions—the use of which has steadily increased over the past several administrations—provide a tool to promote U.S. foreign policy interests. Offering relief from such sanctions in exchange for concessions can be equally impactful. Over the past year, the United States has eased certain Africa-related sanctions to facilitate trade with and investment in the continent, including through the Prosper Africa initiative and the 2022 U.S.-Africa Leaders Summit. While such sanctions initially sought to promote "America's strong foreign policy interests in combatting corruption around the world,"[1] dialing back those sanctions can increase corruption risks, even while advancing other U.S. interests.

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1. U.S. Dep't of State, "Revocation of License Granted for Dan Gertler" (Mar. 8, 2021), https://www.state.gov/revocation-of-license-granted-for-dan-gertler.

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The United States recently shifted its sanctions posture to ease certain restrictions that have been in place regarding the Democratic Republic of the Congo ("DRC") and Zimbabwe. These changes aim to encourage access for Western companies to natural resources (in the case of the DRC) and to re-focus sanctions on more "clear and specific targets . . . most responsible for corruption" (in the case of Zimbabwe). However, in the race to take advantage of relaxed restrictions, companies would be prudent to proceed cautiously, with a compliance-focused lens to help mitigate anti-corruption risk.

U.S. Offers to Ease Sanctions Against Mining Magnate in Exchange for Sale of DRC Assets

The United States and the DRC earlier this year offered Israeli mining magnate Dan Gertler sanctions relief in exchange for his sale of DRC assets to the Congolese government and his permanent exit from the country.[2] Gertler, who gained notoriety for alleged corrupt misconduct in the DRC mining industry, counts among his assets royalties from three copper-cobalt mines. The DRC is the world's second-largest source of copper and produces about three-quarters of the world's cobalt. These metals are critical building blocks for clean energy infrastructure, including electric vehicle batteries.[3]

Since 2017, U.S. sanctions barred banks from using the U.S. financial system to do business with Gertler. The U.S. government is reportedly hoping that Gertler's potential exit from the DRC will encourage U.S. companies to invest in the DRC's mining sector without the risk of interacting with entities tied to Gertler and help the United States compete with China (whose companies have a significant presence in the DRC) in acquiring natural resources used in the domestic production of batteries for electric vehicles.

Gertler's Ties to the DRC Led to Sanctions

Through a close friendship with former DRC President Joseph Kabila, Gertler allegedly grew to wield influence over the DRC's mining sector and reportedly amassed a large fortune by acting as a middleman in "opaque and corrupt" mining and oil deals.[4] Gertler allegedly positioned himself as an intermediary that certain multinational companies were required to use to conduct business with or purchase mining assets from the DRC. The U.S. Treasury Department estimated that Gertler's actions caused the DRC to lose revenue of more than $1.36 billion.

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2. *See, e.g.*, Julie Steinberg, "In Quest for Metals, U.S. Pitches Deal to Ease Sanctions on Israeli Businessman," Wall Street Journal (May 16, 2024), https://www.wsj.com/business/u-s-congo-pitch-deal-to-ease-sanctions-on-israeli-businessman-in-quest-for-metals-bcdaf655.
3. Peter Martin and Michael J. Kavanagh, "US Says Billionaire Gertler's Royalties Must Go to Congo For Sanctions Deal," Bloomberg (July 22, 2024), https://www.bloomberg.com/news/articles/2024-07-22/us-says-billionaire-gertler-s-royalties-must-go-to-congo-for-sanctions-deal.
4. U.S. Dep't. of Treasury, "United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe" (Dec. 17, 2021), https://home.treasury.gov/news/press-releases/sm0243.

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In October 2016, Och-Ziff Capital Management Group LLC ("Och-Ziff") and its wholly-owned subsidiary resolved DOJ and SEC investigations relating to the investment firm's activities, including in the DRC. According to the DPA and other court documents, Och-Ziff entered into several transactions with a "DRC Partner" (Gertler), understanding that he would use its funds to pay bribes to DRC officials to obtain special access and preferential prices for investment opportunities in the state-controlled mining sector.[5] To date, DOJ has not announced any criminal charges against Gertler.

"[I]n the race to take advantage of relaxed [trade] restrictions, companies would be prudent to proceed cautiously, with a compliance-focused lens to help mitigate anti-corruption risk."

The Impact of Sanctions Against Gertler on U.S. Investment in the DRC

In December 2017, the Trump Administration's Treasury Department sanctioned Gertler under Executive Order 13818, which implements the Global Magnitsky Act and provides for sanctions against perpetrators of corruption around the world.[6] Gertler then relinquished formal ownership of mines in the DRC, instead profiting primarily through copper and cobalt mining royalties. His stakes reportedly include companies and mines that produce nearly 30 percent of the world's supply of cobalt.

Gertler's attorneys argued that his international dealings served a national security interest. Then, in January 2021, the Treasury Department's Office of Foreign Assets Control ("OFAC") issued two licenses to Gertler that enabled him and his network to open bank accounts in the United States and distribute $10 million throughout the DRC for allegedly charitable purposes.[7] In March 2021, the Biden Administration revoked the license and reimposed full sanctions, asserting that granting Gertler relief was "inconsistent with America's strong foreign policy interests in combatting corruption around the world" and significantly damaged U.S.

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5. *See, e.g.*, Deferred Prosecution Agreement ¶¶ 12, 20, *United States v. Och-Ziff Capital Management Group LLC*, 16-CR-516 (NGG), Docket 11 (E.D.N.Y. filed Sept. 29, 2016); Memorandum & Order 3, *Oz Africa Management GP, LLC*, 16-CR-515 (NGG), Docket 51 (E.D.N.Y. Aug. 29, 2019).
6. *See supra* note 4.
7. U.S. Dep't of State, Action Memo for the Secretary, (SBU) Revocation of Sanctions Licenses Related to Dan Gertler (Jan. 29, 2021), https://int.nyt.com/data/documenttools/2022-01-gertler-foia-docs/1bd65c05009a997b/full.pdf; U.S. Dep't of State, "Revocation of License Granted for Dan Gertler" (Mar. 8, 2021), https://www.state.gov/revocation-of-license-granted-for-dan-gertler.

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credibility.[8] The following year, Gertler sold back to the DRC mining and oil-drilling rights worth $2 billion in exchange for the DRC government lobbying the United States to lift the sanctions, which would allow the DRC to resell the rights to other investors.[9]

Sanctions Removal and Potential Impact

Gertler has long denied wrongdoing and insisted that his investments in the DRC have created thousands of jobs and provide billions in tax dollars for the DRC.[10] Despite his continued retention of royalties, Gertler stated in letters to human rights leaders in Congo, Europe, and the United States that the sanctions have been "crippling" and that he is prepared to sell his remaining DRC assets to get the punishment lifted. As a result of Gertler's position in the DRC, U.S. companies have had to navigate a regulatory landscape marked by increased sanctions and corruption risk when contemplating opportunities tied to the DRC's mining sector.

If Gertler accepts the DRC and U.S. proposal to roll back sanctions against him, which the DRC presented in May 2024, the U.S. Treasury would provide him licenses to sell his three royalty streams and any other assets back to the DRC government. Gertler would be required to disclose his DRC assets, comply with audits of his businesses, and have sanctions reinstated if he commits any corruption-related violations. Contingent upon good standing, Gertler also would receive a license to regain access to international financial markets.

U.S. Lifts Zimbabwe Sanctions, But Sanctions Against Individuals Persist

In March 2024, the Biden Administration also issued an executive order that terminated the broad sanctions program that had been in effect in Zimbabwe since 2003.[11] Determining that the Global Magnitsky sanctions program was the more appropriate tool to address continued concerns in the country, OFAC concurrently imposed sanctions on a more targeted set of individuals. This included President

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8. U.S. Dep't of State, "Revocation of License Granted for Dan Gertler" (Mar. 8, 2021), https://www.state.gov/revocation-of-license-granted-for-dan-gertler.
9. Eric Lipton and Dionne Searcey, "Fight Over Corruption and Congo's Mining Riches Takes a Turn in Washington" N.Y. Times (Apr. 2, 2023), https://www.nytimes.com/2023/04/02/us/politics/dan-gertler-biden-congo-sanctions.html.
10. Eric Lipton, "Seeking Access to Congo's Metals, White House Aims to Ease Sanctions," N.Y. Times (May 16, 2024), https://www.nytimes.com/2024/05/16/us/politics/congo-cobalt-us-sanctions.html.
11. The White House, "Executive Order on the Termination of Emergency With Respect to the Situation in Zimbabwe" (Mar. 4, 2024), https://www.whitehouse.gov/briefing-room/presidential-actions/2024/03/04/executive-order-on-the-termination-of-emergency-with-respect-to-the-situation-in-zimbabwe/?; U.S. Dep't. of State, "Digital Press Briefing with David Gainer, Acting Deputy Assistant Secretary of State – Bureau of African Affairs, and Brad Brooks-Rubin, Senior Advisor to the Office of Sanctions Coordination" (Mar. 7, 2024), https://www.state.gov/digital-press-briefing-with-david-gainer-acting-deputy-assistant-secretary-of-state-bureau-of-african-affairs-and-brad-brooks-rubin-senior-advisor-to-the-office-of-sanctions-coordination.

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Emmerson Mnangagwa, who is accused of providing a "protective shield" to diamond and gold smugglers in exchange for bribes. The sanctions target the president's "criminal network of government officials and businesspeople" in connection with corruption or serious human rights abuses.[12]

Many international banks and U.S. companies had declined to conduct business in Zimbabwe due to the country's higher-risk profile and applicable sanctions,[13] which exacerbated preexisting social and economic challenges in the country.[14] The government of Zimbabwe attributed the country's dire economic condition to sanctions. U.S. State Department officials allege the economic woes are instead due to gross mismanagement and corruption.

In April 2024, Zimbabwe officials asked that the U.S. Treasury issue an advisory note to banks reminding them that sanctions were lifted and that Zimbabwe is open for business.[15] With the bulk of sanctions eliminated, companies face lower political and economic risk in Zimbabwe, which may attract investment, particularly in gold and lithium ore. But with a number of senior government officials remaining sanctioned, both sanctions and corruption risk remain.

Key Takeaways

The new sanctions landscape in the DRC and Zimbabwe are likely to increase U.S. companies' investment in those markets. Companies subject to U.S. and similar laws that pursue such commercial opportunities should consider the following in managing their related risks:

- **When markets open, opportunities follow, and so can corruption risk.** For example, in the early 2000s, the UN Oil-for-Food Program enabled Iraq to purchase humanitarian goods with the proceeds from crude oil sales, notwithstanding expansive sanctions that remained in place. The program ultimately was marred by corruption, including substantial kickbacks paid to Iraqi officials, and several U.S. companies settled related FCPA actions.[16]

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12. U.S. Dep't. of Treasury, "Treasury Sanctions Zimbabwe's President and Key Actors for Corruption and Serious Human Rights Abuse" (Mar. 4, 2024), https://home.treasury.gov/news/press-releases/jy2154.
13. *See, e.g.*, Ringisai Chikohomero, "Open for business? Appraisal of FDI in Zimbabwe," Institute for Security Studies (Dec. 2019), https://issafrica.s3.amazonaws.com/site/uploads/sar-33.pdf.
14. U.N. Office of the High Commissioner, "Zimbabwe: Expert calls for lifting of unilateral sanctions, urges talks" (Oct. 28, 2021), https://www.ohchr.org/en/press-releases/2021/10/zimbabwe-expert-calls-lifting-unilateral-sanctions-urges-talks.
15. Ray Ndlovu and Godfrey Marawanyika, "Zimbabwe Asks US to Help Remind Banks That Sanctions Eased," Bloomberg (Apr. 19, 2024), https://bloomberg.com/news/articles/2024-04-19/zimbabwe-enlists-us-to-help-remind-banks-that-sanctions-eased?.
16. *See, e.g.*, SEC Release No. 2007-230, "Chevron to Pay $30 Million to Settle Charges For Improper Payments to Iraq Under U.N. Oil For Food Program" (Nov. 14, 2007), https://www.sec.gov/news/press/2007/2007-230.htm.

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- **Compliance measures should be commensurate with risk.** Numerous FCPA matters have penalized companies for misconduct related to speedy expansion into new markets without commensurate compliance programs and controls in place. With sanctions easing, it is important to update anti-corruption policies and procedures, especially in third-party management and acquisition due diligence, while ensuring sufficient staffing and training to support and monitor growth. Companies also should ensure that they have a system of internal accounting controls reasonably designed to detect and prevent illegal payments.
- **Third parties and relationship-building:** U.S. companies entering new markets may need support from local partners to help navigate the market and execute on-the-ground projects. This makes rigorous pre-retention diligence of each third party's history, qualifications, reputation, ownership structure, and connections to government officials essential, and ongoing monitoring and documenting of proper risk management imperative. Companies also should train their own personnel and, when feasible, those of third-party agents on applicable laws and company policies, and should emphasize the potential for personal liability for corrupt conduct.
- **Emphasis on interactions with government officials:** The easing of sanctions does not remove the fundamental risk of interactions with government officials, whether directly or indirectly through third parties. These interactions are likely to be increasingly scrutinized by U.S. prosecutors. In addition to the FCPA, anti-money laundering laws, and Travel Act and wire fraud statutes, among others, prosecutors now can investigate and charge violations of the Foreign Extortion Prevention Act ("FEPA"), which prohibits foreign government officials from demanding or receiving bribes from U.S. persons or entities.

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DOJ Launches Program Offering Financial Awards to White-Collar Whistleblowers

On August 1, 2024, the Department of Justice ("DOJ") launched its Corporate Whistleblower Awards Pilot Program (the "Program") for a three-year trial.[1] The Program is designed to fill gaps in other federal programs that reward whistleblowers, for instance FCPA allegations against non-issuers that do not fall under the SEC's whistleblower rewards program.

Under the Program—which Deputy Attorney General Lisa Monaco previewed in March[2]—a whistleblower who provides DOJ with original information about corporate misconduct may be eligible for a financial award, provided that (1) the information must relate to certain specified crimes, (2) the information must result in DOJ successfully obtaining forfeiture, and (3) the whistleblower cannot have "meaningfully participated" in the criminal conduct. In addition to encouraging individual whistleblowers, one goal of the Program is to encourage robust compliance programs at and voluntary self-disclosure ("VSD") by entities, further incentivizing companies that may "hesitate[] to self-report."[3]

The Program's Requirements

Eligibility. To be eligible, a whistleblower must, among other things:

- be an individual (not an entity);
- be innocent or have had, at most, a "minimal" role in the misconduct—i.e., not have "meaningfully participated" in the allegedly criminal activity at issue, "including by directing, planning, initiating, or knowingly profiting from" it;
- be truthful and complete in their submission to DOJ;
- not qualify for an award under a whistleblower program administered by another U.S. agency based on the same information;
- not be an employee of DOJ or a law enforcement organization; and
- not be a foreign government official.

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1. "Department of Justice Corporate Whistleblower Awards Pilot Program" (Aug. 1, 2024), https://www.justice.gov/criminal/media/1362321/dl?inline (hereinafter "Program"). The Program release included an online portal and FAQ at DOJ's website, https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program.
2. *See* Helen V. Cantwell, Andrew J. Ceresney, Arian M. June, David A. O'Neil, "DOJ Announces Whistleblower Rewards Pilot Program" (Mar. 8, 2024), https://www.debevoise.com/insights/publications/2024/03/doj-announces-whistleblower-rewards-pilot-program.
3. "Deputy Attorney General Lisa Monaco Delivers Remarks on New Corporate Whistleblower Awards Pilot Program" (Aug. 1, 2024), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-new-corporate-whistleblower-awards.

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"Original information." To be considered "original," the information reported by the whistleblower must, among other things:

- be derived from the whistleblower's "independent knowledge" or "independent analysis";
- be non-public;
- be not obtained in the context of legal representation, internal reporting procedures, internal investigations, or audits (unless disclosure is necessary to prevent ongoing criminal conduct, obstruction, or imminent harm); and
- be unknown to the Department prior to the report (it is acceptable to provide information that "materially adds to the information that the Department already possesses").

Subject areas. For now, the Program is available only to whistleblowers with information pertaining to the following types of crimes:

- *Financial institution-related crime,* including money laundering, financial fraud, obstructing or defrauding financial regulators, and failing to register a money transmitting business (possibly including certain cryptocurrency firms);
- *Foreign corruption involving companies,* including violations of the Foreign Corrupt Practices Act (excluding by issuers of U.S. securities) or Foreign Extortion Prevention Act;
- *Domestic corruption involving companies,* including payment of bribes or kickbacks to federal, state, or local officials; and
- *Federal health care offenses,* provided they are not covered by the Federal False Claims Act.

Voluntariness. The whistleblower must submit information voluntarily, meaning (i) before DOJ requests it, (ii) not pursuant to an obligation to report, and (iii) before there is a threat of the information being "imminent[ly]" disclosed to the government or the public.

Cooperation. The whistleblower must cooperate with DOJ, including not only by testifying but also "if requested, working in a proactive manner" to assist the Department.

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Amount of an Award

Forfeiture. The Program is rooted in the U.S. Attorney General's statutory authority to pay "awards for information or assistance leading to a civil or criminal forfeiture."[4] A whistleblower award will be available only if the information leads to more than $1 million in forfeited "net proceeds." The forfeiture can be criminal, civil, or administrative in nature.

Discretionary Award. Even when a whistleblower satisfies all the requirements, "whether an individual is eligible for an award and the amount of an award is in the sole discretion of the Department." DOJ specified that an award may be increased based on (i) the significance of the information, (ii) the degree of assistance provided by the whistleblower, and (iii) the whistleblower's participation in the company's internal compliance program.[5] An award may be decreased if the whistleblower interferes with, or "undermine[s] the integrity" of, a company's internal compliance program.

"The Program is designed to fill gaps in other federal programs that reward whistleblowers, for instance FCPA allegations against non-issuers that do not fall under the SEC's whistleblower rewards program."

An award also may be decreased or denied if a whistleblower held a management role and/or had oversight of the functions and personnel involved in the misconduct.

VSD and Compliance Program Considerations

Window for Corporate VSD. For companies, the Program includes a notable provision: If a whistleblower makes both an internal report to the company and a whistleblower submission to DOJ, the company can still qualify for a presumption of a declination. To do so, the company must self-report to DOJ within 120 days of receiving the whistleblower's report and otherwise satisfy the requirements of the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy.

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4. 28 U.S.C. § 524(c).
5. After an individual reports information internally to a company, he or she has 120 days to file a whistleblower report with the Department.

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DOJ apparently included this provision in response to wide criticism, raised after the Program was previewed in March, that the Program could undermine companies' internal compliance programs. Although this provision addresses these concerns to some extent, the concerns persist. DOJ specifies that a company will be eligible for a presumption of a declination only "if it reports to the Department *before* the Department contacts the company." Accordingly, if a whistleblower reports to both DOJ and the company, the company will have *either* 120 days *or* until DOJ contacts the company—whichever happens first—to self-disclose and obtain a presumption of a declination.

The Program is therefore designed not only to incentivize individuals to report corporate wrongdoing to DOJ, but also to further incentivize companies to self-report to the Department—and to do so as quickly as possible. To balance these goals with the Department's other oft-stated aim of empowering companies to develop and invest in their internal compliance programs, DOJ specifies that it may (i) increase a whistleblower's award if the individual also reported the conduct to the company, and (ii) reduce the award if the whistleblower interfered with or sought to undermine the company's internal compliance program.

Impact on Employee Discipline / Retaliation. The Program supports internal compliance programs in that it prohibits awards to those who meaningfully participated in the criminal activity. The Program is narrower than the SEC's whistleblower program, which offers the potential for a reward so long as whistleblowers did not "direct[], plan[] or initiate[]" the wrongdoing.[6] The Program bars any person who meaningfully participated in criminal activity from receiving an award under the Program.[7] Individuals who "could be described as 'plainly among the least culpable of those involved in the conduct,"[8] would still be eligible for awards. Because participants engaged in improper activity can become disgruntled after being disciplined or terminated and evolve into whistleblowers, DOJ's exclusion of culpable employees allows a company to make disciplinary decisions without necessarily triggering analysis of VSD considerations.

DOJ does not have specific regulatory authority to punish retaliation against employees akin to Section 21F(h) of the Securities Exchange Act of 1934 SEC's Regulation 21F.[9] However, the Program's intake form requests whistleblowers to provide information about retaliation. That information may be taken into account in assessing a corporation's cooperation under the Criminal Division's Corporate

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6. 17 CFR § 240.21F-16.
7. Program at 3.
8. *Id.* (quoting U.S.S.G § 3B1.2 cmt. n.4).
9. 17 CFR § 240.21F-2.

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Enforcement and Voluntary Self-Disclosure Policy or may result in obstruction of justice charges.

Analysis

Corporate Whistleblower Resources and VSD. The Program's 120-day window offers companies the possibility of VSD credit even after an internal whistleblower has applied to the Program. Unlike the DOJ's safe-harbor policy in connection with mergers and acquisitions, the Program does not state that the four-month deadline is subject to a reasonableness analysis.[10]

In addition to claims relevant to FCPA actions, corporate whistleblower hotlines can receive tips ranging from inchoate complaints about favoritism or unfair treatment, to harassment or discrimination, to HSSE issues, to passive corruption (e.g., embezzlement or receiving kickbacks). For multi-national companies, these tips can arrive from around the globe, often from anonymous sources. Separating legally relevant tips from baseless complaints or ordinary HR issues is not a clerical task and often involves back-and-forth with the whistleblower (often made difficult by language barriers) followed by referral to the appropriate internal resource (at headquarters or at a foreign subsidiary) for initial investigation.

Companies should review their whistleblower programs to ensure that they account for the changes resulting from the Program. As a practical matter, the four-month window afforded by the Program will often be insufficient for a company to conduct an investigation and assess the merits of VSD. In its haste to discourage companies from what DAG Lisa Monaco described as "hesitat[ing]" to voluntarily self-disclose, the Program risks encouraging the misallocation of resources towards the initial assessment of whether at tip might raise VSD considerations and away from a proper internal investigation of tips deemed to be meritorious.

The short deadlines provided by the Program, the M&A safe-harbor, and recently disclosed declinations,[11] will often put companies in the position of choosing between premature VSD—disclosing allegations without fully knowing their scope or merit—triggering the significant costs associated with a government investigation, or foregoing VSD credit. By doing so, the DOJ may inadvertently be putting companies in a position where the latter is the more realistic option.

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10. *See* Debevoise & Plimpton LLP, "DOJ Announces Six-Month 'Safe Harbor' Policy for Acquisition-Related Disclosures" (Oct. 6, 2023), https://www.debevoise.com/-/media/files/insights/publications/2023/10/06_doj-announces-sixmonth-safe-harbor-policy.pdf?rev=83d817caf59d45e6b64494eefc376e41&hash=905F180DD7E7EDB789FCD7A722E42AB4.

11. *See* Proterial Cable America, Inc. Declination (Apr. 12, 2024) (VSD "within weeks" of discovery); Lifecore Biomedical, Inc. Declination (Nov. 16, 2023) (VSD within three months of discovery), https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-policy/declinations.

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Conclusion

DOJ and other law enforcement agencies have promulgated numerous policies in recent years seeking to incentivize companies to self-report misconduct soon after it is discovered. The Program continues this trend and increases the pressure on companies by offering potentially large awards to individuals who report original information to the Department.

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