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Fighting Transnational Corruption: Why the Treasury Department Must Make Awards More Accessible to Whistleblowers in its AML Whistleblower Act Regulations

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In December 2022, just as the year's legislative finish line neared, the 117th U.S. Congress passed the Anti-Money Laundering Whistleblower Improvement Act (or the "AML Whistleblower Act"), fixing key loopholes found in the 2020 installment of the act. Together, these laws strengthened federal efforts to combat international money laundering and terrorist financing by holding banks to higher standards of accountability and putting teeth behind the requirements of the Bank Secrecy Act. Furthermore, the laws established the AML Whistleblower Program, which offers monetary awards to whistleblowers who report money laundering and sanctions violations to U.S. authorities. Whistleblowers can submit anonymous and confidential reports to both the U.S. Department of Justice (DOJ) and the U.S. Department of Treasury (USDT) and its Financial Crimes Enforcement Network (FinCEN).

USDT and FinCEN are now drafting regulations on how to implement the AML Whistleblower Act and set up an effective whistleblower program. These regulations are, as whistleblower advocates have pointed out, a critical opportunity for the USDT and FinCEN to remove bureaucratic red-tape that has obstructed the fight against corruption unnecessarily.

Dodd-Frank Act: Essential to Combating Corruption, but Unnecessarily Limited in Scope

The AML Whistleblower Act was modeled off of the Dodd-Frank Act's whistleblower law, which established whistleblower programs at the U.S. Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) and has become one of the United States' most effective tools for combating corruption abroad. However, when Dodd-Frank passed after the 2008 recession, the SEC and CFTC barely considered the law's transnational impact. The rules and regulations implementing the Dodd-Frank whistleblower provisions were adopted without any input from international anti-corruption organizations.

As a result, the regulations limit the potential scope of this anti-corruption mechanism by excluding *certain* whistleblowers from receiving rewards, beyond the few groups who are excluded in the actual legislation.

Nonetheless, the Dodd-Frank Act's whistleblower protections and rewards, which extend to non-U.S. citizens and cover violations of the Foreign Corrupt Practices Act, have incentivized whistleblowers all over the world to report fraud and bribery to the U.S. government. Through the 2021 fiscal year, the SEC has received over 5,000 international whistleblower tips from 130 different foreign countries.

In its Phase 4 Report of the U.S. Implementation of the Anti-Bribery Convention, the Organization for Economic Cooperation and Development (OECD) commended the Dodd-Frank Act saying that the law's, "multi-faceted protections, most notably the Securities and Exchange Commission's (SEC's) ability to enforce the anti-retaliation provisions, constitute a good practice given that they provide powerful incentives for qualified whistleblowers to report foreign bribery allegations against issuers."

Even though the OECD has recognized that U.S. whistleblower laws constitute best-practice for combating corruption compared to other countries, the organization also observed that some whistleblowers – particularly non-U.S. citizens – are denied awards arbitrarily.

Based on the OECD report, it is evident that many international whistleblowers are not aware of the technical filing procedures contained in the SEC regulations. Often, they report to the wrong offices or agencies, resulting in the improper and unfair disqualification of an otherwise fully qualified whistleblower. For instance, whistleblowers who have provided information to a U.S. government agency other than the SEC (including the Justice Department) may have only 120 days to file a specific highly technical form in order to be eligible for an award. This is the case even if all the investigators know who the whistleblower is and are aware that their information was the trigger for the enforcement action.

Furthermore, those who blow the whistle to media, investigative journalists, civil society, or foreign law enforcement can be disqualified from obtaining an award if they fail to file the technical complaint form with the SEC. If, for example, a whistleblower reported fraud or bribery to a non-governmental organization (NGO), and that NGO reported the fraud to the U.S. government, the original whistleblower would most likely become ineligible to receive awards as they did not go directly to the government themselves, even if the U.S. government relied heavily on the whistleblower for their investigation. The same is true for whistleblowers who initially report to foreign law enforcement agencies, even if they become a critical source to the United States.

The Department of Justice Foreign Corrupt Practices Act (FCPA) Unit provided the OECD with data on sources of successful FCPA prosecutions which suggest that the SEC's rules disqualify a significant percentage of otherwise fully qualified whistleblowers. According to this data, media reports constitute 20% of detection sources and civil society and foreign law enforcement constitute another 20%. Based on the current regulations that penalize whistleblowers who do not go to the government first, it is almost inevitable that the whistleblowers behind these claims would be disqualified from obtaining a reward.

Furthermore, the DOJ statistics suggest that 40% of its successful FCPA prosecutions are sourced from "whistleblowers," meaning whistleblowers who report directly to a U.S. government agency. Unfortunately, the SEC regulations require whistleblowers who report first to non-SEC government entities – including the Department of Justice, the Department of State, and U.S. embassies – to follow a host of technicalities, which most international whistleblowers will never meet.

Disqualifying even one otherwise qualified whistleblower who has placed so much at risk to report foreign bribery is unacceptable. To have a complicated web of regulations that disqualify a majority of international whistleblowers is a reprehensible flaw in what is otherwise viewed as the gold standard

of anti-corruption laws. USDT and FinCEN need to carefully review these exclusive and counterproductive practices when adopting the rules governing money laundering.

We know that whistleblower rewards are an effective incentive for reporting corruption (and that large awards and the sanctions they bring about are an effective deterrent for corruption). Therefore, the unnecessary limits on who can qualify for whistleblower rewards present a barrier to combating corruption in the full scope enabled by the law. The Dodd-Frank Act itself (15 U.S. Code § 78u–6) does not specify denial to categories as far-reaching as the current regulations of the SEC and CFTC.

The AML Whistleblower Act was modeled on Dodd-Frank to emulate its transnational effect on combating corruption, but AML can accomplish so much more if USDT and FinCEN do not repeat these same mistakes that were made with the Dodd-Frank regulations.

Expanding Whistleblower Rewards in AML Whistleblower Act Regulations is Critical to U.S. Anti-Corruption Strategy

In addition to reviewing the shortcomings of the SEC's regulations, USDT and FinCEN must consider two major reports and audits published by governmental and nongovernmental organizations that offer significant guidance for how the AML Whistleblower Act's regulations should be drafted.

First, the OECD Phase 4 Bribery Convention Audit, referenced above, formally recommended that the U.S. "enhance guidance about the protections available to whistleblowers who report suspected acts of foreign bribery depending on the competent enforcement agency to which they report." This recommendation signals that the guidance to whistleblowers, as it stands, is confusing and potentially misleading. Interagency cooperation and streamlining of whistleblower programs are necessary for whistleblower-initiated counter-corruption efforts to be more effective.

Additionally, in 2021, the Biden Administration released the United States Strategy on Countering Corruption ("Strategy"). The Strategy provides clear direction for constructing improved international whistleblower programs, including those covering money laundering and sanctions violations. Based on the OECD findings and the mandates of the Strategy, it is evident that an effective AML whistleblower office will play a critical role in combating international corruption, especially with respect to money laundering. Under the Strategy, the White House explicitly pointed to the AML and Dodd-Frank whistleblower reward programs as playing central roles in combating international corruption.

The Strategy, which is the first-ever "whole government approach" to combating worldwide corruption, requires FinCEN to ensure that their final rules implement the Strategy's letter and spirit.

Pillar One of the Strategy states that "departments and agencies will work to support, and better make use of analysis conducted by external partners, including academia, the private sector, civil society, and media." To implement this, FinCEN regulations for the AML Whistleblower Law must incorporate civil society actors, both as potential whistleblowers (or "analysts") and entities where whistleblowers will make initial disclosures. Unlike the current Dodd-Frank regulations, the new AML regulations cannot contain highly technical traps that will ensnare international whistleblowers and will result in hardship and injustice.

Also, the rules defining voluntary disclosure must be reassessed in order to maximize the potential of

the AML law. Qualified reporting needs to include disclosures to external partners, academia, the private sector, civil society, the media, and international law enforcement and regulatory agencies. Such requirements must ensure that initial filings with these nongovernmental entities can be fully credited, if the original information provided to these entities is forwarded to FinCEN or the DOJ, and an investigation is triggered – regardless of whether the whistleblower provided this information directly to FinCEN/the DOJ or provided this information indirectly through reporting to another entity that informed FinCEN/the DOJ.

Relevant to the AML Whistleblower Act in particular, Pillar Three of the Strategy states that "The United States will implement newly established tools for investigating and prosecuting money laundering offenses. For example… financial rewards to incentivize reporting on Bank Secrecy Act violations." It also requires the government to "work with partner countries to bolster anti-corruption enforcement to amplify the use of tools." In promulgating rules, FinCEN must contemplate the AML whistleblower law's importance, as dictated by this Strategic Objective.

If the United States is to make good on its promise in the Strategy to "stand in solidarity" with human rights defenders, including whistleblowers, and work collaboratively with law enforcement agencies, the definition of "original information" must expand. Original information must include information that originates from a whistleblower but is either publicly reported in the news media or referred to the DOJ or FinCEN from various third parties, such as foreign law enforcement agencies, anti-corruption organizations, U.S. embassy personnel, or civil society. The AML law incontrovertibly provides this authority.

Conclusion

In the short time frame in which Dodd-Frank has existed, its whistleblower rewards programs have proven transformative to U.S. initiatives to combat corruption. Both the bipartisan Strategy to Combat Corruption and the OECD have recognized that the combined effect of Dodd-Frank and the AML Act will be catalytic to U.S anti-corruption efforts. However, both have also identified that improving U.S. anti-corruption efforts requires working with groups who are currently excluded from whistleblower rewards and collaborating between agencies to streamline the process for international whistleblowers.

Empowering whistleblowers is at the heart of pressing national security concerns, including the threat of authoritarian regimes like Russia. As USDT and FinCEN write the regulations for the AML Whistleblower Improvement Act, it is paramount that they consider the recommendations made clear by the OECD, the United States Strategy on Countering Corruption, and anti-corruption organizations worldwide and expand the scope of effective whistleblower rewards programs.

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