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Fact sheet: AML Act of 2020

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OVERVIEW

The Anti-Money Laundering Act of 2020 (the "AMLA" or the "Act") represents the most significant change to the American bank secrecy, and anti-money laundering/counter-terrorist financing ("AML/CFT") regime since the USA PATRIOT Act of 2001.

The purpose of the AMLA is to:

- protect national security;
- broaden the coverage of the Bank Secrecy Act ("BSA");
- reinforce a risk-based approach to AML/CFT;
- improve cooperation, coordination, and information-sharing among regulators, financial institutions, law enforcement and intelligence agencies;
- modernize the U.S. AML/CFT regime;
- encourage innovation and adoption of technology to combat illicit financial activity; and
- improve corporate transparency.[1]

FOCUS ON TERRORIST FINANCING

AML has traditionally been thought of as a disciplinary catchall for a broad range of initiatives aimed at combatting illicit financial activities ranging from money laundering to terrorist financing, proliferation finance, serious tax fraud, trafficking, sanctions evasion, and other illicit activities.

CFT is typically included under the AML umbrella, but there is an increasing trend toward focusing on terrorist financing as a discrete set of challenges that require a unique and holistic law enforcement framework, and the AMLA really advances CFT as a distinct priority.[2]

EXPANDED BSA COVERAGE

One of the major challenges to effectively combatting money laundering is the difficulty of holding lawyers, private bankers, real estate agents, art and antiquities dealers, and other intermediaries accountable for their roles in placing illicit funds into the legitimate financial system.

One of the ways that the AMLA addresses this is by expanding the coverage of the BSA. Specifically, the Act:

Expands the definition of "financial institution" to include persons "engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities[;]"[3] and

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Broadens several key BSA provisions such that covered transactions now include "currency, funds, or value that substitutes for currency," which will likely bring cryptocurrency exchanges within the ambit of the BSA.[4]

NOTE: This measure is intended to address Congress' longstanding concern that terrorists and criminals may exploit vulnerabilities in the global financial system by using virtual currencies to move illicit funds, casting cryptocurrencies as a sort of Bogeyman of illicit finance.[5]

However, it should be noted that despite this popular wisdom having become a distinct feature of the current political discourse, research has failed to produce any significant evidence of terrorist organizations adopting cryptocurrencies as a method of payment transmitting.[6]

The most recent data suggests that illicit transactions represented just 2.1% of all cryptocurrency transaction volume in 2019, and just .34% in 2020.[7]

EXPANDED ENFORCEMENT POWERS

Prior to passage of the AMLA, the scope of the Department of Justice's power to seek documents from foreign financial institutions was limited to records relating to their U.S. correspondent accounts. The Act significantly expands the power of the federal government to obtain records from any foreign financial institution that maintains a correspondent account in the United States.[8]

Now, the DOJ may request "any records relating to the correspondent account ***or any account*** at a foreign bank, including records maintained outside of the United States[.]"[9]

While the statute does recognize that there may be challenges to disclosure in certain circumstances — for example, if a subpoena request conflicts with foreign secrecy laws, or in the absence of a legal assistance treaty with the country in which the subpoena target is located — the Act offers only the United States district courts as the narrow forum for relief.[10]

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The AMLA also establishes additional penalties at the individual level for repeat BSA violators. The Act bars "egregious violators" from serving on the board of any U.S. financial institution, and requires executives convicted of certain BSA violations to return all profits and bonuses received during the calendar year of the violation.[11]

COOPERATION AND COORDINATION

International collaboration, interagency coordination, and public-private partnerships are among the major objectives of the AMLA, consistent with its broader focus on information-sharing. The Act positions the Secretary of the Treasury as the nucleus of cooperation.

The Secretary is tasked with, among other things, organizing a national strategy to advance AML/CFT priorities and convening a "supervisory team" comprising representatives from each of the Federal functional regulators, private sector subject matter experts, and other key stakeholders.[12]

The AMLA encourages information-sharing at the individual level by establishing a more robust BSA whistleblower program, increasing incentives and strengthening protections for those who come forward with information about violations of U.S. anti-money laundering law.

The updates are patterned in large part after the SEC whistleblower program, established by the Dodd-Frank Act and widely regarded as a major success.

EXAMINATION AND SUPERVISION

AML/CFT are high priorities for bank examination and supervision. The AMLA specifically provides that Federal bank examiners will now be required to receive specialized annual training focused on money laundering as well as terrorist financing patterns, trends, and risk profiles.

FINANCIAL INTELLIGENCE

The AMLA outlines FinCEN's core responsibilities with respect to:

- safeguarding the U.S. financial system from illicit activity,
- countering money laundering and terrorist financing, and
- promoting national security through collection of financial intelligence.[13]

FinCEN was already performing many of the functions described in the AMLA, but the Act more clearly defines and codifies its role as the center of financial intelligence in the United States.

FinCEN will be responsible not only for the promulgation of regulations implementing government-wide AML/CFT priorities, but also for ensuring clear communication of those priorities on an ongoing basis, and for making experts available for consultation on emerging threats and technologies that can assist in efforts to identify financial crime networks.

TECHNOLOGY

The AMLA also requires state and federal banking regulators and law enforcement agencies to consider whether it is possible to further "streamline" currency transaction and suspicious activity reporting processes.[14] Specifically, authorities must consider whether electronic reporting might be enhanced by allowing automatic population of reports and automatic submission of suspicious transaction data.

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Enhanced electronic reporting raises the prospect that at some point in the near future, financial institutions will be able to automate their suspicious activity reporting processes for certain non-complex categories of reports.

CORPORATE TRANSPARENCY ACT

The Corporate Transparency Act (the "CTA") is the section of the AMLA that has garnered the most attention, presumably because of what are certain to be far-reaching consequences.[15] The CTA aims to "discourage the use of shell corporations as a tool to disguise and move illicit funds," by requiring certain companies doing business in the U.S. to disclose the identities of their beneficial owners.

This new requirement represents a significant departure from the current framework, which places the onus on financial

institutions to prevent abuse of corporate structures for the purpose of concealing suspicious financial activity.

Frequently, criminal actors use lawful, licensed and registered businesses as front companies to comingle illicit proceeds generated from an illegal scheme with that of a legitimate business.

Under the new regime, financial institutions will still be responsible for the same level of customer due diligence, but legal entities will now also have a duty to regularly self-report directly to authorities.

Overall, the CTA brings the U.S. closer to the international standard for corporate transparency, with the key distinction being that the actual identifying information for beneficial owners will not be available to the public as is the practice in several European countries. FinCEN will maintain beneficial ownership information in a non-public database accessible only to law enforcement and as a resource for financial institutions.

The expected increase in BSA coverage and reach, information sharing, innovation and corporate transparency will reduce mechanisms to conceal illicit activity and increase regulator and law enforcement capabilities.

Notes

[1] Anti-Money Laundering Act of 2020, H.R. Res. 6395, 116th Cong. § 6003 (2020).

[2] H.R. Res. 6395 § 6102(c)(2) (amending 31 U.S.C. § 5318(a)(2) by inserting "the financing of terrorism, or other forms of illicit finance" after "money laundering").

[3] H.R. Res. 6395 § 6110(1)(B).

[4] H.R. Res. 6395 § 6102(d)(1)(B) (amending 31 U.S.C. § 5312(a)(1) – (2) (defining "financial agency" and "financial institution" under that BSA); 31 U.S.C. § 5330(d) (requiring registration of "money transmitting businesses").

[5] H.R. Res. 6395 § 6102(a)(3).

[6] Cynthia Dion-Schwarz, David Manheim, Patrick B. Johnston, The RAND Corporation, Terrorist Use of Cryptocurrencies: Technical and Organizational Barriers and Future Threats (2019) ("We see little current evidence of the adoption of cryptocurrencies by terrorist organizations or the motivation to do so, but that very well might change as countermeasures shut off funding and as the cryptocurrency technology changes.").

[7] Chainalysis, The 2021 Crypto Crime Report, at 5 (2021).

[8] H.R. Res. 6395 § 6308.

[9] H.R. Res. 6395 § 6308(a)(2).

[10] H.R. Res. 6395 § 6308 (a)(1)(B) (amending 31 U.S.C. § 5318A(iv)).

[11] H.R. Res. 6395 §§ 6309; 6310; 6312.

[12] H.R. Res. 6395 §§ 6214; 6101.

[13] H.R. Res. 6395 § 6102(a)(1).

[14] H.R. Res. 6395 §§ 6202, amending 31 U.S.C. §5318(g); 6204.

[15] H.R. Res. 6395, Title LXIV.

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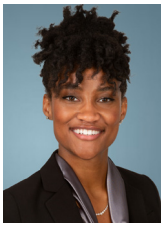
ABOUT THE AUTHOR



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