

'Minimal Participant' Bar Is Tough To Clear For Whistleblowers

By **Caleb Hayes-Deats, Jackson Myers and Eric Rolston** (December 16, 2024, 4:19 PM EST)

In October and November, U.S. District Judge Lewis A. Kaplan handed down noncustodial sentences to multiple defendants who pled guilty to charges related to the fraud committed by the cryptocurrency exchange FTX.

In their advocacy to Judge Kaplan of the U.S. District Court for the Southern District of New York, both Nishad Singh and Zixiao "Gary" Wang highlighted their limited role in the wrongdoing. They emphasized that they knew little or nothing about key elements of the scheme, and argued that their culpability paled in comparison to that of the scheme's masterminds.

But neither Singh nor Wang expressly argued for a "minimal participant" adjustment under Section 3B1.2 of the U.S. sentencing guidelines.

The minimal-participant provision of Section 3B1.2 has recently taken on new relevance because the U.S. Department of Justice incorporated this minimal-participant standard into its Corporate Whistleblower Awards Pilot Program, which was launched on Aug. 1.[1]

Whistleblowers with some culpability in the misconduct they report are not eligible for a monetary award unless, under the sentencing guidelines, they "could be described as 'plainly among the least culpable of those involved in the conduct of a group.'"[2]

The minimal-participant standard is a high bar to clear — so high that Singh and Wang did not even invoke it, despite raising similar considerations that persuaded Judge Kaplan to enter a noncustodial sentence.

The bar is especially high for aspiring whistleblowers, who must persuade the DOJ that they have enough information about a criminal scheme to provide significant assistance.

Whether a whistleblower can receive a monetary award by qualifying as a minimal participant thus requires a careful analysis of relevant precedent and DOJ guidance.

The Minimal-Participant Adjustment

Section 3B1.2 of the sentencing guidelines provides for an offense-level reduction for a defendant's "mitigating role," with different reductions for "minor participants" and "minimal participants." Both



Caleb Hayes-Deats



Jackson Myers



Eric Rolston

adjustments apply to individuals "substantially less culpable than the average participant" in the particular scheme at issue.[3]

The guidelines set out five factors to consider in making that determination, including whether the individual played a leadership role in the scheme and whether they "stood to benefit from the criminal activity." [4]

But to qualify as a minimal participant, specifically, the bar is even higher. The individual must be "plainly among the least culpable of those involved in the conduct of a group." [5]

And in addition to the factors mentioned above, the guidelines single out one consideration as the key indicator of a minimal participant: the individual's "lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others." [6]

Even a de minimis contributor might not qualify as a minimal participant if they knew about the full scope of the crime and participated regardless. [7]

Unsurprisingly given these stringent requirements, minimal-participant reductions are very rare: In 2023, less than 8% of criminal defendants received any mitigating-role adjustment, and less than 1% of defendants were classified as minimal participants. [8]

Indeed, courts have observed that some schemes have no minimal participants — simply being the least culpable of one's co-conspirators does not automatically make you a minimal participant. [9]

A Dilemma for Whistleblowers

Satisfying Section 3B1.2's minimal-participant test could be especially difficult for potential whistleblowers.

A whistleblower must provide information that is "derived from the individual's independent knowledge, ... previously not known to the Department, ... [and] materially adds to the information the Department already possesses." [10]

And the amount of any award depends in part on the "[s]ignificance of the information provided by the whistleblower," including whether the whistleblower was able to "explain complex transactions, interpret[] key evidence, or identify[] new and productive lines of inquiry or potential sources of evidence." [11]

But combining the requirements of helpful information and minimal participation in the scheme puts would-be whistleblowers in a bind: A minimal participant, by definition, lacks knowledge about the broader scheme, but whistleblowers, by definition, possess inside knowledge useful for prosecutors.

If a whistleblower with criminal exposure reveals their knowledge of the entire scheme, they may disqualify themselves from an award. But if the whistleblower only has a limited understanding of the scheme, the information they provide may not be material, reducing any potential award.

Weighing Whether Whistleblowers Can Thread the Needle

Whether a whistleblower can, in fact, obtain a whistleblower award by qualifying as a minimal

participant will depend on how the DOJ applies its new guidance in practice. Any whistleblower who attempts to do so must first identify other, more culpable participants in the scheme they report.

Such a whistleblower claim would stand the greatest chance of success if it described a scheme with multiple levels of responsibility, with the whistleblower on the lowest level performing a discrete function only tenuously connected to the rest of the scheme.

But how would such a complaint provide significant assistance if the whistleblower did not even know the full scope of the criminal scheme? One strategy might be to emphasize potential investigative avenues, such as identifying witnesses, phone numbers, email addresses, and physical or digital locations of relevant documents.

The DOJ's guidance makes clear that assistance can take the form of not just factual information, but also providing information that "allow[s] the Department to obtain evidence of criminal activity."^[12]

The story behind the whistleblower's decision to report will also be critical, as will any steps the whistleblower has taken to mitigate any harm caused by the conduct.^[13]

As the examples of Singh and Wang demonstrate, a minor participant who learns of wrongdoing and shortly thereafter cooperates with law enforcement can make a compelling case for leniency.

Whistleblowers, of course, cannot hope to profit by concealing their knowledge of the full scheme or their role in it. The DOJ explicitly requires that whistleblowers "provide all information of which they have knowledge related to any misconduct, including misconduct in which they participated."

A whistleblower who "lies about, conceals, or mischaracterizes their role in the misconduct" is not eligible for an award,^[14] and faces a risk of being prosecuted for making false statements.

Finally, it is possible that the DOJ might not apply the minimal-participant standard as restrictively as courts have. The DOJ has expressed its desire to "incentivize those with information about corporate criminal wrongdoing to report original information about criminal conduct that might otherwise go undetected or be difficult to prove."^[15]

On the other hand, however, the DOJ could have incorporated a more lenient standard into its guidelines, as other whistleblower programs have, but chose not to. And it has adopted a complementary Pilot Program on Voluntary Self-Disclosures for Individuals,^[16] which offers whistleblowers with potential culpability the opportunity for nonprosecution agreements, rather than monetary awards.^[17]

Ultimately, understanding how the minimal-participant reduction works in the sentencing context shows that potential whistleblowers have a narrow path to an award under the DOJ's Corporate Whistleblower Awards Pilot Program.

If whistleblowers play only a small role in a scheme, report shortly after learning of the scheme's full nature and provide the DOJ with many high-quality investigative leads, then the DOJ may still deem them eligible for an award.

While the viability of that path is far from certain, many whistleblowers will undoubtedly try, because it

is vastly preferable to litigate one's status as a minimal participant before the DOJ rather than a sentencing court.

Caleb Hayes-Deats is a partner at MoloLamken LLP. Previously, he served as an assistant U.S. attorney in the Southern District of New York.

Jackson Myers is an associate at MoloLamken.

Eric Rolston is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See DOJ Corporate Whistleblower Awards Pilot Program Guidance, August 1, 2024 [hereafter "Program Guidance"], available at <https://www.justice.gov/criminal/media/1362321/dl?inline>.

[2] Program Guidance §II.1(e) n. 4 (quoting U.S.S.G. § 3B1.2 Appl. Note n.4).

[3] Aggravating & Mitigating Role Adjustments, at 14 (U.S. Sent'g Comm'n 2024) ("Thus, the relative culpability of the defendant is measured only in comparison to those persons who actually participated in the criminal activity, rather than against other individuals who commit similar crimes."), available at https://www.ussc.gov/sites/default/files/pdf/training/primers/2024_Primer_Role.pdf; United States v. Nkome, 987 F.3d 1262, 1270–71 (10th Cir. 2021).

[4] U.S.S.G. §3B1.2 Appl. Note 3.

[5] U.S.S.G. §3B1.2 Appl. Note 4; see also United States v. Moeller, 80 F.3d 1053, 1063 (5th Cir. 1996).

[6] Id.

[7] See, e.g., United States v. Bruey, No. 22-12452, 2023 WL 6290830, at *4 (11th Cir. Sept. 27, 2023) (rejecting reduction where defendant "knew the loan funds were fraudulently obtained, and fully acknowledge[d] that he knew it was being done on his behalf" (cleaned up)); United States v. Ramirez , No. 22-13216, 2024 WL 1090720, at *4 (11th Cir. Mar. 13, 2024) ("The record reflects that Ramirez understood the scope of the scheme ... When she cashed checks, she knew that the proceeds were from a broader scheme to defraud"); United States v. Roybal, 188 F. Supp. 3d 1163, 1216 (D.N.M. 2016) (defendant "was aware of the full scope of [co-defendant's] drug-trafficking operations" and actively assisted in those activities); United States v. Daramola, No. 20-CR-2124, 2024 WL 4241840, at *4 (D.N.M. Sept. 19, 2024).

[8] See U.S. Sentencing Comm'n, 2023 Sourcebook of Federal Sentencing Statistics, at 48 (Table 21), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf.

[9] United States v. Bruey, No. 22-12452, 2023 WL 6290830, at *4 (11th Cir. Sept. 27, 2023) ("[T]he fact that a defendant's role may be less than that of other participants engaged in the relevant conduct may not be dispositive of role in the offense, since it is possible that none are minor or minimal participants."

(quoting *United States v. Rodriguez De Varon*, 175 F.3d 930, 944 (11th Cir. 1999) (en banc)); *United States v. Nkome*, 987 F.3d 1262, 1277 (10th Cir. 2021) ("[A] defendant is not entitled to a reduction under 3B1.2 simply because he is the least culpable among several participants in a jointly undertaken criminal enterprise.").

[10] Program Guidance II.2(a)-(c).

[11] Program Guidance III.3(a)(i)-(ii).

[12] Program Guidance III.3(a)(i)(A).

[13] Program Guidance III.3(a)(ii)(B)-(D) ("The Department will assess...timeliness of the whistleblower's initial report...resources conserved as a result of the whistleblower's assistance...efforts taken by the whistleblower to remediate the harm caused by any criminal violations involved").

[14] Program Guidance II.5.

[15] Program Guidance at 1.

[16] <https://www.justice.gov/criminal/criminal-division-pilot-program-voluntary-self-disclosures-individuals>.

[17] Program Guidance II.1(e) n.4.