Whistleblower rewards law: fixing money laundering loopholes

By Stephen M. Kohn, Esq., Kohn, Kohn & Colapinto LLP

JANUARY 28, 2022

On Jan. 1, 2021, Congress overrode President Donald Trump's veto of the massive National Defense Authorization Act, better known as the NDAA. Included in the NDAA were major overhauls of the U.S. anti-money laundering laws; chief among them was a new whistleblower reward law modelled on the highly successful Dodd-Frank Act (https://bit.ly/3tOlbL9). But unlike Dodd-Frank, the Anti-Money Laundering whistleblower law, 31 U.S.C. § 5323, (https://bit.ly/3tPcUXm) was riddled with loopholes that have crippled its implementation and will undermine its effectiveness.

The Grassley-Warnock bill, Senate Bill 3316, will close the loophole by providing a 10% mandatory minimum reward for whistleblowers whose original information results in a successful enforcement action of over $1 million.

Like Dodd-Frank, the AML whistleblower law empowers the Secretary of Treasury to potentially establish a robust whistleblower program covering disclosures of money laundering and violations of the Bank Secrecy Act both in the United States and internationally. The law follows the best practices implemented under Dodd-Frank to permit anonymous and confidential reporting and permit "related action" payments (i.e., rewards based on sanctions issued by other agencies, including the Justice Department, for money laundering crimes).

The law also focuses its coverage on reporting major violations and will only pay rewards in cases where either the Departments of Treasury or Justice issue a sanction of over $1 million. The U.S. Department of Treasury has the authority to pay awards "up to 30%" of the sanctions actually obtained from fraudsters.

But the loopholes are devastating. For example, although the law prohibits retaliation against whistleblowers who report violations of money laundering and the Bank Secrecy Act, it *excludes from coverage* all employees at FDIC insured financial institutions and credit unions. These institutions are often involved in major money

laundering scandals, and have responsibility to report "suspicious" financial transactions. Thus, the vast number of potential whistleblowers can be fired for reporting money laundering but have no protection under the AML law.

Similarly, the AML law permits the Secretary of Treasury to pay rewards "up to 30%" whenever a whistleblower's disclosure results in a covered sanction, specifically targeting sanctions obtained by FinCEN. There are three fundamental problems with the provision. First, the payment of rewards is strictly discretionary, and the Secretary can deny the payment of a reward to any whistleblower for any reason. Most whistleblowers will never trust such a program, and similar discretionary reward laws, lacking any mandatory minimums, have all miserably failed.

To compound the problem, unlike the Dodd-Frank Act, Congress did not create a fund, so the ability of the Secretary to pay any rewards whatsoever is in question. Finally, the law's definition of a sanction is far narrower than that of the Dodd-Frank and may exclude most criminal money laundering cases from coverage.

Currently there are major efforts underway to help implement or fix the law. Both have the potential to transform the law from a feckless first step to end money laundering into a modernized effective law enforcement tool. The first is a bipartisan bill sponsored by Senator Charles Grassley (R-IA) and Raphael Warnock (D-GA) designed to fix the major loopholes in the reward-payment provisions.

Additionally, the U.S. Department of Treasury is in the process of drafting proposed rules implementing the current law. This rulemaking process provides an opportunity to address shortcomings in the law and also create common sense regulations effectively implementing those aspects of the law that do not need a congressional fix.

The failure to have a mandatory minimum award is a throwback to failed whistleblower laws. The three most successful whistleblower laws, the False Claims Act, the IRS tax law, and the securities whistleblower law, all had discretionary reward provisions. The earlier versions of these three laws all completely failed. All were amended to ensure that fully qualified whistleblowers, whose original information triggered a successful prosecution, obtained a minimum reward (between 10-15%). All of the laws were amended to permit the whistleblowers to enforce their rights in court. By

guaranteeing a reward, otherwise highly hesitant employees, who feared retaliation for blowing the whistle, were incentivized to take the risk.

Once a minimum reward was guaranteed, all of the laws worked incredibly well, bringing in billions of dollars in sanctions, and holding thousands of companies and individuals accountable. The 2021 Annual Report of the SEC's Office of the Whistleblower provides empirical data documenting these results. (https://bit.ly/356h1Ul).

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The success of the mandatory whistleblower reward laws cannot be overstated. For example, the Trump-appointed former Chairman of the SEC, Jay Clayton, opposed placing limits on the whistleblower rewards, describing the Dodd-Frank Act's program in glowing terms (https://bit.ly/3fLYKy0):

"Over the past ten years, the whistleblower program has been a critical component of the Commission's efforts to detect wrongdoing and protect investors and the marketplace, particularly where fraud is well-hidden or difficult to detect. Enforcement actions from whistleblower tips have resulted in more than $2.5 billion in ordered financial remedies... of which almost $750 million has been, or is scheduled to be, returned to harmed investors."

The False Claims Act has had similar success. Sanctions obtained from fraudulent government contractors and medical providers ripping off Medicare and Medicaid had topped $65 billion since the law was amended in 1986 to guarantee a 15% minimum reward. According to the former chairman of the IRS Advisory Panel, Professor Dennis Ventry (https://bit.ly/3KvMFuS), the IRS mandatory reward law was responsible for cracking the once invincible Swiss offshore banking, resulting in over $13 billion in direct recoveries, and IRS/DOJ settlements with all of the major Swiss banks.

The Grassley-Warnock bill, Senate Bill 3316 (https://bit.ly/3nLZ8ko), will close the loophole by providing a 10% mandatory minimum reward for whistleblowers whose original information results in a successful enforcement action of over $1 million. It also creates a fund that will enable the Secretary to actually pay whistleblowers, once a whistleblower qualifies. The bill targets the biggest violators and poses no threat to small businesses.

Other problems with the AML whistleblower law can be partially addressed by the Treasury Department when it publishes rules implementing the law. Again, unlike Dodd-Frank, there was no mandatory requirement that Treasury enact any regulations whatsoever, and no deadline was set. The Treasury Department is drafting regulations, which are expected to be published this year.

Because Treasury does not have any current regulations covering AML whistleblowers, the department's new rules are not confined by any existing, outdated or ineffective regulations. Treasury can construct its rules to address the fact that money laundering is a serious driver in worldwide corruption, and is used by drug lords, corrupt dictators, terrorists, tax evaders, and government officials who accept bribes.

It is expected that Treasury will adopt regulations similar to those under other Dodd-Frank Act programs, such as the SEC's. Following this model, Treasury most likely will create a Whistleblower Office, with a user-friendly website. Because the AML law requires that Treasury accept anonymous whistleblower tips, the regulations will have to spell out the precise procedures whistleblowers must use to remain strictly confidential.

The law also requires cooperation between the Justice Department and Treasury, and aspects of the program will also need specific rules governing these interactions, and interactions with other agencies involved in combating money laundering.

In December 2021, the White House published the United States Strategy on Countering Corruption (https://bit.ly/3rEoIZs), identifying money laundering as a major driving force facilitating corruption in the United States and worldwide. Significantly, the Strategy also recognized the critical role whistleblowers play as "anti-corruption activists" who "challenge corrupt power structures." Congress should amend the AML whistleblower law, and the Treasury Department should implement that law, consistent with the goals and policies identified in the United States' Anti-Corruption Strategy.

About the author

Stephen M. Kohn is a founding partner of the whistleblower law firm **Kohn, Kohn & Colapinto LLP** in Washington, D.C., and the chairman of the Board of Directors of the National Whistleblower Center. He is the author of the first legal treatise on whistleblowing and the author of "The New Whistleblower's Handbook" (Lyons Press, 2017). The firm can be reached at consult@kkc.com.

This article was first published on Reuters Legal News and Westlaw Today on January 28, 2022.