U.S. Whistleblower Program Expands to Allow the Payment of Awards to Non-U.S. Citizens, Auditors, and Compliance Professionals Who Report Financial Crimes or Money Laundering

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INTRODUCTION

In December 2022, the U.S. Congress included the Anti-Money Laundering Whistleblower Improvement Act as part of the Omnibus Budget for that year.[1] The Act includes drastic new measures to expand enforcement against those committing financial crimes, violating sanctions, and money launderers operating in the United States financial system or abroad, chiefly by expanding the incentives for whistleblowers with knowledge of illicit conduct.

NEW CLASSES OF WHISTLEBLOWERS

The most important update to these whistleblower laws is that non-U.S. citizens, corporate auditors, and compliance professionals can now qualify as whistleblowers eligible to receive significant financial compensation for their disclosures of financial misconduct.

This is a significant expansion to include more eligible financial professionals typically prohibited from claiming an award under the Securities and Exchange Commission's (SEC) Office of the Whistleblower created under the Dodd-Frank Act in 2010.[2]

In general, anyone who has original-source, substantial, and relevant knowledge of wrongdoings that are of interest to the United States can be a whistleblower.

Where the Act differs from other U.S. whistleblower programs is where it shines. More precisely, a few differences are critical:

1. the new program is not limited to U.S. citizens and foreign citizens may receive awards;

2. other whistleblower programs typically exclude potential whistleblowers who gained knowledge of criminal conduct as part of compliance or audit duties related to their employment. This exclusion was removed from the Act and allows those who are often in the best position to gain knowledge of criminal conduct to qualify for awards;
3. the Act allows whistleblowers to report violations or the evasion of U.S. sanctions, including but not limited to statutes such as the Trading with the Enemy Act and the Foreign Narcotics Kingpin Designation Act. This notable expansion largely relates to Russia's invasion of Ukraine and the government's desire to target and seize assets of oligarchs engaged in money laundering and other abuses of U.S. financial systems – though its reach extends far beyond Russia.

OTHER REQUIREMENTS TO TRIGGER U.S. JURISDICTION

a. The Extraterritoriality Criteria – Establishing a (Loose) Connection to the U.S.

The money laundering or financial crime at issue must have some connection to the U.S. However, the intensity of the territorial link/connection with the U.S. need not be strong.

Dirty money passing through a U.S. bank or even the foreign branch of a U.S.-based bank could be enough. If U.S. financial systems or interests are affected in any way, the U.S. will likely find a sufficient nexus to allow enforcement.

The U.S.'s strong stance on this issue, though, gets a lot of negative responses from foreign countries, which view the position as unreasonable.

France, for example, has passed a blocking statute known as the Loi de Blocage[3] to prevent its citizens from cooperating with the U.S. government as a direct result of what they considered as U.S. government overreach.

From a Swiss point of view, there are few, but extremely relevant, norms that need to be considered when the potential whistleblower is on Swiss territory, or the Swiss sovereignty is at stake:

1. The Swiss blocking statute, provided for by article 271 of the Swiss Criminal Code, criminally sanctions activities conducted on Swiss soil on behalf of foreign authorities.
2. Article 47 of the Federal Banking Act that forbids banks to disclose information about current or former customers of Swiss banks under the threat of a criminal sanction.
3. The (new) Federal Data Protection Act, similarly to the GDPR, provides that personal data can only be disclosed under certain circumstances.

b. Reportable Criminal Conduct

The criminal acts that trigger the jurisdiction of U.S. authorities are quite broad under the latest statutory revisions. Money laundering, financial crimes, sanctions violations, and violations of a number of U.S. statutes (such as drug kingpin statutes) qualify. The U.S. money laundering statutes are incredibly broad, so even activity that may seem mundane will often qualify and warrant referral to the U.S.

c. Double Incrimination/Reciprocity

In general, a violation of a U.S. law needs to be shown. However, if there is evidence of violations of a foreign financial law and there is a nexus to a U.S. financial institution or the U.S. generally, there could be a statute that would trigger whistleblower protection.

COMPENSATION FOR WHISTLEBLOWERS AND REQUIREMENTS OF THE PROGRAM

Though large payouts under the U.S.' various whistleblower programs routinely make the news – a whistleblower was recently awarded nearly $279 million USD[4] – and significant awards are increasing in frequency, would-be whistleblowers are often discouraged to learn that statutory exclusions render them ineligible for an award.

The Anti-Money Laundering Whistleblower Improvement Act eliminated many award eligibility barriers and increased the scope of reportable conduct which can entitle one to an award.

The Act created the Financial Integrity Fund, out of which whistleblower awards will be paid. The Act also dictated that at least 10%, and up to 30%, of any collected financial sanctions exceeding $1 million USD resulting from whistleblowing will be

paid to eligible, voluntary whistleblowers who provided qualifying information to their employer, the Department of the Treasury, or the Department of Justice. When determining the size of a whistleblower award, the Treasury will consider the following factors:

- the significance of the information provided by the whistleblower to the success of the covered action;
- the degree of assistance provided by the whistleblower;
- the programmatic interest of the Treasury in deterring the particular violations disclosed by the whistleblower; and
- additional factors to be decided by the Department of the Treasury.

Importantly, the Act also provides significant protection for whistleblowers against retaliation stemming from their cooperation with the government. Unlike other U.S. whistleblower programs, whistleblowers qualify for retaliation protections even if they only reported criminal conduct to their employer and not to the government.

PRACTICAL EXAMPLES IN THE EU AND SWITZERLAND

a. Banque Pictet

On 4 December 2023, Banque Pictet et Cie SA admitted to conspiring with U.S. taxpayers to hide more than $5.6 billion USD and prevent U.S. taxing authorities from discovering income derived therefrom.[5]

The bank used a variety of means to assist U.S. taxpayer-clients in concealing their undeclared accounts, including by forming or administering offshore entities in whose name the Pictet Group opened and maintained accounts, some of which were undeclared for U.S. taxpayer-clients and opening and maintaining undeclared accounts in the names of offshore entities formed by others for U.S. taxpayer-client.

The case, which was brought by prosecutors from the Southern District of New York, resulted in the bank paying fines of $122.9 million USD, entering into a deferred prosecution agreement, and requiring the bank to fully cooperate with prosecutors in ongoing investigations and affirmatively disclose any information it may later uncover regarding U.S.-related accounts. If the bank complies with these conditions for three years, further charges will be dropped.

Banque Pictet's penalty could qualify a whistleblower for an award exceeding $36,000,000 USD.

b. Credit Suisse Group AG and UBS Group AG

UBS and Credit Suisse recently received subpoenas from the U.S. Department of Justice related to concerns that the banks failed to maintain compliance programs sufficient to prevent the evasion of U.S. sanctions by Russian citizens and that certain employees within the banks purposely aided Russian citizens in evading such sanctions.

The U.S. government and the banks remain in negotiations, and the Helsinki Commission[6] has conducted hearings to learn more about the potential sanctions evasion. The Swiss Bankers Association, a group of the country's financial institutions, estimated in July more than $200 billion in Russian money has been stashed in Swiss banks. If true, and banks were found to have purposely aided Russians in hiding money (or even negligently failed to detect and report Russian assets), the Department of Justice will likely pursue massive seizures and impose significant penalties.

U.S. politicians are not hiding their intentions. Senator Ben Cardin, a Democrat from the state of Maryland and co-chair of the Helsinki Commission, said at a recent hearing that "[U.S.] sanctions are only as effective as we are able to make sure that they are enforced. And we have seen the Russian economy surviving better than we thought it would. Part of that has been the laundering of dirty money in Switzerland." It is likely that at least one whistleblower is involved in this case; given the sprawling nature of the sanctions evasion schemes at issue – paired with the number of Swiss banks that make prime enforcement targets – additional whistleblowers are likely to come forward to secure both financial awards and protection from prosecution.

CONCLUSIONS

The Act is a positive, overdue measure that will better enable the government to curb financial crimes that often go undetected and undeterred and will encourage new groups of key individuals to come forward with knowledge of these abuses.

Given the stakes involved in reporting criminal financial conduct such as money laundering or sanctions evasion, potential whistleblowers should take comfort in

knowing that under the newly modified Act, they can report violations anonymously and minimize the chances of any retaliation from those they report. This would also provide Swiss whistleblowers an added layer of protection against potential suits brought by those they report under Article 47 of the country's 1934 Banking Act, which states that anyone who "discloses information about bank customers to other people" can be punished with up to three years in prison.

Nonetheless, given the complexity of such situations, the interplay between the two systems (the U.S. and the Swiss ones), and the risks a potential whistleblower could face at home and abroad, we encourage any potential whistleblower to seek the advice of experienced and competent U.S. and Swiss counsels prior to contacting the authorities or make any statement.

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[1] https://www.congress.gov/bill/117th-congress/senate-bill/3316/text

[2] https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf

[3]https://www.entreprises.gouv.fr/fr/securite-economique/la-loi-de-blocage-reforme-et-publication-d-guide

[4] https://www.sec.gov/news/press-release/2023-89

[5]https://www.justice.gov/opa/pr/swiss-private-bank-banque-pictet-admits-conspiring-us-taxpayers-hide-assets-and-income; https://www.pictet.com/fr/fr/corporate-news/settlement-agreement-with-us-departement-of-justice

[6] https://www.csce.gov/

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