PROGRAM MATERIALS
Program #31290
November 8, 2021

The Anti-Money Laundering Act of 2020: A Sea of Change in AML Compliance

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The Anti-Money Laundering Act of 2020

A Sea Change in AML Compliance

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Anti-Money Laundering Act of 2020

- Anti-Money Laundering Act of 2020 (“AMLA”)
  - Enacted as part of H.R. 6395 (116th): National Defense Authorization Act for Fiscal Year 2021
  - 56 sections across 5 Titles of U.S. Code; primarily Title 31
  - Ushers in the most significant changes to the Bank Secrecy Act and anti-money laundering laws since the USA PATRIOT Act of 2001.
- Main purposes of the AMLA
  - Establish uniform beneficial ownership information reporting regime
  - Codify the risk-based approach to AML compliance
  - Modernize the AML system
  - Expand enforcement and investigative authority
  - Emphasize coordination, cooperation, and information-sharing among financial institutions & regulators

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“Financial Institution” Definition

- Under the AMLA, a “financial institution” now includes a person that engage as a business in the transmission of currency, funds, or value that substitutes for currency.
- Also includes persons engaged in the trade of antiquities or sale of antiquities
  - AMLA requires study into the facilitation of money laundering and terrorism financing through the art trade.
- 31 U.S.C. § 5312(a)(2) defines “financial institution” as an insured bank, commercial bank, trust company, private bank, agency or branch of a foreign bank, credit union, thrift institution, broker-dealer, investment bank, currency exchange, insurance company, pawnbroker, loan or finance agency, travel agency, telegraph company, auto dealership, casino, among other types of businesses

BSA/AML Violations Subject to New and Increased Sanctions

- AMLA added two new financial crimes to the BSA for deceiving or withholding information from financial institutions:
  - 31 U.S.C. § 5335(b): **knowingly conceal, falsify, or misrepresent, from or to a financial institution, a material fact concerning the ownership or control of assets involved in a monetary transaction** if (i) the person or entity who owns or controls the assets is a senior foreign political figure; and (ii) the aggregate value of the assets involved is at least $1,000,000.
  - 31 U.S.C. § 5335(c): **knowingly conceal, falsify, or misrepresent, from or to a financial institution, a material fact concerning the source of funds in a monetary transaction** that (i) involves an entity found to be a primary money laundering concern; and (ii) violates a prohibition on opening or maintaining a correspondent or payable through account.

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BSA/AML Violations Subject to New and Increased Sanctions

- New Civil and Criminal Penalties
  - Criminal violations punishable by up to 10 years' imprisonment and a fine of up to $1 million (31 U.S.C. § 5335(d))
  - Increased civil penalties for repeat and egregious BSA violators – three times the profit gain or loss avoided (31 U.S.C. § 5321)
  - Willful failure to file beneficial ownership information can result in civil liability of $500 per day, fine, and up to two years' imprisonment
  - Prohibitions on those who commit an "egregious" violation of the BSA from serving on the board of directors of a United States financial institution during the 10-year period after their conviction
    - Egregious violations are those for which an individual is convicted where the maximum term of imprisonment is more than one year, and a civil violation where the individual willfully committed a violation and such violation facilitated money laundering or the financing of terrorism.

Beneficial Ownership Registry

- Section 6403 of AMLA pertains to Beneficial Ownership Registry.
- Beneficial Ownership Registry applies to “reporting companies,” which include corporations, LLCs, and other similar domestic entities. Foreign entities registered to do business with the United States also qualify.
- “Reporting companies” must disclose their beneficial owners.
  - Those who directly or indirectly “exercise substantial control” over the business, or who own/control over 25 percent of the business.
  - Full name, date of birth, current residential or business street address, unique identifying number

Beneficial Ownership Registry

- Willful failure to file beneficial ownership information can result in civil liability of $500 per day, fine, and up to two years' imprisonment
- Beneficial ownership information is generally confidential. FinCEN may disclose to law enforcement and regulators. Also, FinCEN may disclose to financial institutions performed due diligence if "reporting company" authorizes.
- Unauthorized disclosures are subject to civil liability, fine, and imprisonment of up to five years.

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Pilot Program for Cross-Border Sharing of SAR Information

- Secretary of Treasury must establish rules for a pilot program allowing for the sharing of Suspicious Activity Reports (SARs) internationally with non-U.S. affiliates of financial institutions
- Three-year pilot program (with an option to extend for two years) allowing financial institutions to share SARs information "with the institution's foreign branches, subsidiaries, and affiliates for the purpose of combating illicit finance risks," so long as those foreign entities are not located in certain high-risk countries.
  - High-risk countries include Iran, Pakistan, North Korea, Yemen, Albania, Nicaragua, Cambodia, and several others in Africa

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Expanded Subpoena Power for Foreign Banks with U.S. Correspondent Accounts

- 31 U.S.C. § 5318(k)(3)
- Treasury Department and Justice Department may subpoena "any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside the United States relating to the deposit of funds into the foreign bank."
- Expands that authority to include "<u>any</u> records relating to the correspondent account or any account at the foreign bank, including records maintained outside the United States" (emphasis added), provided it is the subject of any one of several enumerated types of investigations or actions

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Expanded Subpoena Power for Foreign Banks with U.S. Correspondent Accounts

- 31 U.S.C. § 5318(k)(3)(A)(iv) permits foreign bank to petition federal district court to quash the subpoena.
- Gag order: No officer, director, partner, employee, or shareholder of, or agent or attorney for, a foreign bank on which a subpoena is served under this paragraph shall, directly or indirectly, notify any account holder involved or any person named in the subpoena issued under subparagraph (A)(i) and served on the foreign bank about the existence or contents of the subpoena.
- DOJ may apply to a federal district court to compel compliance, including by holding the foreign bank in contempt, and to pursue civil penalties enforceable via seizure of funds held in the foreign bank's correspondent account at any U.S. financial institution.

Whistleblower Rewards and Protections

- Section 6314 of the AMLA increases whistleblower payments that had been enacted through the Bank Secrecy Act (31 U.S.C. § 5323)
- Monetary Incentives
  - Previous, pursuant to the Bank Secrecy Act, the Department of Treasury had discretion to pay a whistleblower an award capped at $150,000
  - Under the AMLA, the Department of Treasury "shall" pay a whistleblower up to 30% of economic recovery, provided the recovery exceeds $1 million.
- Protections from Retaliation
  - AMLA also repeals the Bank Secrecy Act's whistleblower protection statute (31 U.S.C. § 5328
  - Puts in place significant whistleblower protections from retaliation, including the ability to file a complaint with the Department of Labor and sue employer for compensatory damages, reinstatement, double back-pay, and attorneys' fees, among other things.

Safe Harbor for Law Enforcement "Keep Open" Requests

- What does a financial institution do when an account is identified by law enforcement as potentially engaged in money laundering activity?
- AMLA Section 5333
  - If a federal law enforcement agency, after notifying FinCEN (or other agency with FinCEN concurrence), submits request to keep account open, the financial institution will not be liable for maintaining the account or itself be subject to adverse action
  - Financial institution must manage account consistent with “Keep Open” request

AML Enforcement Priorities

- FinCEN (Financial Crime Enforcement Network) issues whitepaper identifying national priorities in AML and Countering Financing of Terrorism (June 30, 2021)
- Top priorities are:
  - Corruption
  - Cybercrime (including virtual currency considerations)
  - Foreign and domestic terrorism financing
  - Fraud
  - Transnational criminal organization activity
  - Drug trafficking organization activity
  - Human trafficking and human smuggling
  - Proliferation Financing

AML Enforcement Priorities

- Corruption
  - Corrupt government actors and financial facilitators may take advantage of weaknesses within U.S. financial system to launder assets and obscure criminal proceeds
  - Misappropriation of public assets, bribery, and other forms of corruption affects individuals and entities across the world, threatens the national security of the United States and the global financial system, degrades the rule of law, perpetuates conflict, and deprives innocent civilians of fundamental human rights.
  - Advisories issues regarding specific foreign jurisdictions (Nicaragua, South Sudan, Venezuela) help covered financial institutions comply with BSA obligations

AML Enforcement Priorities

- Cybercrime
  - Size, reach, and accessibility of U.S. financial system makes covered financial institutions attractive targets to criminal, including state criminal actors and terrorists
  - Ransomware -- ransomware attacks increased dramatically in 2020 and 2021 in both scale and sophistication, posing a threat to the U.S. health care system and other critical infrastructure, as well as U.S. national security and economic prosperity. In some instances, ransomware campaigns have been associated with adversary governments, sanctioned entities, or jurisdictions with weak AML/CFT regimes and high AML/CFT and sanctions risks, such as Russia, North Korea, and Iran.
  - COVID-19 -- criminals increasingly exploited the pandemic through phishing campaigns and the compromise of remote applications to facilitate extortion, business email compromise (BEC), and other fraudulent schemes, especially against financial and health care systems. Ill gotten gains laundered through system
  - Cryptocurrency -- convertible virtual currencies (CVCs) also have grown as the currency of preference in a wide variety of online illicit activity. In addition to being the preferred form of payment for buying ransomware tools and services, online child exploitation material, illicit drugs and other illicit goods online, and for paying ransoms to the perpetrators of ransomware attacks, CVCs often are used to layer transactions to hide the origin of money derived from illicit activity.

AML Enforcement Priorities

- Terrorist Financing
  - Islamic State of Iraq and Syria (ISIS), Al Qaeda, Lebanese Hizballah, and Iran's Islamic Revolutionary Guard Corps; domestically racially or ethnically motivated violent extremists—primarily those advocating for the superiority of the white race—and anti-government or anti-authority violent extremists are the most lethal domestic violent extremist threats
  - Terrorist financing includes lone actors using small amounts of money to self-fund attacks, as well as more complex schemes and networks that may be embedded within existing money laundering methods used to support logistical networks, operatives, and the procurement of material.

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AML Enforcement Priorities

- Fraud
  - Bank, consumer, health care, securities and investment fraud account for the bulk of illicit proceeds in the United States. Health care fraud alone estimated at $100 billion annually.
  - Increasingly internet based – romance scams, business email compromise, synthetic identity theft, and other forms of identity theft. FinCen identified 32,000 reported cases involving almost $9 billion in attempted theft from BEC fraud schemes affecting U.S. financial institutions and their customers
  - Proceeds from fraudulent activities may be laundered through a variety of methods, including transfers through accounts of offshore legal entities, accounts controlled by cyber actors, and money mules.
  - COVID 19 fraud -- economic impact payment, health insurance and health care, unemployment insurance, counterfeit COVID-19 vaccine, pump-and-dump and other market manipulation schemes, and cyber-enabled fraud schemes

AML Enforcement Priorities

- Transnational Criminal Organization Activity
  - Organizations engaged in drug trafficking, cybercrime, fraud, wildlife trafficking, human smuggling, human trafficking, intellectual property theft, weapons trafficking, and corruption
  - Many operate in the U.S., Mexico, and Russia, with certain Africa- and Asia-based organization gaining prominence year after year
  - Malign state actors who provide TCOs safe haven or other support in return for financial or political gain, or assurances of their own security, enable TCOs' malign activity, including foreign election interference, attempts to stoke social unrest, and other profit-driven criminal acts—most often perpetrated online—that undermine public confidence and threaten the social fabric of foreign nations.
  - Increasingly turning to professional money laundering services that charge a fee or commission for services

AML Enforcement Priorities

- Drug Trafficking Activity
  - Illicit drugs continue to generate significant proceeds for DTOs. The proceeds, which may be laundered in or through the United States, and the drugs themselves, contribute to a significant public health emergency
  - DTOs rely more on professional money laundering networks in Asia (primarily China) that facilitate exchanges of Chinese and U.S. currency or serve as money brokers in trade-based money laundering (TBML) schemes.59 There has been a substantial increase in complex schemes to launder proceeds from the sale of narcotics by facilitating the exchange of cash proceeds from Mexican DTOs to Chinese citizens residing in the United States, including the use of front companies or couriers to deposit cash derived from the sale of narcotics into the banking system.

AML Enforcement Priorities

- Human Trafficking and Human Smuggling
  - Financial activity from human trafficking and human smuggling activities can intersect with the formal financial system at any point during the trafficking or smuggling process.
  - human trafficking and human smuggling networks use a variety of mechanisms to move illicit proceeds, ranging from cash smuggling by individual victims to sophisticated cash smuggling operations through professional money laundering networks and criminal organizations.
  - The illicit proceeds from human trafficking can include income associated with logistics, such as housing and transportation of victims, as well as earnings from the exploitation of victims.
  - Human traffickers and smugglers have established shell companies to hide the true nature of a business.

AML Enforcement Priorities

- Proliferation Financing
  - Proliferation financing refers to the act of providing funds or financial services which are used, in whole or in part, for the manufacture, acquisition, possession, development, export, trans-shipment, brokering, transport, transfer, stockpiling, or use of nuclear, chemical, or biological weapons and their means of delivery and related materials (including both technologies and dual use goods used for non-legitimate purposes), in contravention of national laws or, where applicable, international obligations.
  - Proliferation support networks: These networks of individuals and entities, such as trade brokers and front companies, seek to exploit the U.S. financial system to move funds that will be used either: (1) to acquire weapons of mass destruction or delivery systems or their components; or (2) in the furtherance or development of state-sponsored weapons programs, including the evasion of United Nations or U.S. sanctions.
  - Actors engaged in the proliferation of weapons of mass destruction have developed sophisticated and diverse strategies to finance their programs. Covered institutions remain vulnerable to malign actors (including Iran, North Korea, and Syria) seeking to generate revenues and transfer funds in support of illicit conduct through gatekeepers, front or shell companies, exchange houses, or the illicit exploitation of international trade

Thank you!

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