NWC | NATIONAL WHISTLEBLOWER CENTER

May 13, 2026

Submitted via Federal eRulemaking Portal: www.regulations.gov.

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

RE: THIRD SUPPLEMENT – DEFINITION OF VOLUNTARY AND INTERNAL REPORTING

AML WHISTLEBLOWER ACT RULEMAKING COMMENTS
Docket Number FINCEN-2026-0067 and RIN 1506-AB57
Department of the Treasury/Financial Crimes Enforcement Network

Dear Director Gacki:

On behalf of the National Whistleblower Center and the whistleblower law firm Kohn, Kohn and Colapinto, we are submitting the following supplemental comment (our second supplement and third overall comment) regarding the proposed rule defining "voluntary" as it relates to internal reports made to employers, pursuant to the Notice of Proposed Rulemaking submitted by the U.S. Department of Treasury, Financial Crimes Enforcement Network ("FinCEN"). *See* Whistleblower Incentives and Protections, 91 Fed. Reg. 16328, 16377 (April 1, 2026) (Proposed Rule).

This supplemental comment discusses the definition of the term "voluntariness." The Proposed Rules defines this term as follows:

> *Voluntariness.* A whistleblower's submission of original information is voluntary if it is made prior to any request, inquiry, or demand about a matter related or relevant to the original information in the whistleblower's submission from Congress, any agency or authority, or a self-regulatory organization, to the whistleblower or the whistleblower's attorney or other representative, *or in some circumstances to a whistleblower's employer.*

§ 1010.930(c)(2) (emphasis added); 91 Fed. Reg. at 16377.

In our last supplemental comment (Comment #mp4-9zof-2nzk), we proposed an addition to this definition ensuring that third-party disclosures meet the voluntary requirement, as the AML WIA's text requires. In this comment, we wish to call attention to the last phrase in FinCEN's proposed definition of "voluntary," which deems a whistleblower involuntary if the government has made a request or inquiry "in some circumstances to a whistleblower's employer." *Id.* We recommend this provision be struck from the definition of "voluntary."

Unlike Dodd-Frank, the whistleblower program created under the AML WIA explicitly covers whistleblower complaints raised by an employee to their employer. 31 U.S.C. § 5323(b)(1). Thus, for the reasons covered in our previous supplemental comment, the plain meaning of the AML WIA requires that whistleblowers who make internal disclosures be eligible for awards. This provision, by contrast, will disqualify whistleblowers who should

be considered meritorious under the AML WIA. In fact, it will allow unscrupulous companies to *intentionally disqualify* these whistleblowers.

I. Internal Disclosures Are Central to the AML WIA's Policy Goals

Protecting whistleblowers who make internal disclosures is central to the AML WIA's goals for two reasons: the vast majority of whistleblowers make their first disclosure internally,[1] and whistleblowers who make internal disclosures overwhelmingly face retaliation for doing so.[2]

Contrary to the AML WIA, FinCEN's proposed definition of "voluntary" would allow FinCEN to disqualify employees with detailed knowledge of fraud who frequently face retaliation – the exact population FinCEN hopes to target with whistleblower incentives. As demonstrated in some of the earliest whistleblower cases, persons who perform audit functions are often subjected to retaliation if they perform their job in an aggressive manner. *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984) (Energy Reorganization Act "protects quality control inspectors from retaliation based on internal safety and quality control complaints");[3] and *Kansas Gas & Elec. v. Brock*, 780 F.2d 1505 (10th Cir. 1985) (same).

Studies conducted by the Institute of Internal Auditors Research Foundation ("IIARF") likewise demonstrate that auditors are often instructed to water down the results of their findings or simply not conduct audits in various areas, and are frequently subjected to retaliation. *See,* Patrica Miller and Larry Ribbenberg, The Politics of Internal Auditing (2015) and Larry Ribbengerg, Ethics and Pressure: Balancing the Internal Audit Profession (2016).

Both the text and the public policy goals of the AML WIA make clear that auditors and other compliance officials cannot be excluded from FinCEN's definition of voluntary. Any regulation that unnecessarily disqualifies such whistleblowers directly contravenes the AML WIA's goals.

II. The Goals of the "In Some Circumstances" Provision Will Be Realized

Whistleblowers must fulfill many other requirements in addition to the "voluntary" requirement in order to qualify for awards. A whistleblower must provide "original information," that information must initiate or substantially contribute to an enforcement action yielding at least $1 million in sanctions, and the whistleblower must not be

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[1] *See, e.g.*, Ethics Resource Center, *2011 National Business Ethics Survey: Workplace Ethics in Transition,* https://s3.amazonaws.com/berkley-center/120101NationalBusinessEthicsSurvey2011WorkplaceEthicsinTransition.pdf, 53: "Whistleblowers prefer to report internally to their employers."

[2] *See, e.g.,* Stephen M. Kohn et al., *Whistleblower Disclosures: An Empirical Risk Assessment* (Working Paper, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4690852, 1: "internal whistleblowers constitute over 90% of retaliation cases" under the Sarbanes-Oxley and Dodd-Frank Acts.

[3] Significantly, Congress looked toward the Energy Reorganization Act and its cases as precedent for the anti-retaliation provisions of the False Claims Act, the early *qui tam* law on which Dodd-Frank was based. S. Rep. 99-345 (1986), 27. The Senate Report also cited to *Mackowiak* as one of the cases that set forth standards for demonstrating retaliation. *Id.* at 27-28.

otherwise disqualified under the AML WIA (for example, by being convicted of a crime related to the conduct at issue or by failing to comply with requests from Justice or Treasury). 31 U.S.C. § 5323(b)(1), (c)(2).

It will be very difficult for the whistleblowers FinCEN hopes to disqualify with the "in some circumstances" provision to meet all of these requirements.

The unnecessary nature of the "in some circumstances" provision is demonstrated by the fact that the SEC's regulations implementing Dodd-Frank do not include a commensurate provision. 17 U.S.C. § 240.21F-4(a). While the AML WIA allows a broader range of internal disclosures to qualify whistleblowers for awards than Dodd-Frank, other whistleblower requirements under the AML WIA will prevent undeserving candidates from qualifying for awards through internal disclosures.

III. The Proposed Rule is Open to Abuse

Allowing FinCEN to deem whistleblowers "involuntary" if their employer has already received a government request opens a clear path for unscrupulous employers to abuse FinCEN's regulations.

Many companies have policies that require internal reporting but, in practice, are merely window dressing or worse. Under FinCEN's proposed definition of "voluntary," companies who receive internal disclosures could use a whistleblower's disclosure to compel a government inquiry that would disqualify the whistleblower. This would actively empower unscrupulous companies to undermine their employees' ability to qualify for awards.

IV. Proposed Change

For the above reasons, we recommend the "in some circumstances" provision be struck from the definition of "voluntary." The "in some circumstances" provision constrains whistleblowers who are crucial to the AML WIA's policy goals and in profound need of the AML WIA's incentive structure, and threatens to give malicious employers power over their employees' award eligibility – a result FinCEN must avoid if at all possible.

V. Conclusion

Thank you in advance for your careful attention to this proposal.

We would greatly appreciate an opportunity to meet directly with you or the officials working on the Proposed Rules. Please feel free to contact me via email at Stephen.kohn@kkc.com or phone at 202-342-6980. You can also directly contact Alice Wanamaker, KKC's Public Interest Law Fellow; or Jeana Lee, the National Whistleblower Center's Program Manager; who are assisting me on these matters. Their emails are Alice.Wanamaker@kkc.com and Jeana.Lee@whistleblowers.org, respectively.

Respectfully submitted,

/s/ Stephen M. Kohn

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