

Anti-Money Laundering Enforcement Update



By Kyle R. Freeny and Benjamin G. Greenberg | March 2021 | Law Journal Newsletters

Over the last decade or so, anti-money laundering (AML), counter-terrorism financing (CFT), and sanctions compliance have been the subject of increased enforcement efforts by the Department of Justice (DOJ), Department of Treasury, and federal financial regulators. We expect this trend to accelerate in 2021 and beyond, propelled at least in part by the recent enactment of the Anti-Money Laundering Act of 2020 (2020 AMLA). Passed with overwhelming bi-partisan support as part of this year's National Defense Authorization Act, the 2020 AMLA may well have the most significant impact on the AML/CFT landscape since enactment of the USA PATRIOT Act. Among other things, the 2020 AMLA creates several new tools that law enforcement can employ to investigate and prosecute illicit finance, described further below.

Amplifying the likely effect of this legislation, these law enforcement tools will be handed to new DOJ leadership under the incoming Biden administration, which is expected to be more focused on white collar crime than the outgoing administration, and more willing to investigate mainstream U.S. companies, including depository and non-depository financial institutions.

Looking ahead, several likely enforcement trends are worth highlighting:

- Increased willingness to bring enforcement actions against mainstream U.S. companies for AML/CFT compliance lapses;

- Heightened focus on complicit professionals, such as bankers, accountants, and real estate professionals, whose conduct may also expose employers to vicarious liability;
- Enforcement related to the new corporate beneficial ownership registry created by the 2020 AMLA; and
- Increased focus on transnational illicit finance, including through cooperation with foreign counterparts.

Increased Enforcement Risk for AML/CFT Compliance Lapses

The Department of the Treasury, in its most recent [National Illicit Finance Strategy](#), identified ongoing corporate compliance weaknesses as one of the U.S. financial system's key vulnerabilities to money laundering and other illicit finance. It is reasonable to expect that the incoming Biden administration, with its appetite to address perceived corporate misconduct, will channel law enforcement resources to this area. And when it does so, it will have new tools available to it under the 2020 AMLA that merit the attention of corporate counsel.

For several decades now, the Bank Secrecy Act, 31 U.S.C. §§5311 *et seq.*, and its implementing regulations (collectively, the BSA), have required covered financial institutions to meet certain record-keeping, reporting, and other compliance requirements designed to assist U.S. law enforcement in detecting and preventing money laundering. These requirements include the obligation to file suspicious activity reports (SARs) on transactions that may indicate criminal activity and the obligation to maintain an effective anti-money laundering program. Willful compliance lapses can expose companies to civil and criminal penalties.

If past is prologue, the Biden administration is likely to take a liberal view of willfulness under the BSA. For example, it may dust off the doctrine of "collective knowledge," the notion that a corporation can be prosecuted even when no single employee has the requisite knowledge and criminal intent. DOJ's anticipated focus on corporate AML/CFT compliance may find assistance from the Department of Treasury's Financial Crimes Enforcement Network (FinCEN), which administers the BSA and is expected to receive additional funding pursuant to the 2020 AMLA.

Compounding the risk for financial institutions, the 2020 AMLA also creates strong incentives for employee whistleblowing in cases of corporate AML/CFT lapses. The Act replaces a weak incentive system with a robust one that allows the Secretary of Treasury to award a whistleblowing employee up to 30% of a recovered fine or forfeiture for BSA violations. The 2020 AMLA also provides a private right of action for employees who believe they were subject to retaliation. With these new incentives, employee whistleblowing is likely to increase, providing investigative leads that federal law enforcement cannot ignore. A robust compliance program that provides clear channels for employee reporting and remediates weaknesses as they are discovered is thus as critical as ever.

Digital payment companies would be wise to pay particular attention to the risk of AML/CFT enforcement under the new administration. All signals point to a likely increase in focus on the digital payments space, which has already received significant attention from [FinCEN](#) and [DOJ](#) in 2020 and is the subject of capacity-building measures in the 2020 AMLA. It is not just cryptocurrency exchanges, which are subject to the BSA, that are likely to face compliance scrutiny in 2021 and beyond. Other digital payment firms, such as payment processors and payment facilitators, may find themselves on the wrong side of a DOJ investigation if they fail to address significant vulnerabilities to exploitation by criminals.

Complicit Employees May Expose Companies to Money Laundering Liability

Another area of likely enforcement focus, which was highlighted in Treasury's 2020 Illicit Finance Strategy, is the role of "complicit professionals" in facilitating money laundering. "Complicit professionals" refers to gatekeeping professionals, such as lawyers, bankers, accountants, and real estate agents who use their positions to help clients engage in illicit financial transactions.

This anticipated enforcement target should be of concern to corporate counsel, because the government may seek to hold a company vicariously liable for the conduct of one of its employees if the employee was acting: a) within the scope of his or her employment; and b) at least in part for the benefit of the employer (for example, to obtain business or retain a customer). Based on previously articulated policy, federal authorities may be expected to take the view that a banker or other financial professional who assists a customer in moving illicit proceeds was acting within the scope of employment, even when he or she was acting in knowing violation of written policies or in circumvention of internal controls.

In 2020, a foreign bank agreed to pay \$30 million to resolve potential U.S. federal money laundering charges based on the theory that it was vicariously liable for the conduct of certain of its relationship managers who allegedly helped customers transfer bribe payments. The risk that financial institutions may face vicarious liability for money laundering, which would entail significant collateral consequences, only increases in the next administration.

Enforcement Related to the New Beneficial Ownership Registry

In another significant development, the 2020 AMLA also creates a new federal corporate beneficial ownership disclosure requirement, designed to address growing international criticism that U.S. state registration requirements permit criminals to hide behind shell companies and other opaque structures. FinCEN will maintain this beneficial ownership data in a confidential registry, available to law enforcement authorities and financial institutions (but only if the customer of the institution consents).

The full impact of this requirement is beyond the scope of this article and may not be fully apparent until FinCEN promulgates implementing regulations. But such a fundamental change in the way that beneficial ownership is recorded and verified can be expected to assist law enforcement in investigating and prosecuting illicit finance. Notably, the 2020 AMLA criminalizes the provision of false beneficial ownership information, as well as willful failure to comply with the registration requirement. It is reasonable to expect that prosecutors will use this new prohibition to charge suspected money launders who conceal ownership information, even when authorities are unable to establish money laundering beyond a reasonable doubt.

Focus on Transnational Crime, Including Through Cooperation With Foreign Partners

Given the global nature of the economy and the continued importance of the U.S. dollar in international finance, it is not surprising that U.S. law enforcement has increasingly targeted the cross-border movement of illicit proceeds. President-elect Biden has already publicly signaled that his administration would redouble efforts at addressing transnational illicit finance, including by working together with partner nations. *See, e.g.*, Joseph Biden, "Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump," *Foreign Affairs* (March/Apr. 2020).

One area of particular focus under the Biden administration is likely to be the movement of the proceeds of foreign corruption into or through the U.S. financial system. Biden himself regularly uses the term “kleptocracy” and has openly talked about the need to ensure that the U.S. financial system does not become a “haven” for corrupt proceeds. *See id.* Additionally, the Kleptocracy Asset Recovery Act, which was enacted alongside the 2020 AMLA, creates a pilot program to reward persons who provide information to federal law enforcement that leads to the seizure or forfeiture of assets linked to foreign government corruption. Given the potential increase in law enforcement leads that this program may create, financial institutions that have facilitated the movement of significant corrupt proceeds, even unwittingly, may find themselves and their compliance programs subject to greater scrutiny by both regulators and DOJ in 2021 and beyond.

Financial professionals who count politically exposed persons (PEPs) among their clients should also take heed of this potential enforcement focus. Section 6313 of the 2020 AMLA makes it a crime for a person to conceal, falsify or misrepresent to a financial institution the ownership or control over assets belonging to a senior foreign political figure. This provision would permit the prosecution of lawyers, accountants, bankers, and real estate agents who provide false information on behalf of PEPs to help them access the U.S. financial system, irrespective of whether the U.S. government can prove that those assets were in fact the proceeds of corruption.

Economic sanctions compliance is also likely to continue to be a strong focus in 2021 and beyond, although the enforcement focus may shift to countries of concern to the new administration. For example, the incoming administration may be expected to enforce Russian sanctions more aggressively, particularly in the wake of the recent cyber security breach against governmental and other targets, which has been attributed to Russian intelligence. Additionally, the new administration, in contrast with the outgoing one, is likely to pursue a multi-lateral, coordinated approach to sanctions and sanctions enforcement with allied nations.

Indeed, the number of parallel investigations across multiple jurisdictions is likely to increase more generally in 2021 and beyond, given the Biden administration’s stated aim to work with partner nations to address illicit finance. Cross-border and parallel investigations can be tricky for corporate clients to navigate, presenting difficult choices about how to satisfy authorities with different and sometimes contrary expectations and raising the possibility of unfair duplicative penalties. Enactment of the 2020 AMLA potentially increases these risks. Section 6308 of the 2020 AMLA expands the authority of federal law enforcement to subpoena foreign bank records from financial institutions with no U.S. presence, so long as they maintain a U.S. correspondent account. Of particular concern, that section appears to foreclose courts from quashing a subpoena solely on the ground that disclosure would violate a foreign nation’s bank secrecy or data privacy laws.

Conclusion

The 2020 AMLA has given federal law enforcement and financial regulators an arsenal of new AML/CFT enforcement tools, amplifying what was already an apparent inclination by the incoming administration to take more aggressive enforcement action against non-compliant corporate actors. This anticipated uptick in federal AML/CFT enforcement, including in conjunction with foreign counterparts, will unfortunately coincide with a period of regulatory uncertainty for financial institutions, as the implications of the 2020 AMLA come into full view and as implementing regulations are promulgated over the next year or more. The confluence of increased complexity and increased scrutiny of AML/CFT compliance raises the stakes for

institutions that fail to engage proactively and, thus, increases the importance of robust and timely remediation.

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