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The New Anti-Money Laundering Act: Issues for Financial Institutions

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The new Anti-Money Laundering Act of 2020 (AMLA or the Act) established the most comprehensive set of reforms to American anti-money laundering (AML) law since the passage of the Patriot Act in 2001. The AMLA—which was quietly passed in the massive 2021 National Defense Authorization Act—strengthened existing government authority to regulate and police money laundering. Specifically, the Act expands Justice and Treasury Department power to investigate and punish both anti-money laundering and Bank Secrecy Act (BSA) violations. In doing so, the AMLA's reforms present particularly significant implications for financial institutions and their AML compliance programs.

Enhanced Penalties for BSA/AML Violations. The AMLA enhances penalties for BSA and anti-money laundering violations. These provisions will provide prosecutors with increased leverage in enforcing AML prohibitions and motivate them to focus on actively pursuing criminal activity in this space.

Specifically, the AMLA creates a new anti-money laundering *crime*. It is now unlawful to knowingly conceal from or misrepresent to a financial institution a material fact concerning (1) the ownership or control of certain assets involved in transactions over $1 million or (2) concerning the source of funds in certain transactions. Violating these provisions can result in up to 10 years in jail and a $1 million fine.

The Act also enhances the penalties for existing BSA and anti-money laundering rules. Repeat offenders face additional monetary penalties, and the government can bar those who commit "egregious" violations from sitting on a financial institution's board of directors for ten years. Under a new clawback provision, too, a financial institution can even recover any bonus it paid an employee who committed a money-laundering violation in the calendar year of the bonus.

Expanded Whistleblower Program. The AMLA has strengthened the incentives for employees at financial institutions with knowledge of BSA/AML violations to blow the whistle. Where previously awards were discretionary and capped at $150,000, the Act guarantees an eligible whistleblower an award of up to 30% of the amount recovered if the government obtains more than $1 million in monetary sanctions. The AML whistleblower program also institutes measures to protect informants against retaliation.

These heightened incentives for whistleblowing may well inspire an uptick in activity by whistleblowers and plaintiff's lawyers. Years ago, the SEC instituted a similar whistleblower program, which has brought in thousands of tips and paid out more than $700 million in rewards over the past decade. Financial institutions can expect a similar volume of whistleblowers (or more), especially given

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the large number of employees at financial institutions who have access to relevant information.

Problematically, the new AML whistleblower program could weaponize these front-line employees. The promise of a substantial whistleblower recover could motivate employees to skip internal reporting processes and go and blow the whistle as a first stop. Particularly if workers feel that their concerns will not be addressed adequately internally, they may elect to take advantage of the whistleblower program's hefty rewards and go directly to regulators. The whistleblower program may well make it harder for banks to ensure that information is captured internally and not just reported out to government.

Broadened Extraterritorial Reach. The AMLA bolsters the government's power to acquire information from financial institutions abroad. Previously, law enforcement could only use subpoenas to obtain records from foreign banks with a small presence in the United States where those banks had American correspondent accounts. And those subpoenas were limited in that they could only reach records relating to the correspondent accounts.

Now, regulators can subpoena information on *any* account of a covered foreign bank, even if it has no presence in the United States. This drastic change significantly expands the universe of overseas documents federal agencies can procure. And the new subpoena power comes with teeth: the government can impose a penalty of up to $50,000 per day for noncompliance and force American banks to terminate their correspondent relationships with a foreign bank that does not cooperate with a subpoena.

The AMLA therefore poses a challenge to foreign banks whose home nations make it illegal to disclose bank account information. Critically, the Act explicitly clarifies that foreign privacy laws are *not a basis for quashing a subpoena*. Foreign banks will thus need to consider whether the financial benefits of maintaining correspondent accounts in the United States justify the burden of these new AMLA subpoena requests or whether it is in a bank's best interests to close its correspondent accounts altogether. Similarly, American banks will have to assess whether the value of their correspondent relationships outweighs the heightened scrutiny they will now face from the AMLA.

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While it is likely that this provision will face legal challenges, it is important to be aware of its scope until and unless a successful challenge is mounted.

SAR Information Sharing. The AMLA addresses the uncertainty surrounding banks' ability to share the information contained in suspicious activity reports (SARs) with their foreign affiliates. The Act instructs the Treasury Department to develop rules creating a three-year pilot program to allow financial institutions to share information related to SARs with an institution's foreign branches and subsidiaries in order to combat illicit activities. This program will help multinational banks fight money laundering across borders and better understand what different affiliates and divisions know about potential financial wrongdoing.

Beneficial Owner Registry. The absence of comprehensive laws requiring disclosure of the beneficial owners of companies has facilitated criminal activity by allowing businesses to obscure their true owners. The AMLA seeks to change that by requiring "reporting companies" to disclose their beneficial ownership to FinCEN, which will create an internal registry of that information. The entities covered by these provisions are largely shell companies and smaller businesses, as financial institutions and large companies are exempt from the reporting requirement. Financial institutions will be able to obtain beneficial ownership information from this registry, making it easier for them to satisfy their obligations under FinCEN's Customer Due Diligence rule to verify the beneficial ownership information of account holders.

Virtual Currency Transactions. Virtual currencies have increasingly presented difficulties for financial institutions as criminals have begun to rely on non-monetary tools such as cryptocurrencies to launder money. In November 2020, for instance, the DOJ seized more than $1 billion worth of Bitcoin used as part of the Silk Road drug trade. Before the AMLA, regulators sought to stretch existing AML regulations to reach transactions in virtual currencies. But banks lacked

certainty as to whether the laws actually apply to these new mediums. The Act resolves the issue by clarifying that businesses that engage in the exchange or transfer of value that substitutes for currency are financial institutions under the BSA. In doing so, the AMLA has fortified law enforcement's ability to go after violators who seek to bypass the conventional monetary system by relying on cryptocurrencies to facilitate their illegal behavior.

SAR and CTR Reforms. The minimum monetary thresholds for transactions for which banks must file a SAR or currency transaction report (CTR) have remained unchanged for decades, resulting in millions of filed reports every year. That amount has created massive burdens for banks and left prosecutors with an unmanageable volume of information. The AMLA seeks to begin to remedy this situation by instructing the government to conduct a formal review of the monetary thresholds for SARs and CTRs and assess whether those thresholds should be adjusted. The Act also orders regulators to explore whether the process of filing these reports can be made less burdensome to prioritize the submission of high-value information. While this effort is only a first step, it nonetheless represents a positive advancement toward modernizing the filing process for financial institutions.

Compliance. In light of these and other reforms in the Act, covered financial institutions need to be proactive in preparing their compliance programs for this next generation of AML regulation. To start, banks will be well-served by conducting fresh top-to-bottom "hygiene check" of their BSA/AML programs, done either internally or by a third party. This may require a financial institution to perform a new risk assessment to evaluate the health of its compliance program and review old records to address any outstanding problems. It is important to ensure that internal oversight is robust and that employees at all levels are involved in the process and encouraged to escalate their concerns. The escalation process should include control function and business-side leadership. Ultimately, board members must be well-informed by the escalation process to enable them to make reasoned oversight and strategic decisions.

Especially given the AMLA's heightened whistleblowing incentives, it is more crucial than ever that banks foster environments where employees have faith in and can rely on internal reporting mechanisms to resolve their concerns.

Banks also need to be mindful of their organizational cultures around compliance. Especially given the AMLA's heightened whistleblowing incentives, it is more crucial than ever that banks foster environments where employees have faith in and can rely on internal reporting mechanisms to resolve their concerns. A bank's "tone at the top" isn't enough: front-line employees are the ones most likely to blow the whistle when an issue arises, so leadership needs to review firm culture at all levels and change it if necessary. Doing so can help instill in employees a confidence in the company's internal processes so that they feel comfortable using those mechanisms and escalating any problems within the bank rather than going directly to the government. Reacting now, rather than waiting until a problem arises can help financial institutions get ahead of the curve.

The Act makes clear that BSA/AML issues will be a priority for law enforcement going forward, so banks need to stay focused on this area as regulators roll out new rules implementing the AMLA. By ensuring that an institution's compliance programs are effective and up to date and adjusting those programs in real time as issues arise, financial institutions can take major strides toward mitigating the new risks that they face in this new era of AML compliance.