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September 21, 2021

AMLA 2020 Series Part 2: New Bank Secrecy Act Whistleblower Provisions

On New Year's Day 2021, Congress passed the Anti-Money Laundering Act of 2020 (AMLA 2020). As we [reported](#) last April, the AMLA 2020 included sweeping reforms aimed at strengthening protections against money laundering, terrorism financing, and other illegal activities. In July, we [examined](#) the expansive new beneficial ownership reporting requirements added to the Corporate Transparency Act. In this second substantive installment of our multipart series on the AMLA 2020, we examine the changes made to the Bank Secrecy Act (BSA) whistleblower provisions.

The AMLA 2020 updated and expanded existing BSA whistleblower provisions to include additional incentives for whistleblowers to report violations of law and stronger retaliation protections for whistleblowers who do come forward. The new provisions, which were reportedly modeled after the aggressive and very successful U.S. Securities and Exchange Commission (SEC) whistleblower program enacted in 2010 as part of the Dodd-Frank Act, incentivize whistleblowers to disclose violations of the BSA in exchange for potentially hefty rewards. Reports need not disclose money laundering or other criminal activity; rather, whistleblowers could reap rewards for disclosing any manner of BSA violations by a regulated financial institution, including failure to file suspicious activity reports or more general failures to maintain an adequate anti-money laundering compliance program.

Below we explore key components of the new whistleblower law. Especially in light of the significant incentives now available for whistleblowers, financial institutions would be well-advised to take a close look at their compliance procedures, particularly in relation to the handling of allegations reported to the company. BSA-regulated entities should also review their anti-retaliation policies to ensure that they are in line with the new provisions.

Stronger Incentives: New Whistleblower Award Provisions

First, the AMLA 2020 creates strong new monetary incentives for whistleblowers to report potential violations of the BSA. Whereas whistleblowers were previously limited to discretionary awards of \$150,000, they can now be awarded up to 30% of the government's recovery in a judicial or administrative action—provided the action results in monetary sanctions exceeding \$1 million.

While the amount of the "bounty" is capped at a maximum of 30% of the government's recovery, the U.S. secretary of the treasury (Secretary) retains significant discretion to determine how much to actually award a whistleblower. Under the new law, the Secretary must consider four factors when deciding how much to award to a whistleblower:

- The significance of the information provided by the whistleblower to the success of the action;
- The degree of assistance provided by the whistleblower and/or whistleblower's counsel during the covered action;
- The programmatic interest of Treasury in deterring violations by making awards to whistleblowers who provide information leading to successful enforcements; and
- Such additional relevant factors as the Secretary, in consultation with the attorney general, may prescribe by rule or regulation.

These whistleblower awards are mandatory in circumstances meeting the statutory criteria, but the statute does not prescribe a minimum amount that the Secretary is required to award a whistleblower and there is no right to appeal the amount the Secretary ultimately awards. This means a whistleblower could, in theory, walk away with a nominal award. However, if the BSA program is administered in any way like the SEC's, whistleblowers are likely to see substantial awards, which will in turn lead to greater public awareness of the program and incentivize more whistleblowers.

The AMLA 2020 not only expands the potential awards for BSA whistleblowers, it dramatically expands who can qualify as a whistleblower. Specifically, the statute contemplates that employees of BSA-regulated financial institutions—including legal, compliance, and risk management professionals—who report violations internally would be eligible for whistleblower awards if that information ultimately leads to enforcement action. In an era with increasing enforcement action against compliance professionals, this new reporting incentive will surely weigh on compliance programs, particularly as decisions are made regarding whether concerns raised for internal attention trigger reporting requirements under the BSA. This has certainly been true with regard to the SEC's Dodd-Frank whistleblower program: the potential for whistleblower intervention is a routine consideration in corporate decisions as to whether, how, and how quickly to voluntarily disclose potential misconduct to the SEC.

Stronger Protections: New Whistleblower Retaliation Provisions

The AMLA 2020 also creates robust new whistleblower protections for company employees who report violations internally as well as externally. The new law prohibits employers from directly or indirectly discharging, demoting, suspending, threatening, blacklisting, harassing, or in any manner discriminating against a whistleblower who provides information about a violation of law—or conduct the whistleblower reasonably believes to constitute a violation of law—to the whistleblower's employer or to the government.

Perhaps most significantly, the AMLA 2020 creates a private right of action for aggrieved whistleblowers. If retaliation occurs, the statute allows a putative whistleblower to file a complaint with the U.S. secretary of labor, which, if not acted upon within 180 days, permits the whistleblower to file suit against the employer in federal district court.

If the whistleblower prevails, the statute authorizes as relief (1) full reinstatement, (2) two times the amount of back pay owed, with interest, (3) compensatory damages including litigation costs, expert witness fees, and reasonable attorneys' fees, and (4) any other appropriate remedy.

One important caveat is that not all employees are subject to the AMLA 2020's new whistleblower protections. Specifically, the whistleblower provisions and protections in the AMLA 2020 are not available to employees of insured depository institutions, federal credit unions, or federal banking agencies—because such employees are already covered by whistleblower programs established under the Federal Deposit Insurance Act and the Federal Credit Union Act.

Comparison to the SEC Whistleblower Program and Key Takeaways

While the AMLA 2020's whistleblower provisions are modeled after the SEC whistleblower program passed as part of the Dodd-Frank Act, there are key differences that companies should be aware of.

- As discussed above, unlike the SEC provisions, the AMLA 2020 does not provide for a minimum amount that the Secretary is required to award to a whistleblower. Moreover, while the AMLA 2020 provides a right for whistleblowers to appeal the Secretary's decisions about whether to make an award and to whom to make an award, it specifically excludes a right to appeal the amount of the award. In theory, a whistleblower could walk away with a nominal reward and no right to appeal, undercutting the incentive to report in the first place.
- The whistleblower protections under the AMLA 2020 extend to internal reporting as well as to outside reporting. This means that a whistleblower triggers the protections of the AMLA 2020 simply by reporting a violation of law to the employer. This differs from the SEC whistleblower protections, which are only triggered once the whistleblower reports to the SEC.
- This last point leads into what is perhaps the most significant difference between the AMLA 2020 and SEC whistleblower programs. Under the SEC provisions, compliance professionals—employees whose job it is to ensure the company's compliance with law, and to investigate potential lapses in compliance—may not obtain an award for disclosing information discovered in the normal course of their duties. The AMLA 2020 lacks a similar carveout. By allowing employees acting within the scope of their duties to qualify as "whistleblowers," the statute is almost certain to affect decision-making around employment action against compliance professionals.

As under the SEC program, however, awards may not be made to whistleblowers who have been convicted of crimes related to the subject matter of the report, nor will awards be available in circumstances where a whistleblower knowingly and willfully makes any false, fraudulent, or fictitious statement or representation, or uses any false or fraudulent document in making a complaint.^[1] Nevertheless, the sensitive information held by compliance professionals and the availability of whistleblower status may lead to new concerns around discipline and termination of compliance personnel.

- The Secretary, in consultation with the attorney general, has the power to promulgate additional rules and regulations related to these new whistleblower provisions, but these are not necessary—the statutory provisions are self-executing. The Secretary has not yet promulgated any regulations under this section, but companies should be on the lookout for future rulemakings and opportunities for public comment, which may help to shape the ultimate BSA whistleblower program.

In the meantime, companies with questions about the enhanced whistleblower protections should consult with counsel regarding their implications and steps that may be prudent to address this new regime.

Endnotes

^[1] Awards will also not be available to whistleblowers who, at the time they acquired the information, were employed by a regulatory or banking agency, the U.S. Department of the Treasury, the U.S. Department of Justice, or a law enforcement agency, and were acting in the normal course of their duties.

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