

KOHN, KOHN & COLAPINTO, LLP
ATTORNEYS AT LAW
1710 N STREET, N.W.
WASHINGTON, D.C. 20036

TELEPHONE: (202) 342-6980

TELECOPIER (202) 342-6984

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The Honorable Janet L. Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
(202) 622-1100
correspondence@treasury.gov

Re: Treasury Action to Implement AML Whistleblower Program - Rulemaking

Dear Secretary Yellen:

We are writing in regard to the U.S. Department of Treasury's [drafting of proposed rules](#) to implement the whistleblower provisions of the [Anti-Money Laundering \(AML\) Act of 2020](#). As you may be aware, the [National Whistleblower Center](#) for which I am Chairman, has [extensive experience working with whistleblowers](#) who have reported AML crimes, including highly successful cases where whistleblowers have exposed [illegal offshore banking](#). My firm, [Kohn, Kohn and Colapinto, LLP](#) currently represents the leading whistleblower in the \$230 billion dollar [Danske Bank](#) money laundering scandal, and has successfully represented numerous international banking whistleblowers whose successful claims resulted in multiple billions of dollars in sanctions and recoveries.

This rulemaking process is a pivotal moment for the AML whistleblower program, and we hope the Treasury Department welcomes the whistleblower community's input. As such, we would appreciate the opportunity to meet with you or your staff and discuss proposals for the implementation of the AML whistleblower law.

As you may be aware, we have major concerns regarding the AML whistleblower statute, including whether it can work in practice. This includes the inability of the Treasury Department to access funds to pay rewards authorized under the statute without an explicit Congressional appropriation, the discretionary nature of the award process, and the failure of the law to follow the basic framework of the [Dodd-Frank Act](#) (a law that has proven to be highly successful in practice). We are very concerned that the Department has the authority to deny rewards to fully qualified whistleblowers, or pay rewards at a drastically reduced level, undercutting the goal of the law to incentivize whistleblowers and deter money laundering. Some of these statutory loopholes were addressed in our article published in the [National Law Review](#).

Given [the importance of combating money laundering](#) and the central role that effective AML laws must play in effectuating the [United States Strategy on Countering Corruption](#), the Treasury Department should publicly and aggressively support amendments to the AML whistleblower law that would harmonize that law with the highly effective Dodd-Frank Act. Until these amendments are passed we strongly urge you to use your rulemaking authority to provide maximum protection for all AML whistleblowers. As set forth below, the Treasury Department rules implementing the AML whistleblower law need to ensure that the goals of the [United States Strategy on Countering Corruption](#) are met and that whistleblowers are fully protected and incentivized.

I. REGULATIONS IMPLEMENTING THE AML WHISTLEBLOWER LAW SHOULD ENHANCE THE GOALS OF THE U.S. STRATEGY ON COUNTERING CORRUPTION.

The Department of Treasury should use all of the authorities available to it to make the AML whistleblower effective. In judging these rules the Treasury Department should ensure that the regulations bolster the [United States Strategy on Countering Corruption](#). This Strategy mandates that the Treasury Department, among other agencies, work with whistleblowers and other non-governmental actors to fight money laundering. This was made clear in the Strategy:

“For too long, corrupt actors and their financial facilitators have taken advantage of vulnerabilities in the U.S. and international financial systems to launder their assets and obscure the proceeds of crime . . . To counter corruption effectively around the globe, the U.S. Government must, at home and abroad, combat money laundering . . . “

[United States Strategy on Countering Corruption](#), pp. 10-11.

The Strategy directs agencies such as the Treasury Department, FinCEN, and the IRS, to capitalize on the size and influence of the U.S. economy to fight money laundering. The AML whistleblower law stands at the heart of the government’s ability to implement this goal. As explained by the Strategy: “As the largest economy in the international financial system, the United States bears particular responsibility to address our own regulatory deficiencies, including in our AML/CFT regime, in order to strengthen global efforts to limit the proceeds of corruption and other illicit financial activity. We will therefore address deficiencies in the U.S. anti-money laundering regime . . .” *Id.*, p. 11.

The [United States Strategy on Countering Corruption](#) envisions that the Treasury Department would use its regulatory tools to increase the ability of the United States to police corrupt practices, including money laundering. The Strategy envisions that whistleblowers and other non-governmental actors will be fully incorporated into the war against corruption: “We will

bolster the ability of civil society, media, and private sector actors to prevent corruption and push for accountability . . . We will protect anti-corruption actors and defend the freedom of expression of anti-corruption activists, **whistleblowers**, and investigative journalists.” Strategy at pp. 12, 14 (emphasis added).

The Strategy speaks directly to whistleblower laws, such as the AML rewards law, as being important tools in combating corruption:

Bringing aggressive enforcement action, including relevant tax enforcement, against money launderers and those who enable launderers as appropriate, considering new legislation expanding criminal substantive law as needed, and expanding investigative tools as well as **new information generated by whistleblower programs . . .**

Strategy p. 11 (emphasis added).

Other provisions in the Strategy also address the need to protect whistleblowers¹ and integrate them into international U.S. policies.² The AML rules need to address both the financial rewards provisions and issues related to retaliation.

II. RECOMMENDATIONS FOR THE TREASURY DEPARTMENT’S IMPLEMENTATION OF REGULATIONS GOVERNING THE AML WHISTLEBLOWER PROGRAM

On January 1, 2021 Congress [passed the AML whistleblower law](#), and entrusted the Treasury Department with implementing this law. Although 15 months have passed since the passage of the law, no rules covering this program have been published. This delay has caused significant problems for AML whistleblowers. It has created confusion and uncertainty about whether whistleblowers should use this law and has prejudiced whistleblowers who want to take advantage of the law's confidentiality provisions but are unaware as to how to file a confidential complaint. The simple task of publishing a quality webpage, similar to the Dodd-Frank Act web pages published by the [Securities and Exchange Commission](#) (SEC) or [Commodity Futures Trading Commission](#) (CFTC), has not been accomplished. Regardless of the reasons for these delays, and any good faith efforts of the Treasury Department to implement the law, these delays

¹ “When anti-corruption activists, **whistleblowers**, and investigative journalists challenge corrupt power structures, the corrupt often fight back with physical threats and legal harassment. The United States stands in solidarity with these reformers” Strategy p. 34 (emphasis added).

² “The United States will consistently apply criteria across countries specifically related to transparency, accountability, and anti-corruption, including around the protection of journalists and **whistleblowers**.” Strategy, p. 37 (emphasis added).

can be interpreted as the failure of the Treasury Department to prioritize whistleblower protections in the effort to combat money laundering.

Regardless of the reasons behind the delay in publishing AML whistleblower regulations, it is imperative that these rules will work in practice, achieve the intent of Congress, and help implement the Strategy on Countering Corruption. We urge the Treasury Department to publish interim regulations implementing the program based on the highly successful SEC and CFTC programs.³ We further urge Treasury to adopt the following specific recommendations in its interim rules:

- Establish a user-friendly whistleblower office, with an informative website. The SEC’s Office of the Whistleblower’s website is a good working model. The SEC uses its website to publicize the program, it links to the law and regulations, it has clear explanations as to how to file a complaint. Perhaps most significantly, it explains how whistleblowers can file their concerns anonymously and confidentially. Most potential whistleblowers do not understand their rights, and consequently high-quality publicly available information is always the most important first step for a successful program;
- Execute a Memorandum of Understanding with the IRS Criminal Investigations division, granting IRS CI investigatory authority (or joint authority) over all money laundering cases. IRS [CI has expertise in these matters](#) and can complement the investigatory authorities of other Treasury offices, such as FinCEN. Furthermore, by authorizing IRS CI to assist in these cases the Treasury Department will also be able to better take advantage of the tools available to incentivize and protect whistleblowers under the current IRS whistleblower program;
- Create strict deadlines for making award decisions, and permit an internal administrative appeal whenever a reward is denied, or where a whistleblower believes that a reward is not sufficient. One of the biggest complaints with current whistleblower reward programs are the long delays. A case can languish within an administrative agency for years, and it is not uncommon for an agency to take 2-5 years to make a reward decision. The IRS whistleblower program [takes on the average 10 years to complete a whistleblower case](#). Congress has proposed amending the Dodd-Frank Act to mandate reasonable time requirements. The Treasury Department can do this by a rule. Careful consideration needs to be given on how to streamline the sanctioning and reward process, with a goal that a reward is paid no later than 1 year after sanctions are obtained;

³ According to the program’s [most recent Annual Report to Congress](#), “enforcement matters brought using information from meritorious whistleblowers have resulted in orders for nearly \$5 billion in total monetary sanctions.” Correspondingly, the SEC has awarded approximately \$1.2 billion to 245 individual whistleblowers. SEC Chair Gary Gensler [recently noted](#) that “[t]he assistance that whistleblowers provide is crucial to the SEC’s ability to enforce the rules of the road for our capital markets.”

- Ensure interagency cooperation. Other whistleblower programs, including the programs operated by the IRS, CFTC, and SEC, all have jurisdiction over some money laundering crimes. For example, the CFTC [issued a “Whistleblower Alert”](#) specifically encouraging whistleblowers to file money laundering cases with the Commission. The Treasury Department should work with these other agencies to ensure that whistleblowers are in fact rewarded, even in cases where the AML whistleblower law falls short. This would include executing memoranda of understanding with agencies such as the IRS CI, IRS Whistleblower Office, FBI, CFTC, Department of State, Agency for International Development, SEC Whistleblower Office, CFTC Whistleblower Office, among others, to coordinate access to information on money laundering and ensure that whistleblower information filed under the AML Whistleblower Law is properly shared with all relevant stakeholders;
- Establish criteria for granting significant awards that will incentivize whistleblowers to provide the U.S. government with high quality information, even in high-risk circumstances. Reasonable criteria explaining to potential whistleblowers precisely what they need to do to qualify for a reward, and what steps they can take to maximize the amount of an award, are essential. This criteria needs to tell potential whistleblowers what the government is looking for, and what whistleblowers have to produce to get the promised compensation. This will drive the type of evidence the government needs to successfully prosecute a case;
- Work directly with the IRS, CFTC, and SEC to assist whistleblowers in qualifying for rewards impacting money laundering under those programs. Under the Dodd-Frank Act, if either the SEC or CFTC sanctions a money launderer over \$1 million the “related action” provisions of those laws can kick-in. Thus, AML whistleblowers can be incentivized, even where the Treasury Department lacks the funds or authority to pay an award. The Treasury Department needs to realistically confront the defects in the current law, and create administrative rules that can mitigate against their most destructive deficiencies;
- Work with international organizations and whistleblower advocacy groups to ensure that the rights of individuals to report money laundering crimes are understood outside the United States. There are numerous anti-corruption organizations and experienced whistleblower advocates that have access to informants with information the Treasury Department needs to make its program successful. The Treasury Department should meet with these experts and obtain input while drafting or finalizing its rules. Thereafter, a mechanism should be approved where the Treasury Department has regular contact

with these international NGOs and whistleblower law experts to monitor the success of the program;

- By regulation the Treasury Department should mandate that a qualified whistleblower must obtain a reward of no less than 10% of any and all collected proceeds (including related actions) and no greater than 30%. This is the range that is in the highly successful Dodd-Frank Act reward programs. The importance of paying large (and guaranteed) rewards to qualified whistleblowers was explored by the SEC in its 2018-20 rulemaking, and the Commission [unanimously rejected](#) implementing a rule that could lower rewards in large cases. Instead, the SEC went in the exact opposite direction, and approved a rule that would guarantee awards at the highest level in cases where an overall reward may be small;
- The Treasury Department should implement rules similar to those of the SEC that require the Department to issue a preliminary determinations, and permit the reward applicants to fully brief any issues that may arise based on the preliminary ruling (including the right to fully supplement the record, request a larger reward and/or to challenge any denials). The right to address issues before the government issues a final decision will help avoid court challenges, and ensure that the program is fair, and ultimately strengthen the reputation of the program

Thank you in advance for your prompt attention to this matter. We look forward to meeting with you or your staff to further discuss our recommendations.

Respectfully submitted,

Stephen M. Kohn
Partner, Kohn, Kohn and Colapinto
Chairman of the Board of Directors, National Whistleblower Center

CC:

Elizabeth Rosenberg
Assistant Secretary for Terrorist Financing and Financial Crimes

Himamauli Das
Acting Director
Financial Crimes Enforcement Network (FinCEN)

