

# FinCEN Regs Must Recognize Int'l Whistleblower Realities

By **Stephen Kohn** (August 18, 2023)

The U.S. Department of the Treasury and the Financial Crimes Enforcement Network, or FinCEN, are in the midst of drafting regulations to implement the anti-money laundering whistleblower program.[1]

The program, established in 2021 by the AML Act and reformed in 2022 with the AML Whistleblower Improvement Act,[2] offers monetary awards and anti-retaliation protections for whistleblowers who provide original information about money laundering or sanctions violations.



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Given the transnational reach of the AML Act's whistleblower provisions, the global nature of money laundering and the central role money laundering plays in enabling corruption to flourish, the AML whistleblower program is primed to play a central role in the U.S.' global anti-corruption efforts.[3]

Therefore, it is essential that FinCEN crafts regulations that will ensure that whistleblowers are fully incentivized to report in a manner consistent with the needs and customs of international whistleblowers.

The central role of money laundering whistleblowers in U.S. anti-corruption efforts is laid out clearly in the "U.S. Strategy on Countering Corruption." [4]

The strategy, approved by the White House in December 2021, provides clear direction for constructing an effective AML whistleblower office to play a critical role in combating international corruption.

By following the mandates of the strategy in drafting regulations, FinCEN will be able to set up a whistleblower program that will duly protect and compensate whistleblowers in extreme danger worldwide.

The AML Whistleblower Improvement Act was modeled off the whistleblower provisions of the Dodd-Frank Act,[5] which established the hugely successful whistleblower programs of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission.

The regulations for these programs were adopted without input from international anti-corruption organizations and with little consideration for the whistleblower laws' transnational impact.

Since these regulations were enacted, however, thousands of international whistleblowers have used Dodd-Frank to report corrupt activities worldwide.[6]

There is no doubt that the AML whistleblower program will likewise appeal to whistleblowers across the globe. Furthermore, numerous governmental and nongovernmental organizations, active in combating corruption, will also play major roles in providing assistance to whistleblowers, and will be reporting violations based on whistleblower disclosures.

Developing regulations that harmonize the implementation of the AML Whistleblower Act with the transnational use of this law is thus of critical importance.

### **U.S. Strategy on Countering Corruption**

The U.S. Strategy on Countering Corruption is the first-ever whole-government approach to combating corruption worldwide.

The strategy was approved by the White House in December 2021, after a careful review by all major federal government departments in combating international corruption, including the Department of the Treasury.

A focus of the strategy was to increase the ability of the U.S. to fight transnational corruption in the U.S. and international financial systems, and to stop money laundering, i.e., actions "to hide assets and launder the proceeds of corrupt acts," as the White House noted in a fact sheet on the strategy.

Numerous provisions of the strategy are directly applicable to combating money laundering and sanctions violations. For example, its Strategic Objective 2.1 is "Address Deficiencies in the Anti-Money Laundering Regime."

The strategy even specifically mentions<sup>[7]</sup> the importance of monetary awards for anti-money laundering whistleblowers:

The United States will implement newly established tools for investigating and prosecuting money laundering offenses. For example, the Department of Justice (DOJ) and its investigative partners now have expanded subpoena power ... as well as financial rewards to incentivize reporting on Bank Secrecy Act violations in financial institutions and for information leading to the identification and seizure of illicit proceeds.<sup>[8]</sup>

Furthermore, the report repeatedly mentions the need for the U.S. to protect whistleblowers and other anti-corruption activists, including journalists, stating:

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.<sup>[9]</sup>

The strategy makes clear that a strong anti-money laundering whistleblower program is a key component of U.S. anti-corruption efforts.

The strategy requires FinCEN to carefully ensure that its final rules implement the letter and spirit of the strategy.

### **FinCEN's Rulemaking and the Strategy**

FinCEN must incorporate the strategy's objectives into the core purposes of the AML whistleblower regulations.

In order to do so, FinCEN must craft the regulations in a way that recognizes the unique situation of international whistleblowers and the myriad ways in which these individuals may choose to disclose their information.

By incorporating civil society, human rights defenders and investigative journalists into the whistleblower regulations, FinCEN can go a long way toward fulfilling the strategy's objectives.

The AML law incontrovertibly provides this authority. The law's definition of "original information" includes 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 final rules implemented by FinCEN must incorporate civil society actors, both as potential whistleblowers and entities where whistleblowers will make initial disclosures.

In promulgating the final rules, FinCEN must contemplate that international whistleblowers will make initial reports to external partners.

Rules defining a voluntary disclosure need to include disclosures to external partners, academia, the private sector, civil society and the media.

Rules for filing whistleblower complaints, referred to as tip, complaint or referral requirements, also need adjusting.

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.

The current Dodd-Frank regulations published by the SEC and CFTC provide coverage when whistleblowers report to private sector actors — corporate compliance programs or corporate oversight bodies, like the Financial Industry Regulatory Authority. But these regulations are silent concerning reports to civil society and the news media.

Through FinCEN's AML regulations, the agency must ensure that voluntary reports to civil society organizations or the news media are voluntary disclosures under the regulations.

Additionally, FinCEN's rules must allow for disclosures to the U.S. Department of State, including embassy personnel or representatives from the U.S. Agency for International Development.

The strategy mandates that

State, the Treasury, and DOJ will engage governments to detect and disrupt kleptocracy and foreign bribery, and to deny corrupt actors the ability to hide ill-gotten gains through the adoption of real estate transparency, beneficial ownership transparency, and other anti-money laundering measures.[10]

Procedures must be implemented to facilitate the coverage of disclosures to the State Department and the DOJ and to promote information sharing.

Furthermore, whistleblower disclosures to foreign law enforcement officials must be considered protected disclosures under the AML law.

Specific steps are required to accomplish this goal, including:

- Ensuring that disclosures made voluntarily to foreign law enforcement or regulatory officials are considered voluntary under the regulation's definition;
- Undertaking efforts to facilitate the forwarding of these disclosures to U.S. authorities, e.g., the DOJ or FinCEN; and
- Implementing procedures to ensure that disclosures lawfully made to foreign government officials are classified as original information, provided that the information is accessed by the U.S. and used to go after AML or sanctions violations.

## **Conclusion**

If FinCEN follows the mandates of the strategy, FinCEN will duly protect and compensate whistleblowers in extreme danger worldwide.

Many whistleblowers are unable to live normal lives after courageously exposing wrongdoing. Often subjected to life-threatening retaliation, they have limited employment prospects and often should have police protection due to the reprisal they face from organized crime and corrupt government officials.

The strategy references the need for the U.S. government to protect, incentivize and stand in solidarity with whistleblowers.

The importance of using the Dodd-Frank reward structure is directly referenced in the section on money laundering, and the need to update existing regulations to accomplish the goals of the strategy is also mentioned.

As the strategy explains, "[c]ounteracting corruption is not a simple task," and "[c]hanging embedded cultures of corruption requires significant political will."

Because of these realities, the strategy mandates that

the United States will increase support to state and non-state partners committed to reform, boost the capacity of other governments to tackle corruption, and empower those, including activists, investigative journalists, and law enforcement on the front lines of exposing corrupt acts.[11]

It is with these objectives in mind that FinCEN must develop effective regulations that will bolster the ability of the U.S. to work successfully "with our most committed allies and partners," who are often nongovernmental actors: whistleblowers, civil society and investigative journalists, along with committed anti-corruption officials.

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[1] <https://whistleblowersblog.org/aml-rewards/treasury-department-drafting-rules-for-aml-whistleblower-program/>.

[2] <https://kkc.com/blog/congress-passes-landmark-anti-money-laundering-whistleblower-law/>.

[3] <https://kkc.com/in-the-news/new-aml-whistleblower-law-is-a-game-changer-in-enforcing-russian-sanctions/>.

[4] <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

[5] <https://kkc.com/frequently-asked-questions/dodd-frank-act-whistleblower-protections-and-rewards/>.

[6] <https://kkc.com/wp-content/uploads/2023/07/International-Whistleblower-Tips.pdf>.

[7] <https://whistleblowersblog.org/aml-rewards/bidens-anti-corruption-plan-includes-utilizing-aml-whistleblowers/>.

[8] See The White House, United States Strategy on Countering Corruption (2021), at 25.

[9] *Id.* at 34.

[10] *Id.* at 28.

[11] *Id.* at 8.