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FinCEN's New Whistleblower Program: Global Implications

Modernizing FinCEN's Whistleblower Program Under the Anti-Money Laundering Act of 2020

INTRODUCTION

Reporting on multiple international money-laundering schemes last year brought public focus to the anti-money laundering ("AML") enforcement efforts of the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN"). Capitalizing on the public attention, Congress reinvigorated efforts to reform AML enforcement with an eye towards enhancing reporting mechanisms.[1] The resulting legislation, the Anti-Money Laundering Act of 2020, passed at the start of 2021 and, among other things, revamped FinCEN's whistleblower program. The Act not only lifted the cap on whistleblower awards considerably, but also greatly increased protections for employees who report on possible money laundering violations at their companies. These reforms could have far-reaching effects, and it is critical for those in the financial industry and other affected industries to be aware of the potential implications.

OVERVIEW OF THE ANTI-MONEY LAUNDERING ACT OF 2020

The Anti-Money Laundering Act of 2020 ("AMLA"), is one of the most significant legislative reforms to AML enforcement in the past twenty years (read more about the AMLA here). The AMLA, sponsored by then-Senate Banking Chairman Mike Crapo (R-ID) and then-Ranking Member Sherrod Brown (D-OH), garnered initial support from the Trump Administration, the Biden campaign, federal prosecutors, and state Attorneys General. Senators Crapo and Brown borrowed concepts and provisions from several preceding bills like the ILLICIT CASH Act and STIFLE Act, which attempted to address specific areas of AML reforms, to create one sweeping bill that would modernize the entire enforcement system. After several months of close negotiations, the

AMLA was passed on January 1st, 2021 as part of the omnibus FY21 National Defense Authorization Act ("NDAA").

The AMLA bolstered several key provisions of the Bank Secrecy Act ("BSA"), providing federal agencies—such as the Department of Justice and FinCEN—with new tools to combat money laundering and terrorism financing. The AMLA also expanded the scope of FinCEN's regulatory authority, reinforcing its role as the primary federal agency responsible for enforcing the BSA. Members of Congress agreed to support BSA reforms, in part, based on the recognition that alleged wrongdoers have embraced new technology and techniques to exploit loopholes or blind spots in the system. During congressional hearings on BSA reforms in 2018, Sen. Crapo explained: "[M]embers of the Committee are united on the idea that there is room for change in a decades-old system that will yield a modernized BSA AML regime that works for law enforcement, financial institutions, their regulators, and the man in the street, who is the ultimate beneficiary of a strong U.S. financial system."[2]

IMPLICATIONS FOR WHISTLEBLOWERS

Importantly, the AMLA directed Treasury to establish a new whistleblower program. Previously, the law governing AML whistleblowers was limited to four provisions of the BSA and capped potential awards at $150,000.[3] The AMLA, however, now requires FinCEN to promulgate new rules under Title 31 to implement a robust new whistleblower program that encourages informants to bring forward independent knowledge of wrongdoing.[4] While the AMLA provides some specifics for the new whistleblower program, many of the operative procedures and provisions will depend on FinCEN's forthcoming rules.[5] Still, much can be gleaned from the statutory language of the AMLA, especially in comparison with similar provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), and the False Claims Act ("FCA"), which all provide for robust whistleblower programs overseen by other federal agencies.

It is, undoubtedly, the expectation of Congress, Treasury, and FinCEN that a whistleblower program will generate new AML enforcement actions. FinCEN director Ken Blanco testified at a 2018 Senate Banking Committee Hearing that "the lack of information is a problem for [FinCEN]. The fewer pieces of tips and information we have creates problems for our investigation[s]…."[6] FinCEN can reasonably expect a significant increase in whistleblower tips under the new program. For example, since Dodd-Frank established the whistleblower program at the Securities and Exchange Commission ("SEC") in 2011, the number of tips the SEC receives annually has more than doubled.[7]

This client alert examines the provisions of the AMLA related to FinCEN's new whistleblower program, explores potential awards whistleblowers can receive under the revised BSA, reviews the AMLA's limitations on whistleblower eligibility and awards, and discusses what the new program might look like in practice.

THE AMLA SIGNIFICANTLY EXPANDS WHISTLEBLOWER AWARDS AND PROTECTIONS

The AMLA dramatically reshapes the existing BSA whistleblower program to mirror the robust programs created by Dodd-Frank and the FCA. Historically, those programs—and whistleblower programs more generally—are intended to encourage whistleblowing activity, and the enhanced whistleblower provisions of the AMLA show that Congress plans to do the same for AML enforcement. The AMLA has attempted to incentivize those with knowledge of BSA violations to blow the whistle by drastically upping the potential awards, while relaxing the eligibility requirements and strengthening the statutory protections against whistleblower backlash or retaliation. Importantly, however, the AMLA retains several limitations on whistleblower eligibility and grants considerable discretion to Treasury to determine award amounts. Moreover, the rulemaking authority granted to Treasury allows for further restrictions on the whistleblower program.

CAPS ON AWARD AMOUNTS LIFTED

Historically, whistleblowers who reported money laundering and other violations of the BSA have not received awards on par with those issued under Dodd-Frank or the FCA. For example, FCA relators can obtain up to 30% of the monetary recovery for reporting violations of the False Claims Act.[8] Under Dodd-Frank, the SEC and CFTC reward whistleblowers 10-30% of any monetary recovery of over $1 million. Until the AMLA was passed, however, whistleblower awards for BSA violations were capped at $150,000 or 25% of the net amount of the fine or penalty, whichever was less.[9] Moreover, the awards were entirely left to FinCEN's discretion.[10]

Under the AMLA, if a whistleblower meets certain requirements, Treasury must award them for voluntary information that results in prosecution and monetary sanctions over $1 million.[11] The AMLA directs Treasury to allow awards of *up to* 30% of the net amount of fines or penalties levied against a violator of the BSA, but the exact framework for determining award amounts will not be known until FinCEN promulgates its new rules.[12] As discussed more fully below, potential awards are likely to far exceed the previous statutory cap of $150,000 given the historical size of BSA penalties.

AWARD SETTING DISCRETION STILL PROVIDES A MEANINGFUL LIMITATION

Although awards *up to* 30% are authorized, the exact percentage is discretionary. Like Dodd-Frank and Sarbanes-Oxley, the AMLA directs Treasury to determine award amounts based on several factors designed to maximize the awards given to those that provided substantial assistance, including: (1) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action; (2) the degree of assistance provided by the whistleblower; (3) the interest of the government in deterring BSA violations that the whistleblower disclosed; and (4) any other relevant factors established by Treasury.[13]

Critically, however, the AMLA does not provide a guaranteed minimum award amount, as it only provides for a statutory cap of 30%. Therefore, even though the AMLA mandates awards based on certain criteria, Treasury has the discretion to award mere nominal sums to whistleblowers. Given the fact that the prior modest award maximum failed to encourage whistleblowers in the numbers seen comparatively to other, more robust programs, if Treasury delays setting a mandatory floor or awards nominal sums, the theoretical effectiveness of the program change would be reduced. Here, Treasury may look to the SEC's and CFTC's rules, which establish a range of potential awards between 10-30% of the monetary penalty assessed.[14] Given the similarities between the AMLA and Dodd-Frank, it is possible that Treasury will establish a similar statutory minimum on award amounts.

SOME RELAXED ELIGIBILITY REQUIREMENTS FOR WHISTLEBLOWER STATUS

Prior to the passage of the AMLA, the BSA provided limited guidance on who would be eligible as a whistleblower, save for a few provisions explicitly excluding certain government employees from eligibility.[15] Those provisions incentivized direct reporting to government agencies. The AMLA reversed course, broadening the eligibility requirements considerably. For example, whistleblower status under the AMLA is now available to employees who report internally before relaying the information to the government. And as explained more fully below, the AMLA provides remarkable protection against retaliation for employees who *only* report potential BSA violations internally.

Under the broad language of the AMLA, even BSA/AML compliance personnel or auditors at a company may qualify as whistleblowers. This represents a stark and controversial departure from the Dodd-Frank framework, which limits whistleblower eligibility for compliance officers and internal audit personnel. These company insiders, who are uniquely positioned to identify money laundering violations, could provide substantial and perhaps otherwise undetectable

information about potential violations to FinCEN. Treasury may, however, exclude these individuals from whistleblower eligibility through its forthcoming regulations, similar to its rulemaking for the IRS whistleblower program.[16]

The AMLA also incorporates some of the protections provided by Dodd-Frank. For example, eligible whistleblowers do not necessarily have to be company insiders. So long as the government was not previously aware of the information, independent evaluators of public information that spot wrongdoing can also receive awards under the AMLA. Anonymous reporters can also qualify for awards so long as they certify their eligibility and are represented through counsel.[17] Further, tips on violations that occurred in the distant past can still qualify for awards—whistleblowers with information related to civil violations that occurred up to six years ago or related to criminal violations that occurred up to five years ago can qualify under the statute.[18] Whistleblowers can even receive an award if their tips relate to an existing government investigation.[19]

IMPORTANT LIMITATIONS ON WHISTLEBLOWER ELIGIBILITY REMAIN

Although whistleblower eligibility is expanded under the AMLA, several categories of people remain precluded from award eligibility. Similar to Dodd-Frank, awards are prohibited for: (1) whistleblowers convicted of criminal violations related to the acts at issue; (2) whistleblowers that fail to submit information in accordance with the rules; and (3) regulatory and law enforcement officials.[20] Other key limitations placed on whistleblower eligibility relate to how the whistleblower acquired the information and the way that information was shared with the government.

Whistleblowers must provide "original information," a term also used by Dodd-Frank.[21] This information must be "derived from the independent knowledge or analysis of a whistleblower," not known to the government from any other source, unless the whistleblower is the original source of the information, and is *not* exclusively derived from publicly available information (unless that information was also obtained from the whistleblower).[22]

The SEC recently amended this provision to require that the original information be provided "in writing" and also limited the scope of "related actions" to those based on the original information provided directly to the SEC or another governmental entity.[23] As the statutory language of the AMLA mirrors Dodd-Frank, it is possible that Treasury will promulgate similar rules for FinCEN whistleblowers.

INTERNAL WHISTLEBLOWERS NOW PROTECTED AGAINST EMPLOYER RETALIATION

Despite its many similarities to the SEC's whistleblower program under Dodd-Frank, the AMLA provides even stronger protections against whistleblower retaliation. Most notably, Congress drafted the AMLA to protect purely internal whistleblowers from retaliation—a stark contrast from the SEC's program.

The AMLA includes several anti-retaliation provisions and establishes a private right of action for whistleblowers who face retaliation. First, the AMLA extends whistleblower retaliation protection to individuals who simply assist or testify in any Treasury or DOJ-led investigation or any judicial or administrative action.[24] Second, the AMLA broadly defines "retaliation" in order to maximize protection and incentivize whistleblowers to come forward. Indeed, the AMLA prohibits both direct and indirect retaliatory acts such as termination, demotion, suspension, threats, blacklisting, harassment, or "other manner[s of] discriminat[ion]" against a whistleblower.[25] This wide-ranging prohibition against retaliation is similar to the broad protection extended to whistleblowers under Dodd-Frank and the Sarbanes-Oxley Act.[26] But the AMLA goes a step further by extending whistleblower retaliation protection to employees who *only* report potential BSA violations internally. By doing so, Congress took the unprecedented step of shielding whistleblowers—even if they do not cooperate with the government.

In 2018, the Supreme Court held that the definition of "whistleblower" under Dodd-Frank included an inherent reporting requirement to the government, thereby eliminating whistleblower protections for purely internal reports under the SEC's program.[27] For the AMLA, Congress took steps to ensure that purely internal whistleblowers would be given retaliation protection by: (1) eliminating any reporting language from its definition of "whistleblower" and (2) expressly extending protection to individuals who report potential BSA violations to their superiors or other employees with authority to investigate such allegations.[28] This provision could have wide-reaching implications for internal investigation practices and corporate compliance programs for financial institutions and other companies subject to the BSA. For example, employers regulated by the BSA should carefully document any performance or disciplinary problems for under-performing employees to protect against potential retaliation claims if those employees had previously filed internal reports related to the BSA. Additionally, the risk of potential retaliation claims may be further mitigated by employing outside counsel to independently investigate claims by internal whistleblowers and ensure confidentiality.

Further, BSA regulated employers ought to be aware of the harsh penalties and fines for retaliation. Under the AMLA, whistleblowers could be granted reinstatement, double back pay with interest, uncapped compensatory damages (including emotional damages), and even attorney fees if they succeed with a private action.[29] While the statute does not provide for punitive damages, fines in these actions could be significant based on the back pay and compensatory damages alone.

POTENTIAL AWARDS

While there are some limitations on the whistleblower provisions, the size of awards granted to whistleblowers under this new regime could still be unprecedented. Considering that more than one billion dollars have been paid in BSA-related penalties in the past 10 years, and up to 30% of these penalty amounts could be now up for grabs, employees and plaintiffs' attorneys have a tremendous incentive to bring complaints forward.

As mentioned earlier, whistleblowers can collect up to 30% of the monetary sanctions imposed in a judicial or administrative action, including fees, penalties, disgorgement amounts, or accumulated interest.[30] Restitution payments, like forfeiture and victim compensation, are excluded from the amount that whistleblowers can collect on.[31] In practice, this provision is not likely to provide much restraint as civil monetary penalties under the BSA are assessed for "each day that the violation continues" and can total hundreds of millions of dollars.[32]

Further, the AMLA considerably increased the potential monetary sanctions that could be ordered in BSA actions. Not only did the AMLA create two new criminal violations for intentionally deceiving or withholding information from financial institutions, which both are punishable by a fine of up to $1 million, it also increased civil penalties for repeated and egregious violators.[33] Repeat violators are now liable for up to three times the profit gained from the violation.[34] These increased penalties exponentially raise the amount that whistleblowers can obtain from one actionable tip.

Looking at a sample of major BSA penalties per year over the previous decade, we can get a sense of how large some whistleblower awards under the new AMLA framework could be. This chart below shows the total penalties of select BSA actions per year and calculates what awards could have been granted to an eligible whistleblower under the new legal framework that year.

Year	Total of Appliable Penalties[35] (Excluding Forfeiture)	Max Whistleblower Awards Contemplated Under AMLA
2021	$390 million	$117 million
2020	$65 million	$19.5 million
2019	N/A	N/A
2018	$272.5 million	$81.75 million
2017	$87 million	$26.1 million
2016	$12.8 million	$3.84 million
2015	$30.5 million	$9.15 million
2014	$863.5 million	$259.05 million
2013	$18.2 million	$5.46 million
2012	$845 million	$253.5 million
2011	$10.9 million	$3.27 million
TOTAL	**$2.568 billion**	**$778.62 million**

While Treasury could decide to cap awards below the 30% maximum set by the AMLA, it is clear from the chart above that the AMLA has the potential to create a multimillion-dollar impact on the AML enforcement industry. Indeed, the SEC's whistleblower has awarded over $800 million for tips resulting in enforcement actions over the past decade.[36] The prospect of these high-value awards will likely lead to a significant increase in tips and a corresponding increase in BSA enforcement. Similar revamps to whistleblower programs at other agencies provide some insight into how these significant changes could specifically affect enforcement actions and industry response.

THE FUTURE OF FINCEN'S WHISTLEBLOWER PROGRAM

While the AMLA has been enacted and has technically gone into effect, significant portions of the new whistleblower regime have yet to be determined. Directing the promulgation of rules to implement the new whistleblower program, the AMLA has tasked Treasury with establishing additional program eligibility requirements, factors that will be considered when determining award amounts, and any potential limits on minimum award amounts. Treasury must also establish program procedures and a reporting system, as it is currently unclear how whistleblowers can submit tips or whether there will be an online filing system. FinCEN's standard review or communication processes are also unknown at this time. Establishing all these rules and procedures is no small task—it took the SEC and IRS almost a year to fully implement robust whistleblower programs.

Unlike other sections of the AMLA, the whistleblower provisions did not set a statutory deadline specifying when those rules must be drafted or implemented. Treasury, however, has acted quickly in launching rulemaking efforts to update some of the other provisions of the BSA. On April 1, FinCEN issued an Advance Notice of Proposed Rulemaking seeking input on beneficial ownership reporting requirements.[37] FinCEN director Kenneth Blanco also noted during a March speech that the agency's "number one priority" is implementing the AMLA and suggested it will seek public comment for the various provisions on an ongoing basis.[38]

Given FinCEN's current pace and commitment to modernizing and increasing AML enforcement, a finalized whistleblower program can be expected within the next year or two. By way of analogy, Treasury issued similar regulations under the Patriot Act within one to three years after its passage in 2001. Here, Treasury may undertake a similar timeframe. Judging by the success of similar whistleblower programs that have come before, a significant number of new enforcement actions in the AML enforcement space should be expected.

CONCLUSION

As regulatory guidance evolves and Treasury finalizes FinCEN's new whistleblower program through rulemaking, financial institutions and other entities subject to the BSA ought to consult with counsel to design and implement effective BSA/AML compliance programs. Moreover, maintaining adequate safeguards for whistleblowers by developing policies that protect the confidentiality of whistleblowers and prevent potential retaliation is imperative in light of the protections now afforded to internal reports. Employing outside counsel to independently review and evaluate tips by internal whistleblowers can help maintain confidentiality, mitigate the risk of retaliation claims, and, most importantly, demonstrate a commitment to BSA/AML compliance.

[1] *See* Pete Schroeder, *U.S. Policymakers Seize on FinCEN Leaks to Press for Stepped up Money-Laundering Fight*, REUTERS (Sept. 21, 2020), https://www.reuters.com/article/global-banking-fincen-congress/u-s-policymakers-seize-on-fincen-leaks-to-press-for-stepped-up-money-laundering-fight-idUSKCN26D09W.
[2] Press Release, Sen. Crapo, *Crapo Statement at Money Laundering Hearing* (Nov. 30, 2018), available at https://www.banking.senate.gov/newsroom/majority/11/30/2018/crapo-statement-at-money-laundering-hearing.
[3] *See* 31 U.S.C. § 5328.
[4] *See* AMLA § 6314.
[5] Currently, FinCEN has not issued any proposed rules to implement the new whistleblower program under the AMLA. In fact, FinCEN has only issued advance notice of proposed rulemaking for AMLA provisions to-date. *See* Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17557 (Apr. 5, 2021).
[6] *Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform*, 115 Cong. (2018) (Statement of Kenneth Blanco).
[7] *See* U.S. SEC. & EXCH. COMM'N, OWB REPORT, WHISTLEBLOWER PROGRAM 28, 31 (2020), available at https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.
[8] *See* 31 U.S.C. § 3730(d)(2).
[9] *See* 31 U.S.C. § 5323.
[10] *See* 31 U.S.C. § 5323(a) ("The Secretary may pay a reward . . . .").
[11] *See* AMLA § 6314.
[12] *See* AMLA § 6314(b)(1).
[13] *See* AMLA § 6314(a).
[14] *See* 15 U.S.C. § 78u-6(b).
[15] *See* 31 U.S.C. § 5323.
[16] Similar to the AMLA, the organic act for the IRS program was silent as to whether compliance personnel may be eligible for whistleblower awards. *See* I.R.C. § 7623. The accompanying regulations to the IRS program, however, excluded several categories of persons from award eligibility, including an "individual who is or was required by Federal law or regulation to disclose the information or who is or was precluded by Federal law or regulation from disclosing the information." Treas. Reg. § 301.7623-1(b)(2)(iii). This provision was drafted to reflect the IRS's determination that the whistleblower program "does not incentivize conduct that is either already mandated by, or contrary to, Federal law." *See* Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws, 79 Fed. Reg. 47246-01, 47248 (Aug. 12, 2014). As the BSA already contains a number of reporting requirements, the Treasury may similarly narrow the scope of eligible AMLA whistleblowers by prohibiting awards for compliance personnel who submit information pursuant to reporting requirements of the BSA or other federal laws.
[17] *See* 31 U.S.C. § 5323.
[18] *See* 31 U.S.C. § 5321(b); 18 U.S.C § 3282(a).
[19] *See* 31 U.S.C. § 5323.
[20] *See* AMLA § 6314(h)
[21] *See id*.
[22] *See* 15 U.S.C. § 78u-6(a)(3).
[23] *See* Final Rules 21F-3(b), 21F-2, "*Whistleblower Program Rules*," Release No. 34-89963, File No. S7-16-18 at p. 35-38, 72-74, available at https://www.sec.gov/rules/final/2020/34-89963.pdf.
[24] *See* AMLA § 6314(g) (to be codified at 31 U.S.C. § 5323(g)).
[25] *See* AMLA § 6314(g) (to be codified at 31 U.S.C. § 5323(g)).
[26] *See* Sarbanes-Oxley Act of 2002, § 806, 116 Stat. 745 (2002); Dodd-Frank Wall Street Reform and Consumer Protection Act, § 922, 124 Stat. 1376-2223 (2010). In fact, the SEC recently broadened the scope of "retaliation" under Dodd-Frank to include actions "a reasonable employee [would find] materially adverse" such that it would dissuade an individual from reporting; furthermore, administrative law judges have similarly found broad retaliation protection under Sarbanes-Oxley.
[27] *See Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767, 778 (2018) (holding that internal reporting is insufficient to trigger the anti-relation protections under Dodd-Frank because the definition of a "whistleblower" included an SEC-reporting requirement).
[28] *See* AMLA § 6314(g)(1) (to be codified at 31 U.S.C. § 5323(g)(1)).
[29] *See* AMLA § 6314(g)(2) (to be codified at 31 U.S.C. § 5323(g)(2)).
[30] *See* AMLA § 5324(a).
[31] *See id.*
[32] *See* 31 U.S.C. § 5321(a)(1).
[33] *See* AMLA §§ 6309-10 & 6312.
[34] *See id*.
[35] The basis for calculating potential whistleblower awards under the AMLA is restricted. First, the basis for calculating an award is limited to money judgments obtained in a "covered judicial or administrative action" brought by the Secretary of the Treasury or the Attorney General or a "related action" by another authority in connection with an action brought by the Secretary of the Treasury or the Attorney General. *See* AMLA § 6314(a) (to be codified at 31 U.S.C. § 5323(b)(1)). Many BSA/AML enforcement actions, however, are brought solely by authorities other than Treasury or the Department of Justice, such as the Federal Reserve or the FDIC. This chart includes BSA/AML enforcement actions brought by the Department of Justice, FinCEN or OCC, as well as related actions. Second, any forfeiture or restitution amounts are expressly excluded from the basis. Over the

last decade, however, many significant global settlements for BSA/AML claims have included large forfeiture amounts, exceeding even a billion dollars in some instances. We have excluded those amounts from the chart.

[36] *See* U.S. SEC. & EXCH. COMM'N, *Whistleblower Awards*, available at https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.

[37] DEPT. OF THE TREASURY, RIN 1506-AB49 - BENEFICIAL OWNERSHIP INFORMATION REPORTING REQUIREMENTS (2021), https://public-inspection.federalregister.gov/2021-06922.pdf.

[38] Al Barbarino, *FinCEN To Seek Input On Rules Targeting Shell Companies*, LAW360 (Mar. 22, 2021), https://www.law360.com/articles/1367483?copied=1.