AMLA – US trigger to re-examine AML Compliance

Legislation to overhaul the US anti-money laundering regime, effective 1 January 2021, will impact financial institutions and some of their customers far and wide. Timothy J. Treanor, Michael D. Mann and Brian C. Earl of Sidley look in detail at three of the major innovations.

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Each year, trillions of dollars – generated through criminal activity, like fraud, corruption, and narcotics trafficking – are laundered in an endless cat-and-mouse game played by criminals seeking to shield their plunder from the legitimate world. In one of the most poorly kept secrets, a sizeable share of those funds ends up in the U.S., not only because foreign criminals appreciate our stable and free economy, but also because lax corporate formation laws facilitate the creation of shell companies that can be used to conceal the identities of beneficial owners who stand behind these companies, creating a massive control gap that criminals exploit enthusiastically.

Change, however, is afoot. The recently-adopted Anti-Money Laundering Act of 2020 (AMLA) promises to alter the balance in the war against financial crime. In particular, three provisions of the AMLA – establishing a beneficial owner disclosure program for shell companies; empowering a whistleblower program for money laundering activities; and expanding government powers to compel the production of overseas financial records – herald the most significant changes in AML compliance and enforcement since adoption of the USA PATRIOT Act twenty years ago and require financial institutions to rethink traditional approaches to addressing money laundering and other financial crimes.

Beneficial owner disclosure program

Most transformative among AMLA's reforms is the creation of a secure, non-public, beneficial owner database to be managed by the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN). The database is to be populated with beneficial owner information that certain companies themselves must provide to FinCEN at the time of formation or registration in the U.S. or, for existing companies, within two years of the effective date of the relevant to-be-issued regulations. FinCEN, at least initially, will not verify the information submitted, but Treasury must conduct a study on the costs and resources necessary to implement a verification program. Moreover, willful false disclosures and failures to disclose carry potential civil and criminal penalties. This non-public information will be available to law enforcement, and with consent of the relevant company, to financial institutions seeking to confirm information obtained through customer due diligence. AMLA focuses the disclosure requirements on shell companies by exempting from disclosure a range of other lower-risk companies, including U.S. public companies and those in regulated industries, and by exempting any company with more than 20 full-time employees and a U.S. location that filed a federal tax return claiming more than US$5 million in annual revenue in the previous year. The program is subject to regulations that Treasury must issue by 1 January 2022.

The details of the regulations will be critical but there are a number of discernible consequences for financial institutions arising from the program framework set forth in AMLA. To begin with, the onerous burden of conducting customer due diligence (CDD) reviews will be somewhat alleviated by the availability of beneficial owner information in the FinCEN database. Financial institutions will also get some relief from the risk of regulatory and enforcement consequences associated with relying on falsified customer information, because such consequences will be mitigated by demonstrating reliance upon information in the FinCEN database.

In order to maximize the benefits of the disclosure program, financial institutions will have to develop procedures for obtaining, utilizing, and protecting beneficial owner information obtained from FinCEN. Instructions in this regard should be forthcoming with the regulations, but clearly financial institutions will want to obtain available information from the database promptly before they begin servicing new clients. Recipients of database information will also want to develop procedures to ensure that the information is

treated confidentially and with the care afforded to suspicious activity reports (SARs) and other sensitive banking information since unauthorized disclosure of this information brings with it the potential for criminal liability. Although the program will not be operational until the beginning of 2022, at the earliest, now is a good time to start working through how these issues will be handled internally and to consider whether there is value in participating in an effort to influence what the regulations will say.

Enhanced whistleblower program

AMLA also provides enhanced incentives for whistleblowers to report violations of the Bank Secrecy Act (BSA) to Treasury and the Department of Justice (DOJ). Prior to passage of AMLA, a whistleblower providing original information about a BSA violation leading to criminal or civil penalties in excess of US$50,000 was eligible for a discretionary award from Treasury of up to 25% of the total penalty, subject to a cap of US$150,000. This little-known and seemingly little-used provision was simply not incentive enough to motivate whistleblowers to take on the potentially life-altering burdens of becoming government informants. AMLA purportedly breathes life into this useless program with certain updates modeled on the SEC's highly successful whistleblower program established by the Dodd-Frank Act of 2010. AMLA provides for an award of up to 30% of monetary sanctions, where sanctions exceed US$1 million and are obtained in an action brought under the BSA by Treasury and/or the DOJ and adds significant protections against retaliation for certain whistleblowers. It also specifically allows whistleblowers represented by counsel to provide information anonymously so long as they identify themselves to Treasury prior to the approval of an award. The surface implication is that there will be a significant increase in AML whistleblower reports because, as with the SEC program, successful whistleblowers under AMLA stand to receive substantial awards.

AMLA provisions, however, include carve-outs and omissions that potentially threaten the efficacy of the program and thus the likelihood of an increase in AML reports and investigations. To begin with, the new law does not guarantee a minimum award, leaving the award amount to the discretion of Treasury and creating the risk that a whistleblower might receive essentially nothing. This significant omission may be addressed by Treasury's regulations, but AMLA establishes no deadline for the issuance of those regulations, raising questions about when the program will commence. AMLA also expressly excludes from qualified monetary sanctions funds obtained through forfeiture or restitution and any victim compensation payments. These particular exclusions may be relatively inconsequential, since BSA violations typically do not create victim losses, but related or predicate offences, such as fraud and corruption, can be pursued together with BSA violations so it will be interesting to see how such situations are addressed.

The ultimate success of the AMLA whistleblower program will depend on the details of the enabling regulations, but issues with AMLA make it hard to predict to what degree the program will, in fact, generate an increase in whistleblower complaints. Nevertheless, it should be expected that the program will increase AML investigations, and it is not too early for financial institutions to examine their practices, and consider whether the program enhancements warrant additional or updated policies and procedures related to the handling of whistleblower complaints.

Increased government subpoena powers for overseas documents

Finally, AMLA expands the powers of Treasury and the DOJ to compel foreign banks maintaining correspondent accounts in the U.S. to produce records located outside of the U.S. by extending the reach of the subpoena provisions of the USA PATRIOT Act.

In the aftermath of the 11 September 2001 terrorist attacks, Congress passed the PATRIOT Act, which included provisions granting Treasury and the DOJ statutory authority to subpoena, in connection with an AML investigation and from foreign banks maintaining correspondent accounts in the U.S., records related to the correspondent account. If the foreign bank refuses, the PATRIOT Act allows Treasury or the DOJ to seek, on 10-days' notice, termination of the correspondent relationship, with a civil penalty to be imposed on the correspondent bank if it fails to terminate the relationship in a timely manner. These

provisions were meant to supplement Mutual Legal Assistance Treaties (MLATs) between the U.S. and foreign nations, which prescribe procedures for the U.S. to enlist the support of a counter-party government in the collection of evidence related to a U.S. investigation and are often required by the treaties to be used in the first instance to obtain records from the relevant country.

With the passage of AMLA, Congress has attempted to strengthen the government's ability to secure overseas evidence from foreign banks by granting authority to Treasury and the DOJ to issue subpoenas seeking records relating to *any* account at a foreign bank that has a correspondent account in the U.S. – far broader than the PATRIOT Act provision limiting subpoena authority to records related to the correspondent account itself. Additionally, AMLA expands the list of purposes for which subpoenas can issue to include efforts to obtain records in connection with *any* criminal investigation or forfeiture action, far exceeding the permitted purpose under the PATRIOT Act of simply advancing AML investigations. AMLA also directs that an assertion that compliance with an AMLA subpoena would conflict with foreign secrecy law shall not be a sole basis for quashing or modifying a subpoena. Finally, AMLA adds to the subpoena enforcement provisions of the PATRIOT Act, authorizing Treasury and the DOJ to impose on non-compliant banks a civil penalty of up to US$50,000 per day, and giving DOJ the authority to invoke the aid of the federal courts to compel compliance with a subpoena and to seize any funds held in the foreign bank's correspondent account to satisfy civil penalties and orders of contempt. The enforcement provisions also increase, from US$10,000 to US$25,000 per day, the civil penalty that can be imposed on a U.S. correspondent bank for failure to terminate, on notice, a correspondent relationship, and expand the scope of criminal obstruction of justice offences for disclosing the existence of such subpoenas.

Although it is tempting to conclude that the AMLA provisions will result in a flood of subpoenas served on foreign banks with U.S. correspondent accounts, and perhaps also to the U.S. correspondent banks holding those accounts, the reality is that the government is likely to continue to use subpoenas for overseas records judiciously and sparingly. Foreign sovereigns are likely to view unauthorized requests for such records as infringements of state sovereignty and to resent American intrusions onto their soil regardless of the authority conferred upon the U.S. federal agencies – concerns that are not diminished by AMLA. As a result, the DOJ has long favoured, and likely will continue to favour, following the procedures laid out in MLATs where possible and requiring high-level approval for the use of subpoenas to obtain overseas records. The use of AMLA subpoenas will be further limited by the agencies' desire to avoid adverse judicial rulings that could undermine their authority to collect overseas evidence if those powers are used too aggressively. Finally, AMLA subpoenas will continue to be disfavoured in some cases out of recognition that they can put innocent foreign banks in the unfair position of having to choose between violating a subpoena request and violating the laws of another nation.

In the end, the subpoena provisions of AMLA may not be as impactful as they seem. This is not to say, however, that Treasury and the DOJ will not use these powers; it is simply to suggest that they will continue to be selective in doing so, using such subpoenas only where the need is most compelling. Even so, the issuance of AMLA subpoenas to banks can be expected to increase overall due to the availability of such subpoenas in a broader range of cases and their obvious value to law enforcement. Nevertheless, even where such subpoenas are issued, the persistence of state sovereignty, judicial action, and fairness concerns should cause the agencies to be willing to negotiate with the subject banks, and at times to negotiate through them with foreign regulators, on the scope or manner of the subpoena responses to avoid international diplomatic disputes.

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