

October 20, 2023

The Hon. Merrick B. Garland  
Attorney General of the United States  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

The Hon. Janet Yellen  
Secretary of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, DC 20220

Andrea Gacki, Director  
Financial Crimes Enforcement Network  
U.S. Department of the Treasury  
P.O. Box 39  
Vienna, VA 22183

**RE: AML WHISTLEBLOWER ACT RULEMAKING PROPOSAL**

Dear Mr. Attorney General, Secretary Yellen, and Director Gacki:

On behalf of the [National Whistleblower Center](#) and the whistleblower law firm of [Kohn, Kohn and Colapinto](#) we are submitting the following recommendations for the regulations that will govern the Anti-Money Laundering [Whistleblower Incentives and Protection Act](#), 31 U.S.C. § 5323, *as amended* by the AML [Whistleblower Protection Enhancement Act](#) (hereinafter [AML Whistleblower Act](#)) that your agencies have responsibility to administer. As you know, efforts to combat violations of the Bank Secrecy Act, money laundering, and sanctions are critically important to national security, the integrity of the international financial systems, combatting corruption, and enhancing democracy. These goals, and the use of whistleblowers to achieve these goals, are recognized as part of the core public policies of the United States.

Significantly, on October 3, 2023 Ms. Andrea Gacki, [Director of the Department of Treasury's Financial Crimes Enforcement Network \(FinCEN\)](#)—the agency tasked with the responsibility to implement the AML Whistleblower Act—explicitly acknowledged FinCEN’s “support” of “the White House’s 2021 U.S. Strategy to Counter Corruption.”<sup>1</sup>

Consistent with the requirements of the Strategy, Director Gacki acknowledged that “The White House has identified combating corruption as one of its top priorities.” The Strategy set forth an

<sup>1</sup> [THE WHITE HOUSE, UNITED STATES STRATEGY ON COUNTERING CORRUPTION](#) (2021) (hereinafter “Strategy”), available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

“whole-of-government” approach for countering corruption that directly referenced the AML Whistleblower Act as one of the tools that needed to be utilized in fighting corruption worldwide.<sup>2</sup> The Strategy also pledged the United States to “stand in solidarity” with “whistleblowers.”

Consequently, it is imperative that the regulations approved by the Department of Treasury (in consultation with the Department of Justice), *strictly* comply with the mandates and intent of the Strategy. This implementation should also be guided by recommendations contained in the Organization for Economic Development and Cooperation’s (OECD) audit of the United States’ anti-bribery program.<sup>3</sup> The OECD’s findings are consistent with the Strategy.

We have carefully analyzed the Strategy in light of existing regulations governing similar whistleblower programs. Based on this review we are making the proposals included in the appendix for incorporation into the regulations governing the AML Whistleblower Law. These proposals are predicated on the following major “Pillars” and “Strategic Objectives” set forth in the Strategy.

**I. THE STRATEGY ON COUNTERING CORRUPTION SERVES A CORE NATIONAL SECURITY PURPOSE: *The Departments of Justice and Treasury Must Ensure that the AML Whistleblower Regulations are Consistent with that Purpose.***

The United States Strategy on Countering Corruption (“Strategy”)<sup>4</sup> was approved by the White House in December 2021, after a careful review by every executive agency involved in combatting corruption both domestically and internationally.<sup>5</sup> It recognized that combating corruption was a

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<sup>2</sup> Prepared Remarks of FinCEN Director Andrea Gacki During ACAMS (October 3, 2023).

<sup>3</sup> See, Implementing the OECD Anti-Bribery Convention, Phase 4 and the Two-Year Follow-Up Report, published by the ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION (2020), available at <https://www.oecd.org/daf/anti-bribery/United-States-Phase-4-Report-ENG.pdf> (2020 Audit). For the OECD’s follow-up audit, see IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION, PHASE 4 TWO-YEAR FOLLOW-UP REPORT: UNITED STATES (2022), available at <https://www.oecd.org/daf/anti-bribery/united-states-phase-4-follow-up-report.pdf>. (2022 follow-up audit).

<sup>4</sup> THE WHITE HOUSE, UNITED STATES STRATEGY ON COUNTERING CORRUPTION (2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>5</sup> See Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, THE WHITE HOUSE (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/> (last accessed June 23, 2023) (hereinafter “Anti-Corruption Memorandum” or “Memorandum.”).

The Strategy was approved based on “recommendations” from “expert studies” submitted by the following agencies and offices: Office of the Vice President; Departments of State, Treasury, Defense, Justice, Commerce, Energy, Homeland Security, Office of Management and Budget, United States Mission to the United Nations, Office of the Director of National Intelligence, Central Intelligence Agency, Office of the Chairman of the Joint Chiefs of Staff, Agency for International Development, National Security Agency, Assistant to the President, the National Security Advisor, Assistant to the President for Economic Policy, and the Assistant to the President for Domestic Policy.

“core” “national security interest” and was intended to set forth a “comprehensive strategy” based on a “whole-of-government approach to elevating the fight against corruption.”<sup>6</sup>

The Fact Sheet published by the White House explained the critical purposes behind the Strategy explained:

*“Recognizing corruption’s ability to corrode democracy, on June 3, 2021, President Biden established the fight against corruption as a core U.S. national security interest. Accordingly, he directed his national security team to lead the creation of a comprehensive strategy that, when implemented, would improve the U.S. Government’s ability to prevent corruption, more effectively combat illicit finance, better hold corrupt actors accountable, and strengthen the capacity of activists, investigative journalists, and others on the front lines of exposing corrupt acts. . . The Strategy outlines a whole-of-government approach to elevating the fight against corruption.”<sup>7</sup>*

The Strategy directly references the important role of whistleblowers in combating corruption worldwide, and explicitly declares that it is the policy of the United States to stand in “solidarity” with whistleblowers, worldwide. In relevant part, the Strategy states:

*“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>8</sup>*

The Strategy sets forth the critical purposes that the Treasury Department must aim to address when the regulations are proposed and approved. The Strategy was not in existence when prior whistleblower regulations were discussed and approved by federal agencies such as the SEC and CFTC, and consequently, it was simply not possible for those regulations to properly address the policies, mandates and priorities set forth in the Strategy.<sup>9</sup>

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<sup>6</sup> See Fact Sheet: U.S. Strategy on Countering Corruption, [THE WHITE HOUSE](https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/) (Dec. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/> (emphasis added) (last accessed June 23, 2023).

<sup>7</sup> *Id.*, Fact Sheet.

<sup>8</sup> Strategy “Strategic Objective” 5.2, p. 34.

<sup>9</sup> During the Dodd-Frank Act whistleblower rulemaking proceedings (conducted by the SEC in 2010-11) there was no mention of the role Dodd-Frank could play internationally, and no references to the role Dodd-Frank could play in combatting “corruption” as understood in the Strategy. No international organization (except corporate representatives that were not focused on combatting international corruption, but instead signed onto various letters attempting to make internal disclosures a mandatory pre-condition for filing a Dodd-Frank Act claim) filed comments during those proceeding.

## **II. *STRATEGIC OBJECTIVES 3.1 AND 5.2: The Strategy Explicitly Targeted Money Laundering for Enhanced Enforcement, Including Using Whistleblower Reward Provisions.***

The Strategy recognizes that money laundering has a radically corrosive effect on the rule of law and the continued vitality of democratic institutions:

*“[T]he impacts of corruption frequently reverberate far beyond the immediate environment in which the acts take place. In today’s globalized world, corrupt actors bribe across borders, **harness the international financial system to stash illicit wealth abroad**, and abuse democratic institutions to advance anti-democratic aims. Emerging research and major journalistic exposés have documented the extent to which legal and regulatory deficiencies in the developed world **offer corrupt actors the means to offshore and launder illicit wealth**. This dynamic in turn strengthens the hand of those autocratic leaders whose rule is predicated on the ability to co-opt and reward elites.”<sup>10</sup>*

Thus, the Strategy *explicitly* endorsed using the Dodd-Frank whistleblower-reward laws to combat these forms of international corruption. See, e.g., Strategy at 25 (Strategic Objective 3.1, advocating the use of the Dodd-Frank “*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.*” (emphasis added)).

Consequently, the Department of Treasury needs to fully implement the mandates and recommendations of the Strategy when approving final whistleblower rules.

## **III. *“PILLAR ONE: Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Fight Corruption”***

The first “Pillar” of the Strategy requires all federal agencies to work together with key anti-corruption actors to ensure that the policies mandated by the Strategy are fully effectuated. Pillar One sets forth a clear directive to all federal “departments and agencies,” including Justice, Treasury, the SEC and the CFTC. Its mandate is clear: *“Departments and agencies will work to support, and better make use of analysis conducted by external partners, including academia, the private sector, civil society, and media.”<sup>11</sup>*

The regulations implementing the whistleblower laws must incorporate civil society actors and human rights defenders, both as potential whistleblowers (“analysts”) and entities where whistleblowers will make initial disclosures. The current SEC and CFTC regulations do not address this mandate, which did not exist at the time their respective Dodd-Frank whistleblower

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<sup>10</sup> See Strategy, at 4 (emphasis added).

<sup>11</sup> The Strategy at 17 (emphasis added).

regulations were implemented.<sup>12</sup> Thus, since the current whistleblower rules followed by the SEC or the CFTC are inconsistent with this mandate, those regulations should not be followed by Treasury.

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 “TCR” 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. Disclosures to these human rights defenders, the news media, and non-U.S. law enforcement agencies that cooperate with the United States must also be considered “voluntary,” even if these disclosures are not made directly to the Treasury or Justice Departments and/or other entities of the United States.

**IV. “PILLAR TWO: Curbing Illicit Finance STRATEGIC OBJECTIVE 2.1: Address Deficiencies in the Anti-Money Laundering Regime”<sup>13</sup>**

Based on this Pillar, the Strategy applies to money laundering, and thus has specific relevance to the regulations being considered by the Treasury and Justice Departments and FinCEN.

**V. “PILLAR THREE: Holding Corrupt Actors Accountable”<sup>14</sup>**

FinCEN must incorporate the Strategy’s objectives into the core purposes of the AML whistleblower regulations. Whistleblowers are well recognized as crucial for detecting crimes like money laundering; without detection there can be neither enforcement nor accountability. The Strategy also explicitly recognizes that important role that “civil society” outside the United States plays in combatting corruption.

Consequently, the right of whistleblowers to make initial disclosures to civil society actors, human rights defenders and other entities—recognized in the Strategy as playing a critical role in exposing corruption—must be fully protected. A safe and effective pathway must be afforded whistleblowers who make initial disclosures to these non-governmental actors. This includes, but is not limited to, ensuring that disclosures to civil society/human rights defenders be fully protected and those who make initial reports to these entities are assured of their entitlement to a reward, provided that they provide “original information” as required under law, and that this information is ultimately forwarded to either the Justice Department and/or Treasury, and that this information is thereafter used in an enforcement action by Justice or Treasury, or used in a related action proceeding.

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<sup>12</sup> In discussing specific Dodd-Frank regulations currently in place by the SEC and CFTC we directly reference only the SEC rules, and the CFTC regulations mirror the SEC regulations in most instances.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 25.

**VI. “STRATEGIC OBJECTIVE 3.1: Enhance enforcement efforts”<sup>15</sup>**

**“Enforcement of anti-money laundering criminal and civil laws: 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>16</sup>**

In promulgating rules, FinCEN must contemplate the AML whistleblower law’s importance, as dictated by this Strategic Objective. This Strategic Objective can only be fulfilled by ensuring that the regulations implement the Strategy’s various mandates, especially those related to incorporating civil society, human rights defenders, and investigative journalists into whistleblower regulations. The AML law incontrovertibly provides this authority. First, the definition of “original information” can include 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.<sup>17</sup>

Second, in defining “analyst,” FinCEN should encourage representatives from civil society to work with whistleblowers who may have information for local anti-corruption organizations but are unable for any reason to provide that material to the United States.

**VII. “STRATEGIC OBJECTIVE 3.3: Work with partner countries to bolster anticorruption enforcement to amplify the use of tools”<sup>18</sup>**

**“Additionally, 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. In line with U.S. interest and priorities, departments and agencies will work with partners in multilateral fora to push for ending offshore financial secrecy. Finally, the interagency will enhance efforts to build the capacity of foreign justice systems to issue and respond to formal evidence requests related to corruption under existing treaties and conventions, and to restrain and recover stolen assets, complementing the Treasury’s implementation of the new Kleptocracy Assets Recovery Reward Program and State’s ongoing implementation of the TOC Rewards Program”.<sup>19</sup>**

This key mandate must be fully incorporated into the AML whistleblower program.

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<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.*

<sup>17</sup> See 31 U.S.C.S. § 5323(d) (Lexis Nexis 2023).

<sup>18</sup> Strategy, *supra* note 1, at 27.

<sup>19</sup> *Id.* at 28.

First, whistleblower disclosures to the Department of State, including embassy personnel or representatives from USAID, must be considered protected disclosures under the AML law. Procedures must be implemented, to facilitate the coverage of such disclosures and promote information sharing.

Second, whistleblower disclosures to foreign law enforcement officials must be considered voluntarily protected disclosures under the AML law. Specific steps are required, to accomplish this goal, including: (a) Ensuring that disclosures made voluntarily to foreign law enforcement or regulatory officials be considered “voluntary” under the regulation’s definition; (b) Undertaking efforts to facilitate the forwarding of these disclosures to U.S. authorities (e.g. DOJ, FinCEN); (c) 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 United States, and used to sanction AML or sanctions violations.

Third, interagency cooperation is essential, not only for cooperation between State, DOJ, and FinCEN, but other agencies involved in foreign corruption investigations and enforcement actions that often implicate money laundering. The SEC and CFTC should also be included in interagency agreements, regarding information sharing and joint investigations.

Fourth, the roles played by other law enforcement, military or intelligence agencies that have been involved in combating corruption, or supporting international human rights defenders in reporting corruption, need to be recognized and incorporated into the regulations. This would include the Agency for International Development, FBI legal attachés, and the staff at various U.S. embassies, all of which have played a role in various anti-corruption activities engaged in by the National Whistleblower Center and/or Kohn, Kohn and Colapinto.

**VIII. *STRATEGY’S “STRATEGIC OBJECTIVE 3.4: Strengthen the ability of foreign partner governments to pursue accountability in a just and equitable manner***<sup>20</sup>

*“Strengthening investigatory and prosecutorial capacity: Through DOJ, State, and USAID, the United States will deepen cooperation with and assistance to countries with the political will for meaningful anti-corruption efforts, including through the establishment of legal and regulatory frameworks, strengthening detection and capacity oversight, improving accountability institutions and processes, and strengthening justice and law enforcement, including, where appropriate, partnering with countries in joint investigations and prosecutions.*

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*“Expand support for international partnerships: The United States will link governmental actors with counterparts and willing partners at the regional and global levels in order to foster greater cooperation in detecting, tracking, and*

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<sup>20</sup> *Id.* at 29.

*referring corruption cases. This can include facilitating the exchange of law enforcement information among like-minded countries . . .*”<sup>21</sup>

When promulgating regulations to implement the FinCEN/Treasury/Justice Departments’ AML whistleblower program, FinCEN must incentivize and protect disclosures from foreign law enforcement agencies and do so consistent with the goals in this Objective. According to the 2022 follow-up OECD Phase IV audit of the United States anti-bribery program, 20% of the successful law enforcement prosecutions concerning bribery (which often include money laundering) over the past two years originated in foreign law enforcement agencies. Given that 1 in 5 successful FCPA prosecutions come from foreign law enforcement agencies, the United States must ensure that these whistleblowers who report to these agencies are fully covered under the regulations and duly compensated.

**IX. “STRATEGIC OBJECTIVE 3.5: Bolster the ability of civil society, media, and private sector actors to safely detect and expose corruption”<sup>22</sup>**

*“. . . The United States will boost its ongoing efforts to support, defend, and protect investigative journalists and other civil society and media actors on the front lines of the fight against corruption.*

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*“Regulatory action: The United States will continue to expand and use existing regulatory authorities more effectively including . . . financial institutions to locate accounts and transactions of persons who might be involved in money laundering and terrorist financing.*

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*“Facilitate the sharing of information by non-governmental actors: The United States will engage with non-governmental actors seeking to share actionable information with U.S. law enforcement and sanctions experts. The Administration is currently increasing support for civil society-led efforts to document and report on corruption . . . The United States will provide a safe and enabling environment to those exposing, reporting on, and fighting corruption and, as appropriate, for their relatives and other close persons, and will support and protect any U.S. person who identifies, detects, or reports corruption and related offenses against any unjustified treatment. The United States will also continue to urge other countries to fulfill their own obligations and commitments to provide such protections.”*

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<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.* at 30.

To meet this U.S. government Strategic Objective, FinCEN’s final AML regulations must protect and incentivize whistleblowers who report to “civil society, media, and private sector actors.” The current Dodd-Frank regulations, published by the SEC and CFTC do not provide coverage when whistleblowers report to “private sector actors” (other than internal corporate compliance programs that often are engaged in covering up violations or whose disclosures trigger retaliation against the internal whistleblowers). FinCEN’s AML regulations must ensure that voluntary reports to civil society organizations or the news media are “voluntary” disclosures under the regulations. FinCEN must implement procedures to ensure that, if the U.S. government learns of the whistleblower disclosures through information provided by civil society, NGOs, or the news media, the whistleblower who provided the “original information” to these entities is fully credited and is eligible for rewards. FinCEN regulations should “facilitate the sharing of information” between DOJ and FinCEN and “non-governmental actors,” to ensure that otherwise qualified whistleblowers are not prejudiced or harmed, because their initial disclosures were made to non-governmental actors or human rights defenders. The complaint filing process must also be adjusted to accommodate these forms of disclosures.

**X. “STRATEGIC OBJECTIVE 5.2: Protect anti-corruption actors.”**

*“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>23</sup>*

Under this Strategic Objective, the United States must “stand in solidarity” with whistleblowers and other non-governmental actors, who often work closely to safeguard whistleblower disclosures (i.e., “anti-corruption activists” and “investigative journalists.”)

Under this Objective, FinCEN must carefully promulgate rules so that the Departments of Treasury and Justice and FinCEN show solidarity with whistleblowers worldwide. This must include paying international whistleblowers robust rewards and creating regulations that take into consideration that many international whistleblowers will not have attorneys knowledgeable as to the technical requirements of the AML Whistleblower Act, may not speak English, and may reach out initially to the news media, civil society/NGO, governmental anti-corruption committees, foreign law enforcement agencies, and/or human rights defenders.

**XI. OECD AUDIT FINDINGS: Treasury and Justice should address OECD’s recommendations related to bribery cases when considering regulations on money laundering and reporting sanctions violations.**

As part of an OECD audit, the United States Department of Justice (DOJ) provided data on sources of information provided to the government that resulted in successful cases Foreign Corrupt Practices Act (“FCPA”) cases. This data is highly relevant in drafting AML whistleblower regulations, as proof that international reporting behaviors that result in successful FCPA cases

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<sup>23</sup> *Id.* at 34.

will be similar to those in AML cases. The DOJ statistics are the best numbers available, to predict the future sources of detection in money laundering and sanctions related crimes.<sup>24</sup>

The OECD described the DOJ numbers as follows:

*“Since October 2020, the U.S. Department of Justice (DOJ) has maintained sufficient data concerning detection sources. . . During that time period, for concluded cases resulting in sanctions or other dispositions against legal persons for foreign bribery, the DOJ FCPA Unit reports the following approximate breakdown of detection sources: 10% from self-reports; 40% from whistleblowers; 20% from media reports; 20% from civil or foreign authority referrals; and 10% from other law enforcement activity.”<sup>25</sup>*

FinCEN’s regulations must take into consideration this empirical data when implementing the rules governing the AML whistleblower program.

In this regard, the OECD made the following findings:

- *Four out of ten successful FCPA cases originated with whistleblower information.*

Unfortunately, under the current SEC regulations, whistleblowers who report directly to foreign law enforcement agencies, the news media, or even the U.S. Department of Justice can be disqualified from obtaining a reward based on several regulations.

For this reason, the OECD issued a formal recommendation under Recommendation 1.c, in its Phase IV audit in 2020 and in its follow-up audit in 2022, that the United States “*enhance guidance about the protections available to whistleblowers who report suspected acts of foreign bribery depending on the competent enforcement agency to which they report.*”

The OECD clearly was observing what our attorneys working with international whistleblowers on AML/bribery and anti-corruption matters also observe: international whistleblowers are not aware of the technical filing procedures contained in the current SEC regulations and often report to the wrong offices or agencies, thus resulting in the improper and unfair disqualification of an otherwise fully qualified whistleblower.

FinCEN must address this problem in their regulations. Guidance alone is clearly not enough, given the multiple persons who will receive initial allegations of money laundering and/or sanctions violations, be they employed in embassies around the world, members of civil society organizations, recognized human rights defenders, anti-corruption practitioners, or those who

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<sup>24</sup> Although these statistics come from the DOJ, the SEC also informed the OECD that their internal statistics were consistent with those of the DOJ regarding the sources of FCPA violations under its program.

<sup>25</sup> See IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION, PHASE 4 TWO-YEAR FOLLOW-UP REPORT: UNITED STATES (2022), available at <https://www.oecd.org/daf/anti-bribery/united-states-phase-4-follow-up-report.pdf>. (2022 follow-up audit).

otherwise constitute logical persons with whom a whistleblower would file an initial report. Doing the right thing should not and cannot justify denying an otherwise qualified whistleblower an award.

- *Two in ten successful FCPA cases originated from information reported in the news media.*

The Strategy correctly identified the news media and investigative journalists as key players against corruption. Whistleblowers are often the source of information to the news media, and thus whistleblowers who disclose corruption to the news media must be fully protected. Procedures must be established that create a reasonable pathway for a whistleblower who discloses information to the news media to become fully qualified under the reward law, whether the investigation is triggered due to disclosures by the news media, with no direct contact with the whistleblower, or the whistleblower-source is eventually contacted or subpoenaed by the U.S. government. The AML Whistleblower Act explicitly recognizes that “original information” can be filed with the news media. This provision of the statute must be fully enforced. Treasury and FinCEN should seek comments by respected international publications as to procedures that will effectuate not only the mandates of the Strategy, but the direct and explicit requirements of the law.

- *Two in ten successful FCPA cases originated from information obtained from civil society or foreign law enforcement authorities.*

The same policy objectives that apply to news media whistleblowers must also be applied to those whistleblowers whose disclosures to civil society or foreign law enforcement agencies are thereafter referred to U.S. authorities, who thereafter initiate an investigation.

- *One in ten successful FCPA cases originated from corporate self-reports.*

These “self-report” cases most likely originated from an internal report by a whistleblower to a company. The current SEC regulations fully cover and protect internal whistleblowers and describe a safe pathway for these internal whistleblowers to obtain a reward. The SEC rules require that an internal whistleblower file TCRs with the Commission within 120 days of the internal report. Given the nature of international whistleblowing, we would recommend that this deadline be significantly extended, and other rules implemented to protect whistleblowers who make initial internal reports.

- *One in ten successful FCPA cases originated from law enforcement investigations.*

Under current SEC regulations, whistleblowers who have provided information on foreign bribery only to the U.S. Department of Justice can be denied a whistleblower reward, even if the SEC knows the identity of the whistleblower and the whistleblower’s information was used to open an investigation into a company. Based on the OECD audit and recommendation, the OECD probably knew of such an unjust outcome, and thus issued a recommendation for “enhanced guidance” offered to whistleblowers concerning the “competent agencies to whom they report.”

Regardless of any historic issues arising from the SEC's 2010-11 regulations (which were developed ten years prior to the publication of the Strategy and with no input from international anti-corruption players) the AML whistleblower regulations must include specific protections for whistleblowers who report to law enforcement agencies (both domestic and foreign). This is particularly important given the role of various U.S. agencies (such the Agency for International Development, the Department of State, and/or federal officials working within U.S. embassies) in combatting corruption.

## CONCLUSION

The Strategy recognizes the dangerous and destructive problems caused by corruption. The need for a “whole government” response to money laundering, sanctions violations, as well as other forms of corruption, is compelling:

***“Corruption is a cancer within the body of societies—a disease that eats at public trust and the ability of governments to deliver for their citizens. The deleterious effects of corruption impact nearly all aspects of society. It exacerbates social, political, and economic inequality and polarization; impedes the ability of states to respond to public health crises or to deliver quality education; degrades the business environment and economic opportunity; drives conflict; and undermines faith in government. Those that abuse positions of power for private gain steal not just material wealth, but human dignity and welfare.”<sup>26</sup>***

If FinCEN follows the mandates of the Strategy, FinCEN will be able to construct a program that protects and compensates whistleblowers who are often 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 sometimes require police protection due to the reprisal they face from organized crime and corrupt government officials.<sup>27</sup>

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<sup>26</sup> See Fact Sheet: U.S. Strategy on Countering Corruption, THE WHITE HOUSE (Dec. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/> (emphasis added) (last accessed June 23, 2023).

<sup>27</sup> See Tom Warrant et al., *He Was at The Heart of Two of The Biggest Dirty Money Scandals in History. These Are His Secrets*, BUZZFEED (September 20, 2020, 10:01 am) <https://www.buzzfeednews.com/article/tomwarren/alexander-perepilichnyy-money-laundering-scandals>. Also see, e.g., : <https://www.bbc.com/news/world-africa-58550717>; <https://www.theguardian.com/world/2020/dec/22/mexico-journalists-deadly-cpr-press-freedom>; <https://www.cbsnews.com/news/armando-linares-journalist-killed-mexico-eight-murdered-2022/>; <https://apnews.com/article/africa-health-coronavirus-pandemic-south-africa-f25b60761db0d4d7420cc7c89f29d4e8>; <https://www.thesouthafrican.com/news/whistleblowers-in-south-africa-not-protected-enough-athol-williams/>; [https://en.wikipedia.org/wiki/Satyendra\\_Dubey](https://en.wikipedia.org/wiki/Satyendra_Dubey); [https://en.wikipedia.org/wiki/Shanmugam\\_Manjunath](https://en.wikipedia.org/wiki/Shanmugam_Manjunath); <https://newsinfo.inquirer.net/1495703/exposing-wrongdoing-the-uncertain-fate-of-whistleblowers-in-ph>; [https://en.wikipedia.org/wiki/Marlene\\_Garcia-Esperat](https://en.wikipedia.org/wiki/Marlene_Garcia-Esperat); [https://en.wikipedia.org/wiki/Shuping\\_Wang](https://en.wikipedia.org/wiki/Shuping_Wang); [https://en.wikipedia.org/wiki/Jiang\\_Yanyong](https://en.wikipedia.org/wiki/Jiang_Yanyong); [https://en.wikipedia.org/wiki/Herv%C3%A9\\_Falciani](https://en.wikipedia.org/wiki/Herv%C3%A9_Falciani); [https://en.wikipedia.org/wiki/Sergei\\_Magnitsky](https://en.wikipedia.org/wiki/Sergei_Magnitsky); [https://en.wikipedia.org/wiki/Rudolf\\_Elmel](https://en.wikipedia.org/wiki/Rudolf_Elmel); [https://en.wikipedia.org/wiki/Christoph\\_Meili](https://en.wikipedia.org/wiki/Christoph_Meili); [https://en.wikipedia.org/wiki/B%C3%BClent\\_%C5%9E%C4%B1k](https://en.wikipedia.org/wiki/B%C3%BClent_%C5%9E%C4%B1k); [https://en.wikipedia.org/wiki/Aleksandar\\_Obradovi%C4%87](https://en.wikipedia.org/wiki/Aleksandar_Obradovi%C4%87) (whistleblower).

As the Strategy explains, “countering corruption is not a simple task” and “changing embedded cultures of corruption requires significant political will.” This includes the commitment from the Departments of Justice and Treasury to adequately fund the AML whistleblower program, ensure that the final regulations are consistent with the mandates and guidance set forth in the Strategy, and that these agencies work with various partner organizations (including other U.S. law enforcement agencies, foreign law enforcement agencies, civil society, the news media, and human rights defenders) in coordinating an effective transnational enforcement program incentivizing whistleblowers to play a critical role in the detection of money laundering and violations of U.S. sanctions.

Our lawyers have represented whistleblowers since 1984. Since 2008, we have been actively engaged in working internationally on anti-corruption matters. We have worked with whistleblowers who have reported violations of U.S. sanctions, terrorist financing, and money laundering (including the largest known money laundering scandal focused on dirty Russian money). In numerous State Department sponsored presentations, we have met with representatives from approximately 75 countries discussing whistleblowing, international journalists, and we have made formal presentations to government leaders, NGOs, attorneys, and whistleblowers in countries including Bosnia and Herzegovina, Canada, Greece, Hungary, Israel, Kenya, Peru, Mexico, Montenegro, Serbia, South Korea, Thailand, and the United Kingdom. We currently represent whistleblowers who have reported corrupt activities in nations across Africa, Asia, Europe, and North and South America.

We would greatly appreciate an opportunity to meet directly with the persons working with the Justice and Treasury Departments working on the AML whistleblower regulations. Please find our formal recommendations attached in the appendix, and feel free to contact via email at [Stephen.kohn@kkc.com](mailto:Stephen.kohn@kkc.com) or call at 202-342-6980. You can also directly contact Kate Reeves, my Public Interest Law Clerk who is assisting on these matters. Her email is [kate.reeves@kkc.com](mailto:kate.reeves@kkc.com).

Respectfully submitted,

/s/

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

CC: Kaveh Miremadi  
Director, Office of the Whistleblower  
Financial Crimes Enforcement Network  
*via email* [Kaveh.Miremadi@fincen.gov](mailto:Kaveh.Miremadi@fincen.gov)

Nell Williams via email [Nell.Williams@fincen.gov](mailto:Nell.Williams@fincen.gov)  
Danica Hames via email [Danica.Hames@fincen.gov](mailto:Danica.Hames@fincen.gov)

## **APPENDIX**

### **Recommendations for AML Whistleblower Regulations**

1. **TCR Filing Requirements:** The final regulations should follow the procedures for qualifying whistleblowers as set forth in *Whistleblower 21276-13W v. Commissioner*, 144 Tax Court No. 15 (June 2, 2015) and 144 Tax Court 290. FinCEN must acknowledge that many international whistleblowers will not or may not comply with any overly technical filing requirements. *See* Strategy Pillar One and Strategic Objectives 3.1, 3.4, 3.5 and 5.2.<sup>28</sup>
2. **Confidentiality:** The final regulations should follow the precedent in *Montgomery v. IRS*, 40 F.4<sup>th</sup> 702 (D.C. Cir. 2022) regarding any public disclosures or releases under Freedom of Information Act (FOIA) related to whistleblower cases. Additionally, the current SEC regulations regarding confidentiality and anonymity work well and should be followed. *See* Strategy Pillar One and Strategic Objectives 3.1, 3.4, 3.5 and 5.2.
3. **Voluntary:** The final regulations should define the term “voluntary” based on its ordinary meaning, as set forth in the Oxford dictionary. Additionally, the final rules should explicitly state that if a whistleblower provided information voluntarily to any of the following sources prior to obtaining a formal request for information (including a subpoena) from the Department of Justice or Treasury (or another federal agency) the whistleblower would be considered voluntary: any federal law enforcement or regulatory agency; Congress; a state regulatory or law enforcement agency; an international regulatory or law enforcement agency; an “anti-corruption” agency; the news media, an investigative journalist; civil society organizations that thereafter report the whistleblower’s information to the media or a governmental organization; and other human rights defenders as understood by the Department of State or Agency for International Development. *See* Strategy Pillar One and Strategic Objectives 3.1, 3.4, 3.5 and 5.2. The AML regulations should not follow the SEC definition of “voluntary,” which

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<sup>28</sup> The SEC regulations follow a more narrow and restrictive approach concerning the submission of a TCR form. The IRS Office of the Whistleblower originally argued for an approach similar to that followed by the SEC, but this was rejected by the Tax Court. Unquestionably, the Tax Court approach reflects the intent of Congress in ensuring that otherwise qualified whistleblowers are not denied rewards in cases where the United States government knows who the whistleblower is, and can confirm that the government relied on the whistleblower’s original information, as required under law.

The SEC regulations on TCRs were developed during the 2010-11 rulemaking proceedings, and approved by the SEC over *ten years* prior to the approval of the Strategy, and years prior to various audits by the OECD. A review of the commentary surrounding the SEC whistleblower rulemaking proceedings, and the numerous comments submitted during the 2010-11 proceedings, confirms that issues identified in the Strategy related to international corruption and international whistleblowing were not addressed or considered. Based on the mandates of the Strategy, and lessons learned over the years in working with international whistleblowers, the Department of Treasury should not simply duplicate the SEC Dodd-Frank regulations, but should carefully consider various rules approved by the SEC in light of the mandates, recommendations and policies reflected in both the Strategy and the OECD audits.

has been extensively criticized and directly conflicts with the mandates set forth in the Strategy.

4. Coordination: The final rules should establish procedures for whistleblower disclosures made to other federal agencies to be forwarded to FinCEN or the Department of Justice, as is feasible. This is particularly important for disclosures made to employees at U.S. embassies. *See* Strategy Strategic Objective 3.3 and 3.4. Likewise, the FinCEN Whistleblower Office should be cognizant of other agencies that may have a law enforcement interest in a whistleblower's disclosure. Referrals of the whistleblower's information can thereafter be made to these other agencies, with the consent (or at a minimum with notice) to the whistleblower, provided that these agencies adhere to the strict confidentiality rules. No referrals should be made to non-U.S. agencies without the express written consent of the whistleblower.

The regulations should give full force and effect to the "related action" provisions of the law and should encourage interagency cooperation and coordination.

Moreover, the Department of Justice should not be permitted to indict or prosecute whistleblowers without vetting this potential decision to all of the law enforcement agencies and/or regulatory agencies that are also relying on the whistleblower as a source of information. In the past the Justice Department has indicted whistleblowers who voluntarily provided original information in such circumstances. For example, in one well known case the DOJ made a decision to indict the whistleblower whereas the IRS recognized the importance of the whistleblower's contributions and provided financial rewards to the whistleblower. This contradictory approach creates confusion within the whistleblower community and may cause a severe chilling effect on other potential whistleblowers. This is not to say that DOJ should not have the right to indict a whistleblower. Rather, I suggest that prior to indicting a whistleblower, the Department must consider whether such a decision would interfere with a specific investigation involving that whistleblower and, more broadly, with law enforcement priorities that rely on the trust of whistleblowers and the willingness of whistleblowers to voluntarily disclose misconduct for which they may share some liability. This provision is also justified by the mandate that every government agency must stand in "solidarity" with whistleblowers. Making sure that an indictment does not interfere with the overall objectives of the Strategy, or with investigations/prosecutions being conducted by other government agencies, is consistent with this goal.

5. Awards: The prohibition against capping whistleblower rewards at a certain size was adopted by the SEC after two extensive rulemakings. This prohibition should be incorporated into the AML rules. The Department of Treasury needs to recognize the positive impact of paying large awards. Large awards are essential to publicize the program worldwide, incentivize other whistleblowers to step forward, and deter wrongdoing. The regulations should acknowledge that paying awards is essential to incentivizing others to step forward and deterring wrongdoing. *See* Strategy Pillars One

and Two and Strategic Objectives 3.1, 3.5 and 5.2. Also *see* the 2021-22 rulemaking conducted by the SEC.

6. **Related Actions**: Cooperation with related law enforcement activities should be fully encouraged and incentivized. *See* Strategy Pillar One and Strategic Objectives 3.1, 3.3, 3.4, 3.5 and 5.2. *See* Recommendation #4.

7. **Qualification for a Reward**: The final rules should adopt a WB-APP application process like the process used by the SEC. If a whistleblower can demonstrate through this application process that he or she: (a) was the original source of the information used to trigger an investigation and/or significantly contribute to an existing investigation; (b) that the information was voluntarily provided to a third-party as the term “voluntary” is normally used (i.e. the whistleblower can demonstrate that he or she was not somehow compelled to produce the information, such as responding to a subpoena); and (c) that the whistleblower was not excluded from obtaining a reward based on the explicit statutory exclusions set forth by Congress, the whistleblower should obtain a reward. If a whistleblower had not filed a timely TCR form, the burden of proof to demonstrate criteria (a) and (b) would rest with the whistleblower. *See* Strategy Pillars One and Two and Strategic Objectives 3.1, 3.4, 3.5 and 5.2. This follows the current approach used by the IRS and helps ensure that otherwise qualified whistleblowers are not prejudiced.

8. **Foreign Government officials**: Foreign government officials should not be subject to a blanket prohibition on obtaining a reward. Prohibitions should exclude members of anti-corruption committees and persons working within government-owned banks or other agencies, such as doctors working in a state health care program, and persons working in sectors of the economy that are usually managed by the private sector in capitalist societies. *See* Strategy Strategic Objective 3.3 and 3.4. In this regard the SEC’s approach to unilaterally prohibit foreign government employees from being granted a reward should not be adopted by FinCEN. A more nuanced approach is needed. *See* fn. 27.

9. **Analyst**: The definition of “analyst” should encourage representatives from civil society to assist whistleblowers in submitting information. In this regard, representatives from civil society should be able to assemble and present allegations obtained from whistleblowers pursuant to a reasonable “analyst” definition. *See* Strategy Pillar One and Strategic Objectives 3.1, 3.5 and 5.2.

10. **Mandatory Internal Reporting**: The rules should not require whistleblowers to disclose their information internally prior to making a report to the government. Any such requirement is inconsistent with the obstruction of justice laws, **the rights of whistleblowers to remain confidential**, and are also inconsistent with the specific statutory requirements of the AML Whistleblower Law. Instead, regulations similar to those adopted by the SEC should be approved. These regulations give an employee an option to file internally prior to going to the government, and make sure that such employees can still reasonably qualify for a reward.

However, the SEC's incentives for whistleblowers who report internally should not be incorporated by FinCEN into its final rules. First, Employees who work for institutions insured by the Federal Deposit Insurance Corporation (FDIC) and/or who work for credit unions are not covered under the AML Whistleblower Act's anti-retaliation provisions. In other words, banks and credit unions can fire internal whistleblowers and these employees would have no coverage under the AML law. Until this deficiency in the law is corrected, the Treasury Department should encourage confidential and anonymous reporting directly to the government. As for international whistleblowers, U.S. laws prohibiting retaliation, including the obstruction of justice laws and/or state common law remedies that may be applicable to workers in the United States, simply do not apply internationally. It is well documented that the current state of international whistleblower laws is extremely problematic. Thus, international whistleblowers should also be encouraged to remain anonymous and act confidentially – in other words, they should not be encouraged to report internally until such time as the AML Whistleblower Act's anti-retaliation provisions are amended to cover employees at FDIC insured institutions and credit unions.

11. Acknowledge, Protect, and incentivize Corruption-Reporting as Identified in the OECD follow-up Phase IV audit report of the FCPA whistleblowing program: Relying on DOJ statistics, the OECD identified the following major sources of information related to international corruption. These sources must all be accommodated under the regulations: (a) Whistleblowers – this would include persons who report to a wide variety of sources, not just FinCEN or DOJ; (b) news media – which constitute 20% of reports; (c) civil society and international law enforcement – which constitute 20% of reports; (d) internal reports resulting in corporate self-reports – which constitute approximately 10% of reports.

12. Coordinate with U.S. Embassies, FBI Legal Attachés, the Agency for International Development, and the State Department: These agencies have worked with civil society, whistleblowers, and human rights defenders, and many whistleblowers raise their initial claims to these entities. They operate existing anti-corruption programs and/or are already involved in investigating international corruption cases. See Strategic Objective 3.3 and 3.4.

13. Timely Payments: The regulations should contain strict deadlines for paying awards. These regulations should be premised on the fact that the FinCEN and Justice Department investigators/prosecutors will know the identity and contributions of all whistleblowers who would qualify for a reward in a particular case. In this regard, the IRS whistleblower procedures require that their investigators fill out a form regarding whether or not there was a whistleblower involved in the case at the time the case file is closed. This procedure should speed up the process of identifying the “real” whistleblowers who provided evidence. This procedure is also the basis for the Tax Court deciding that a whistleblower could file the mandatory Form 211 (which is similar to the SEC's Form TCR) after the investigation is concluded. In IRS cases, their agents will know who the whistleblowers were, and thus the agency can process a claim quickly. By integrating the affidavits/statements from the front-line investigators into the decision-making process in

a timely manner rewards should be payable within 1-year (or less) and FinCEN will also know who the true whistleblowers were, without overly relying on a “check the box” decision making process. *See* Strategic Objective 5.2.

14. Reporting to International Agencies: The current SEC regulations do not give any credit to a whistleblower who reports to an international law enforcement agency, and such reports are not considered “voluntary,” and thus can lead to a complete disqualification of a whistleblower. Strategic Objective 3.4 mandates that the United States “Strengthen the ability of foreign partner governments to pursue accountability in a just and equitable manner.” Excluding the sources of disclosures made to foreign government partners from recognition under the AML reward program is inconsistent with this Objective. The Strategy explains the importance of encouraging such international cooperation: “Through DOJ, State, and USAID, the United States will deepen cooperation with and assistance to countries with the political will for meaningful anti-corruption efforts, including through the establishment of legal and regulatory frameworks, strengthening detection and capacity oversight, improving accountability institutions and processes, and strengthening justice and law enforcement, including, where appropriate, partnering with countries in joint investigations and prosecutions.” The final AML regulations should accommodate this Objective.

15. Non-Disclosure Agreements: Treasury should adopt the regulations approved by the SEC concerning the rights of individuals to directly report concerns to the government. These regulations prohibit non-disclosure agreements or other contractual terms that interfere with these rights. Prohibiting the use of NDAs to prohibit or interfere with the rights of employees to make disclosures to the DOJ or FinCEN is of critical importance. These NDAs have a chilling effect on the willingness of employees to come forward and undermine the core purposes of the law. *See* SEC Rule codified at 17 C.F.R. §21F-17, and Commission cases decided pursuant to that regulation.