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New protections and financial incentives for whistleblowers in the US

BY ALESSIO EVANGELISTA, EYTAN FISCH, RYAN JUNCK, KHALIL MAALOUF AND JOE SANDMAN

Whistleblowers are set to play a much more prominent role in anti-money laundering (AML) and sanctions enforcement in the US. The Anti-Money Laundering Act of 2020 (AMLA), as amended by the recently enacted Anti-Money Laundering Whistleblower Improvement Act, contains the most sweeping changes to US AML laws since the USA Patriot Act became law in 2001. The whistleblower provisions in the AMLA, as amended, significantly expand the legal protections and financial incentives for whistleblowers to report AML and sanctions violations.

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) soon will propose regulations to implement the new whistleblower provisions. Financial institutions (FIs) and other companies covered by AML and sanctions laws should evaluate their existing internal whistleblower

programmes to ensure that they comply with the new law and encourage internal whistleblowing by employees.

Expanded financial incentives

The AMLA dramatically increased the maximum award for eligible whistleblowers who voluntarily provide original information to the Treasury Department, Justice Department or their employer. Under the Treasury Department's prior programme, whistleblower awards were capped at \$150,000. Under the AMLA, whistleblowers are eligible for awards of no less than 10 percent and up to 30 percent of monetary sanctions collected by the government for AML and sanctions violations (the sanction must be at least \$1m). Enforcement actions over the past several years have resulted in tens of millions of dollars in penalties, and in several recent cases the penalties exceeded \$1bn.

The AML Whistleblower Improvement Act expanded the law to cover sanctions violations and established a \$300m revolving financial integrity fund to pay eligible whistleblowers under the AMLA. These amendments largely align the AML and sanctions whistleblower regime with the whistleblower regimes implemented by the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) following the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. And like those highly successful whistleblower programmes, as the volume and size of the awards for reporting AML and sanctions violations increases over time, the number of whistleblower tips and referrals will increase as well.

FinCEN has not yet promulgated regulations to implement the whistleblower provisions in the AMLA but is expected

to do so soon. The regulations will establish a framework to pay awards to whistleblowers, including practical details about how whistleblowers must provide their information to the government to qualify for awards, and guidelines for how awards will be calculated.

By statute, factors that the government must consider in determining the amount of an award include the significance of the information provided by the whistleblower to the success of the enforcement action, the degree of assistance provided by the whistleblower or the whistleblower's legal representative in an enforcement action, the Treasury Department's programmatic interest in general deterrence, and any other factors established by regulation.

While the AMLA does not permit awards to regulatory or law enforcement personnel, the statute does not bar awards to employees of FIs, including employees in legal and compliance functions who report AML or sanctions violations to the government. This contrasts with the SEC and CFTC whistleblower regimes, which generally do not permit awards to persons who obtained the relevant information in connection with their employment in legal and compliance functions. However, FinCEN could, by rule, generally exclude compliance personnel, as the SEC and CFTC do by regulation (with certain exceptions).

The AMLA does not permit the payment of awards to any whistleblower who is convicted of a criminal violation related to the enforcement action for which the whistleblower otherwise could receive an award. In addition, the AMLA does not permit an award if the whistleblower knowingly and wilfully makes any false, fictitious or fraudulent statement or representation or uses any false writing or document knowing the writing or document contains any false, fictitious or fraudulent statement or entry.

New employment protections

The AMLA includes new robust protections for whistleblowers. For example, the AMLA prohibits employers from discriminating against a whistleblower in the terms and conditions of employment – or post-employment – because of any lawful act by

the whistleblower in providing information to FinCEN, the Justice Department, a federal regulatory or law enforcement agency, or any member of Congress or committee of Congress.

The AMLA also protects whistleblowers who provide certain tips regarding misconduct to a person with supervisory authority over the whistleblower or such other person working for the whistleblower's employer who has the authority to investigate, discover or terminate the misconduct. In this way, the AMLA protects both external and internal whistleblowing by employees.

Individuals who allege unlawful discharge or other discrimination, or who allege other illegal retaliation by an employer may seek redress by filing a complaint with the Department of Labor. Generally, if the Department of Labor has not issued a final decision on the complaint within 180 days of filing, a complainant may file a lawsuit against the employer in federal district court.

Relief for individuals who prevail in complaints with the Department of Labor, or in a federal lawsuit, includes: (i) reinstatement with the same seniority status that the individual would have had but for the illegal retaliation; (ii) two-times the amount of back pay otherwise owed to the individual, with interest; (iii) compensatory damages, which must include compensation for litigation costs, expert witness fees and reasonable attorneys' fees; and (iv) any other appropriate remedy with respect to the conduct that is the subject of the complaint or lawsuit, as applicable.

None of the rights and remedies for whistleblowers under the AMLA can be waived by agreement, policy or condition of employment, including pre-dispute arbitration agreements. No pre-dispute arbitration agreement is valid or enforceable to the extent that it requires arbitration of a dispute arising out of the whistleblower provisions of the AMLA.

FIs and other companies covered by AML and sanctions laws should review their whistleblower programmes in light of the new anti-retaliation provisions. Companies should maintain policies and procedures to protect whistleblowers from unlawful retaliation or any other

form of discrimination, in compliance with the AMLA. Compliance and human resources should coordinate to ensure that proper controls are in place to protect whistleblowers from unlawful retaliation or any other form of discrimination. Appropriate training for employees and managers at all levels regarding whistleblower protections should also be designed and delivered on a regular schedule.

Managing internal whistleblower programmes

The AMLA's whistleblower provisions apply equally to individuals who report violations to the government and employees who report violations to their employer that lead to successful enforcement actions. As a result, FIs and other companies subject to AML and sanctions laws must be prepared for an increase in the number of internal whistleblower tips and reporting.

Companies should have policies, procedures and systems in place to collect whistleblower reports, protect whistleblower confidentiality, prevent retaliation, investigate potential violations and address the violations through self-reporting and remediation if appropriate. A trusted, well-managed internal whistleblower programme can help FIs and other businesses mitigate the compliance, legal, operational and reputational risks associated with AML and sanctions violations before they mushroom into major crises for the FI or company.

Conclusion

The AMLA, as amended, and FinCEN's forthcoming regulations, will dramatically enhance the role of whistleblowers in the enforcement of US AML and sanctions laws. FIs and other companies should evaluate and update their existing internal whistleblower programmes now to minimise any impact of these new laws and regulations on their operations. ■

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