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AMLA 2020: Sweeping New AML Laws Have Broad Impacts on All Financial Crimes

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On January 1, 2021, following House and Senate overrides of a presidential veto, the National Defense Authorization Act ("NDAA") for Fiscal Year 2021 passed into law. Embedded in the NDAA are the Anti-Money Laundering Act of 2020 ("AMLA" or the "Act") and the Corporate Transparency Act ("CTA"),[2] which together constitute the most sweeping anti-money laundering legislation in twenty years.

The anti-money laundering ("AML") and counter-terrorism financing ("CTF") aspects of these laws, which have received the most press attention to date, only partially explain the extensive impact that AMLA will have on investigations and prosecutions. This article explores the broader implications that AMLA will have on the investigation of more traditional financial crime going forward, including criminal tax enforcement, securities fraud, acts of foreign corruption, and other financial fraud. This article will focus on four areas in particular:

(1) The CTA's creation of a beneficial ownership registry to track the ownership of certain shell and other small corporations that are frequently used as fronts for illicit activities,[3]
(2) The significant augmentation of the Financial Crimes Enforcement Network's ("FinCEN") authority and tools, especially with respect to spearheading cooperation and public-private partnerships,[4]
(3) The inclusion of virtual currency exchanges as money service businesses,[5] and
(4) The expansion of U.S. law enforcement's ability to subpoena foreign bank records from foreign institutions who maintain a correspondent banking relationship in the United States.[6]

While this legislation likely will take years to implement fully, it offers potent new tools to U.S. financial investigators that have never existed before, and its impact will be felt for years to come.

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[2] The CTA is embedded within the AMLA, such that references herein to the AMLA also will include the CTA.
[3] AMLA, §§ 6402(3); 6403.
[4] AMLA, §§ 6002; 6102; 6103; 6203; 6211; 6212; 6403.
[5] AMLA, § 6102(d).
[6] AMLA, § 6308(a)(2).

Historical Context – the Bank Secrecy Act

To appreciate the impact of AMLA, it is critical to understand the importance of its progenitor, the Bank Secrecy Act ("BSA"), in white collar criminal law enforcement. Passed in 1970, the BSA dramatically changed how financial crimes, especially those with an international dimension, were investigated. The BSA was designed to address the "frustrations" experienced by "law enforcement personnel" who, in the absence of the BSA's provisions, were subject "to a time consuming and often fruitless foreign legal process" when conducting criminal financial investigations, especially those with an international component.[7] While certainly concerned with money laundering, the BSA was passed in response to a perceived "proliferation of white collar crime," more generally, including tax evasion, securities fraud, and other "schemes to defraud the United States," which Congress concluded had been aided by a lack of transparency in the financial system.[8]

In addition to fostering transparency, the BSA also recruited the private sector to assist law enforcement in enforcing its provisions, requiring that banks and other financial institutions report certain types of activities deemed to be highly relevant to not just AML enforcement, but also to the investigation of all types of financial crimes.[9] For instance, the BSA requires financial institutions to file a Currency Transaction Report ("CTR") reporting information as to all related currency transactions exceeding $10,000 in the aggregate on the theory that, where there is cash, there is a higher likelihood for illegal activity.[10] Similarly, the BSA requires banks to file a Suspicious Activity Report whenever the bank detects a known or suspected violation of federal law by a customer or suspicious activity (as defined in the BSA) related to money laundering activity or a violation of the BSA.[11]

Though by no means the only source of federal financial investigations—others include federal and state agencies, whistleblowers, and informants, to name a few—the importance of the BSA in criminal financial investigations cannot be overstated. A 2020 Government Accountability Office ("GAO") report titled "Anti-Money Laundering: Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks Costs to Comply with the Act Varied"[12] estimates the value and usage of the BSA

[7] *See* H.R. Rep. No. 91-975, at 4 (1970).
[8] *See* H.R. Rep. No. 91-175, at 10 (1975), *reprinted in* 1970 U.S.C.C.A.N. 4394, 4404. The Senate Committee largely echoed the House's stated objectives. *See* S. Rep. No. 91-1139 (1970) (noting that the purpose of AMLA was to provide "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime.").
[9] 31 U.S.C. § 5311 (noting that the purpose of the BSA is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings").
[10] 31 U.S.C. § 5313; 31 C.F.R. § 1010.311.
[11] 31 U.S.C. § 5318(g); 31 C.F.R. § 1020.320; 12 C.F.R. § 21.11.
[12] GAO, GAO-20-574, Anti-Money Laundering Report (2020) ("GAO-20-574"), *available at* https://www.gao.gov/assets/710/709547.pdf.

reporting by six major law enforcement agencies.[13] The GAO report found "that law enforcement personnel at the six federal agencies reported using BSA reports extensively to inform their activities from 2015 through 2018." Specifically, the GAO estimated that 72 percent of personnel who conducted investigations from 2015 through 2018 used BSA reports in their work.[14] More significantly, for the IRS Criminal Investigation ("IRS-CI"), the federal agency with sole jurisdiction for investigating federal tax crimes and the only one on the GAO's list that exclusively investigates financial crimes, the numbers are significantly higher. The GAO report estimates that 91% of IRS-CI personnel used BSA reporting "to start or assist new criminal investigations", and 95% used BSA reporting "to conduct or assist ongoing criminal investigations."[15]

The Anti-Money Laundering Act of 2020

In recent years, the BSA has become an even more valuable tool, as revolutions in technology and data analysis have paved the way for more sophisticated means of using information gathered by law enforcement. Today, the major federal law enforcement agencies use myriad data analytic tools to analyze BSA filings.[16] Most are using sophisticated data analytics technology to help manage the "electronic world", which includes piecing together data points from multiple sources in ways that were not possible even ten years ago. With the benefit of "big data" analysis, complicated algorithms and other data analytical tools, law enforcement can find multiple needles from multiple haystacks, and assemble them in ways never previously imaginable that help them detect criminal activity and build criminal cases.[17]

As potent a tool as the BSA has proven to be, it has been almost twenty years since Congress has passed substantial legislation in the area of AML, an eternity in light of developments in technology and international law enforcement over that period. AMLA addresses this perceived need to augment and modernize law enforcement's tool set for combatting financial crimes by amending and supplementing key provisions of the BSA,

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[13] The agencies consist of: the Federal Bureau of Investigations (FBI); Homeland Security Investigations (HSI); IRS-CI; the United States Secret Service (USSS); the Drug Enforcement Agency (DEA); and United States Attorneys' Offices.

[14] GAO-20-574, Anti-Money Laundering Report, at 31 (2020), *available at* https://www.gao.gov/assets/710/709547.pdf.

[15] *Id*. at 94.

[16] *Id*. at 74-75; *see also* GAO, GAO-18-142SP, Technology Assessment: Artificial Intelligence: Emerging Opportunities, Challenges, and Implications (2018), *available at* https://www.gao.gov/assets/700/690910.pdf.

[17] *See* Kimberly A. Houser & Debra Sanders, *The Use of Big Data Analytics by the IRS: Efficient Solution or the End of Privacy as We Know it?*, 19 Vand. J. Ent. & Tech. L. 817 (2017), *available at* http://famguardian1.org/Subjects/Taxes/Intelligence/Big_Data-Analytics_IRS-Houser-Sanders_Final.pdf; *see also* Internal Revenue Service, Criminal Investigation Annual Report (2018) at 3, *available at* https://www.irs.gov/pub/irs-utl/2018_irs_criminal_investigation_annual_report.pdf ("We have also prioritized the use of data in our investigations. Future criminal investigations must make use of data to help drive case selection and efficiency in the critical work that we do. That means using models, algorithms, and the millions of records and evidence we have at hand to help identify areas of tax non-compliance. Data analytics and other technologies like 'predictive policing' help give law enforcement a clearer picture and are quickly becoming an everyday tool for CI.").

and advancing its core themes of transparency, cooperation, and public-private partnerships.

The Corporate Transparency Act's Beneficial Ownership Reporting and Registry

Arguably the most consequential aspects of AMLA are its adoption, via the CTA, of mandatory reporting as to the beneficial ownership of certain types of companies and the creation of a non-public database, maintained by FinCEN, of such beneficial ownership information.

One of the most vexing challenges to solving complex financial crimes is that posed by entities with unknown ownership.[18] Historically, if IRS or FBI agents were provided with a hot financial lead that involved a company with undisclosed beneficial ownership, the trail often went cold, and agents would often move to other investigative matters. As such, corporate shells have facilitated all manner of financial crimes, from tax evasion, bribery, and embezzlement,[19] to massive accounting frauds.[20] Ironically, despite all the gains that have been made in piercing foreign bank secrecy over the years, until the passage of the CTA, financial criminals often could find more anonymity under state corporate laws in the U.S. than under the laws of foreign tax haven jurisdictions.

The CTA endeavors to close this gaping loophole in corporate transparency. It obligates certain "reporting companies" (smaller, non-public companies that are commonly used as corporate shells) to disclose to FinCEN information about their beneficial owners.[21] The CTA further directs FinCEN to maintain such beneficial ownership information in a non-public database for the purpose of sharing with law enforcement, including certain foreign agencies, upon request.[22] Reporting companies must provide specific identifying information for each of its beneficial owners (defined as those with 25 percent or greater

[18] *See* FATF – Egmont Group (2018), *Concealment of Beneficial Ownership*, FATF, Paris, France, at 8-9, *available at* https://www.egmontgroup.org/sites/default/files/filedepot/Concealment_of_BO/FATF-Egmont-Concealment-beneficial-ownership.pdf ("Schemes designed to obscure beneficial ownership often rely on a "hide in-plain-sight" strategy. This significantly impairs the ability of financial institutions, professional intermediaries, and competent authorities to identify suspicious activities designed to obscure beneficial ownership and facilitate crime.").

[19] *See* Transparency International – News, *Panama Papers Four Years On: Anonymous Companies and Global Wealth* (2020), *available at* https://www.transparency.org/en/news/panama-papers-four-years-on-anonymous-companies-and-global-wealth# ("Abuse of anonymous shell companies is among the reasons why many countries are facing greater challenges today in the face of the COVID-19 pandemic. For years, they have enabled corruption, fraud and tax evasion. This has meant that taxes and public resources that could have served to improve healthcare systems, did not arrive or were embezzled from public coffers.").

[20] *See* C. William Thomas, *The Rise and Fall of Enron*, April 2002 Issue J.A. 41-48 (2002), *available at* https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html; *see also* Colin May, *Shells, Shams & Public Shenanigans: The misuse of shell companies by corrupt public officials*, May/June 2015 Issue Fraud Magazine (2015), *available at* https://www.fraud-magazine.com/article.aspx?id=4294988055#:~:text=Shell%20companies%20are%20paper%20companies,expense%20reimbursement%20or%20payroll%20schemes.

[21] AMLA, §§ 6402(8); 6403(a).

[22] AMLA, §§ 6402(6); 6402(7); 6403(a).

ownership interest in, or those who exercise substantial control over, the entity).[23] The CTA provides for civil and criminal penalties for non-compliance.[24]

For some time, the U.S. has received criticism for allowing certain U.S. companies to conceal their beneficial owners.[25] For one, U.S. inaction in this regard has been criticized as creating a major loophole in its BSA enforcement regime, undermining its efforts at financial transparency and criminal law enforcement.[26] Second, and perhaps more detrimental to law enforcement, this loophole has created an appearance of hypocrisy on the part of the U.S. Through blunt instruments such as the Swiss Bank Program[27] and the Foreign Account Tax Compliance Act, the U.S. has used (or, in some instances, has threatened to use) its influence and economic muscle to promote greater global transparency in banking and other global financial transactions. By allowing this domestic loophole to exist, some have criticized the U.S. as being interested in transparency only when it comes to other countries.[28] The impact the U.S.'s position on this issue has had on its ability to secure assistance from foreign jurisdictions through Mutual Legal Assistance Treaties ("MLAT"s) and other information-gathering mechanisms is difficult to quantify.[29]

When considered in tandem with some of AMLA's other provisions, not to mention pre-existing information-gathering provisions under the BSA, the CTA's beneficial owner provisions provide law enforcement with a vital additional piece in the information matrix that is critical to solving financial crimes today. It also sends the message to the world that the U.S. is willing to practice what it preaches to other jurisdictions in promoting financial

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[23] AMLA, § 6403(a).
[24] *See id*.
[25] *See* FATF (2019), *Best Practices on Beneficial Ownership for Legal Persons*, FATF, Paris, *available at* https://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf.
[26] *See* Molli Ferrarello, *One year after the Panama Papers leak, starting a shell corporation in the US may be easier than getting a library card*, Brookings Institute (April 7, 2017), *available at* https://www.brookings.edu/blog/brookings-now/2017/04/07/one-year-after-the-panama-papers-leak-starting-a-shell-corporation-in-the-us-may-be-easier-than-getting-a-library-card/.
[27] The U.S. Department of Justice's Swiss Bank Program (the "Program", which was signed between the United States and Switzerland in August 2013 and ran through December 2016, provided a path for Swiss banks to cooperate with the Department of Justice's investigations into the use of foreign bank accounts to evade U.S. taxes. Banks that participated in the Program were able to avoid criminal prosecution by providing cooperation to U.S. law enforcement and paying civil penalties. The Program collected $1.3 billion in penalties. *See* Glen Shapiro, *US Justice Dept Completes Swiss Bank Program*, Wolters Kluwer Tax-News (January 3, 2017), *available at* https://www.tax-news.com/news/US_Justice_Dept_Completes_Swiss_Bank_Program___73117.html.
[28] *See* Todd Prince, *Shining Light In A Black Box: Can The U.S. Slow The Flow Of Dirty Money From The Ex-U.S.S.R.?*, Radio Free Europe - Radio Liberty (June 4, 2020), *available at* https://www.rferl.org/a/can-the-u-s-slow-the-flow-of-dirty-money-from-the-ex-u-s-s-r-/30651938.html ("Lax registration rules in states such as Delaware, Wyoming, and New Mexico—which require less information to create a company than to get a library card—helped turn the United States into a leading offshore haven for criminals and corrupt officials the world over, including from the former Soviet Union.").
[29] As their name implies, MLATs are treaties between the United States and other nations pursuant to which the signatories agree to provide one another with assistance with respect to various law enforcement functions, such as evidence gathering.

transparency. This will yield significant fruits for white collar law enforcement for years to come.

For all of the benefits of the CTA's beneficial ownership provisions, Congress could have gone further. Specifically, the CTA specifies that FinCEN's beneficial ownership registry will not be available to the public.[30] This stands in contrast to other jurisdictions' practices, which is to make such information publicly available.[31] The non-disclosure rule also runs contrary to AMLA's general theme of promoting the benefits to law enforcement of public-private partnerships when it comes information sharing.[32] Many would say that it is unfortunate that it did not do so here, as making such information available to the business community, and, in particular, the media, would serve to enlist the public in the law enforcement objectives that AMLA was designed to achieve.

FinCEN Will Take the Helm of Public-Private Partnership and Cooperation

In addition to focusing on transparency, AMLA carries the BSA's other main themes, cooperation and public-private partnerships, into the next decade and a new level. This is abundantly clear from the stated purpose of the AMLA, which includes, as its first listed objective: "to improve coordination and information sharing among the agencies tasked with administering anti-money laundering and countering the financing of terrorism requirements, the agencies that examine financial institutions for compliance with those requirements, Federal law enforcement agencies, national security agencies, the intelligence community, and financial institutions."[33]

Directives and opportunities for cooperation and partnering between law enforcement and private actors permeate AMLA. Section 6208 establishes "Bank Secrecy Act Innovation Officers," whose duties include providing outreach to third parties on "innovative methods, processes, and new technologies" that will assist with BSA compliance.[34] Section 6214 covers "Encouraging Information Sharing and Public-Private Partnerships."[35] Section 6503 requires a GAO study on feedback loops related to, among other things, "public-private partnership information sharing efforts."[36] And section 6211 establishes a Financial Crimes Tech Symposium to "promote greater international collaboration in the effort to prevent and detect and financial crimes and suspicious activities."[37] "Public-Private Partnerships" and "cooperation" are by no means new themes in the AML/CTF regime. In fact, those who have worked in this field are very familiar with

[30] Under the terms of the CTA, the registry will be accessible by other law enforcement agencies as well as by banks upon containing a customer's consent. *See* AMLA 2020, § 6402(6)(B).
[31] *See*, *e.g.*, Open Government Partnership, *Beneficial Ownership* (accessed Jan. 27, 2021), *available at* https://www.opengovpartnership.org/policy-area/beneficial-ownership/.
[32] AMLA 2020, §§ 6103(2); 6214.
[33] AMLA, § 6002(1).
[34] AMLA, § 6208(c).
[35] AMLA, § 6214(a).
[36] AMLA, § 6503(b)(2).
[37] AMLA, § 6211(a)(1).

this terminology, and have long supported public-private partnerships as one of the keys to success in combatting financial fraud. Formalizing these actions within AMLA will reinforce what industry professionals already recognize as a best practice.

At the helm of all of this coordination is FinCEN. Section 6103 of AMLA codifies the "FinCEN Exchange", which "shall facilitate a voluntary public-private information sharing partnership among law enforcement agencies, national security agencies, financial institutions, and FinCEN."[38] AMLA is indeed replete with additional roles and responsibilities for FinCEN. These new responsibilities include, among others, "communicat[ing] regularly with the private sector, regulators and law enforcement" about the government's AML/CTF priorities and "giv[ing] and receiv[ing] feedback to and from the private sector and state bank and credit union supervisors . . . ."[39] FinCEN's importance in the investigation of financial crimes has steadily increased since its creation in 1990, and AMLA ensures that this trend will continue.

As a collective whole, AMLA's collaboration initiatives reflect a concerted effort to bring "community policing" to the financial sector. Community policing requires the active participation of all stakeholders, especially FinCEN, law enforcement, financial institutions, and regulators. The last three are sometimes conceived of by AML professionals as forming a "three-legged stool." In other words, if one is missing or not participating, then the process falls apart.

At the top of the public-private partnership pyramid sits the Bank Secrecy Act Advisory Group ("BSAAG"). The BSAAG is a critical and formal component of cooperation between the parties. Under AMLA, two additional BSAAG sub-committees are added:(1) the Sub-committee on Innovation and Technology;[40] and (2) the Sub-committee on Information Security and Confidentiality. [41]

While the BSAAG is an essential element of public-private cooperation, it will likely not reach its full potential unless the spirit of cooperation and collaboration is carried out nationwide. Regional and local AML groups, such as the Association of Certified Anti-Money Laundering Specialists (ACAMS) chapters, the West Coast Anti-Money Laundering Forum,[42] and the Mid-Atlantic Money Laundering Conference, also fill a critical role in public-private cooperation by connecting regional and local members of financial institutions and law enforcement. History has shown that this "grassroots" method of cultivating relationships

[38] AMLA, § 6103(2). The FinCEN Exchange was created informally by FinCEN in 2017. *See* Press Release, FinCEN, *FinCEN Launches "FinCEN Exchange" to Enhance Public-Private Information Sharing* (Dec. 4, 2017), *available at* https://www.fincen.gov/news/news-releases/fincen-launches-fincen-exchange-enhance-public-private-information-sharing.
[39] AMLA, § 6101(c).
[40] AMLA, § 6207(d).
[41] AMLA, § 6302(e).
[42] *See* West Coast Anti-Money Laundering Forum, "About," *available at* https://wcamlforum.org/ (last accessed Jan. 27, 2021).

between the actors on the ground (*e.g.*, financial employees and executives, regulators, and law enforcement agencies) is vital to the success of any public-private partnership system.

AMLA makes significant strides in the direction of coordinated enforcement.

Including Virtual Currencies in the Definition of Financial Institutions and Money Transmitting Businesses

While once considered a novelty and a fad, virtual currencies have rapidly seized a significant role in the global economy that appears to be here to stay. Because of their unique, difficult-to-trace nature, virtual currencies also increasingly have factored into criminal activity.[43] Through AMLA, law enforcement now has an additional tool to keep up with this rapidly evolving component of the financial system.

AMLA amends the relevant sections of Title 31 of the U.S. Code to expand the definition of financial institutions and money transmitting businesses under the BSA to include entities that provide services involving "value that substitutes for currency."[44] Value that substitutes for currency includes emerging payment methods, such as virtual currencies (including cryptocurrencies).

Recent independent activity by law enforcement agencies illustrates the urgency with which the government treats noncompliance with the laws through virtual currencies. For instance, in what the IRS has touted as the first bitcoin criminal tax prosecution, in November 2020 an ex-Microsoft engineer, Volodymyr Kvashuk, was sentenced for an elaborate cyber theft that included the movement of approximately $2.6M of bitcoin through bank and investment accounts using a bitcoin "mixer" and the filing of false tax returns.[45] Also, in October 2020, John McAfee, founder of the McAfee computer security software company, was indicted on federal tax charges. According to the indictment, McAfee allegedly evaded his tax liability by directing his income to be paid into bank and cryptocurrency exchange accounts in the names of nominees. Other (non-tax) cases include the October 2019 take down of a dark web child exploitation website that was funded by bitcoin;[46] the February 2020 takedown of the Helix bitcoin mixer that was alleged to have

[43] AMLA 2020, § 6102(a)(3) (acknowledging the legality of virtual currencies while highlighting their susceptibility to aiding terrorists and criminals seeking to exploit vulnerabilities in the financial system); *see also* Press Release, Dept. of Justice, *Attorney General William P. Barr Announces Publication of Cryptocurrency Enforcement Framework* (Oct. 8, 2020), *available at* https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-publication-cryptocurrency-enforcement-framework; *and* Don Fort & Lawrence Sannicandro, *Mitigating IRS Cryptocurrency Enforcement Risk In 2021*, Law360 (Jan. 3, 2021), *available at* https://www.law360.com/tax-authority/articles/1339997/mitigating-irs-cryptocurrency-enforcement-risk-in-2021.

[44] AMLA, § 6102(d).

[45] *See* Press Release, Dept. of Justice, *Former Microsoft software engineer sentenced to nine years in prison for stealing more than $10 million in digital value such as gift cards* (Nov. 9, 2020), *available at* https://www.justice.gov/usao-wdwa/pr/former-microsoft-software-engineer-sentenced-nine-years-prison-stealing-more-10-million#:~:text=Seattle%20%E2%80%93%20A%20former%20Microsoft%20software,Moran.

[46] *See* Press Release, Dept. of Justice, *South Korean National and Hundreds of Others Charged Worldwide in the Takedown of the Largest Darknet Child Pornography Website, Which was Funded by Bitcoin* (Oct. 16, 2019), *available at* https://www.justice.gov/opa/pr/south-korean-national-and-hundreds-others-charged-worldwide-takedown-largest-darknet-child.

laundered over $300 million in bitcoin;[47] and the August 2020 take down of three terrorist finance cyber-enabled cells that included the largest-ever seizure of a terrorist organization's cryptocurrency accounts.[48]

For its part, while AMLA was being finalized in Congress, FinCEN was already issuing several Notices of Proposed Rulemaking ("NPRMs"), all of which were released at the end of 2020. On October 27, 2020, FinCEN and the Board of Governors of the Federal Reserve System proposed lowering from $3,000 to $250 the threshold of the "Travel Rule" for fund transfers and transmittals that begin or end outside of the United States.[49] The proposed rule, if enacted, makes it clear that the Travel Rule applies to convertible virtual currencies and transactions involving digital assets with legal tender status, and clarifies the meaning of the term "money" as used in certain defined terms to include virtual currency.[50]

Similarly, on December 23, 2020, FinCEN proposed a rule adopting recordkeeping, verification, and reporting requirements for certain deposits, withdrawals, exchanges, payments, or transfers of convertible virtual currency or legal tender digital assets to un-hosted wallets. If the amount of the transfer exceeds $3,000, cryptocurrency exchanges would be required to keep records of these transactions. If the amount exceeds $10,000, a CTR would have to be filed.[51]

Finally, on December 31, 2020, FinCEN issued a notice clarifying that it intends to propose to amend BSA regulations to require FBAR reporting with respect to virtual currency.[52]

With the passage of AMLA and the NPRMs, the landscape around virtual currencies is becoming much clearer. If these NPRMs are enacted in 2021, this will further equip law enforcement and the Department of Justice to more effectively investigate alleged criminal violations involving virtual currency.

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[47] *See* Press Release, Dept. of Justice, *Ohio Resident Charged with Operating Darknet-Based Bitcoin "Mixer," which Laundered Over $300 Million* (Feb. 13, 2020), *available at* https://www.justice.gov/opa/pr/ohio-resident-charged-operating-darknet-based-bitcoin-mixer-which-laundered-over-300-million.

[48] *See* Press Release, Dept. of Justice, *Global Disruption of Three Terror Finance Cyber-Enabled Campaigns* (Aug. 13, 2020), *available at* https://www.justice.gov/opa/pr/global-disruption-three-terror-finance-cyber-enabled-campaigns.

[49] Joint Notice of Proposed Rulemaking, 85 Fed. Reg. 68005, 68007. The travel rule requires banks and nonbank financial institutions to collect, retain and transmit certain information related to fund transfers and transmittals of funds over $3,000. 31 C.F.R §§1010.410(e); 1010.410(a).

[50] Joint Notice of Proposed Rulemaking, 85 Fed. Reg. 68005, 68007; *see also* Press Release, FinCEN, *Agencies Invite Comment on Proposed Rule Under Bank Secrecy Act* (Oct. 23, 2020), *available at* https://www.FinCEN.gov/news/news-releases/agencies-invite-comment-proposed-rule-under-bank-secrecy-act.

[51] Notice of Proposed Rulemaking, 85 Fed. Reg. 83840, 83846-83847, *available at* https://public-inspection.federalregister.gov/2020-28437.pdf.

[52] Notice 2020-2, FinCEN, *Report of Foreign Bank and Financial Accounts (FBAR) Filing Requirement for Virtual Currency* (2020), *available at* https://www.fincen.gov/sites/default/files/shared/Notice-Virtual%20Currency%20Reporting%20on%20the%20FBAR%20123020.pdf.

Enhanced Subpoena Authority

AMLA also provides for a significant expansion of the government's ability to subpoena foreign bank records pursuant to 31 U.S.C. § 5318(k). Prior to AMLA's enactment, section 5318(k) authorized the government to "issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank."[53] The extent of the government's subpoena authority under this provision was unclear, the issue being whether a subpoena directed to a correspondent bank could be used to reach bank records "not expressly confined to documents related to the Bank's correspondent accounts in the United States."[54]

The results in the two reported cases on this question were mixed: in *United States v. Sedaghaty*, decided in 2001, the subpoenaed bank successfully prevented the government from seeking records that related solely to a personal account in Saudi Arabia,[55] but in the other, the challenge failed, even though the subpoena was "comprehensive . . . seek[ing] . . . it would seem, documents related to transactions using correspondent accounts in countries other than the United States."[56] The court found such records still "related to" a U.S. correspondent account because they pertained to "transactions . . . *in service* of an enterprise entirely dedicated to obtaining access to U.S. currency and markets using a U.S. correspondent account."[57]

Notably, in challenging the subpoena in *In re Sealed Case*,[58] the movant bank relied on the Justice Department's past failed efforts to "persuade Congress to amend the statute to allow the government to obtain . . . any records pertaining to any related account at [a] foreign bank . . . that are the subject of any [criminal] investigation." This is precisely the argument that the AMLA addresses head-on, removing any ambiguity on the reach of such subpoenas. Under the newly amended language of section 5318(k), the government may subpoena foreign banks that maintain a U.S. correspondent account for "any records relating to the correspondent account *or any account at the foreign bank*, including records maintained outside of the United States," if they are the subject of: (1) a federal criminal investigation; (2) any AMLA investigation; (3) a civil forfeiture action; or (4) an investigation pursuant to section 5318A.[59] Under the newly amended statute, a foreign bank can be compelled to produce records regarding any account held by the bank across

[53] 31 U.S.C. § 5318(k)(3)(A)(i) (2014).
[54] *In re: Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019); *see also United States v. Sedaghaty*, No. CR 05-60008-HO, 2010 WL 11643384, at *5 (D. Or. Feb. 26, 2010) ("The Al Rajhi Bank next contends that the scope of the [subpoena] demand exceeds the limits of the authorizing statute because it does not relate to correspondent accounts.").
[55] *See* 2010 WL 11643884, at *6.
[56] *See In re Sealed Case*, 932 F.3d at 928.
[57] *Id.* at 928-30 (emphasis added).
[58] 932 F.3d at 929.
[59] AMLA, § 6308(a)(2).

the world. The penalties for failing to comply with such a subpoena are severe,[60] and neither bank secrecy nor confidentiality laws alone can shield a foreign bank from compliance.[61]

With section 5318(k) now so broadly amended, this provision may serve as a new vehicle for the government to seek a range of foreign bank account records while avoiding what would otherwise be inherent bureaucratic delays in requesting foreign evidence. Normally, acquiring and authenticating foreign bank account records in keeping with the Federal Rules of Evidence[62] can be a herculean task for the government, especially if evidence regarding the existence of a foreign bank account has only come through a whistleblower or an indirect contact, or if the presumed account holder claims to have no records that would be responsive to a subpoena issued under 31 C.F.R. § 1010.670. In such cases, the government often must work with the Office of International Affairs ("OIA") to issue a subpoena for bank records located overseas, which prolongs the process of obtaining and authenticating records.[63] Moreover, OIA, in the interest of international comity, often requires the government to issue subpoenas through MLATs, which adds to these delays.[64] AMLA paves the way for the government to circumvent these delays by providing the government with authority to directly reach foreign banks with U.S. correspondent accounts, thereby expediting the process of both gathering and authenticating foreign records. This has the potential to significantly facilitate investigations and prosecutions involving foreign bank records.

Conclusion

While AMLA is an undeniable shot in the arm to the government's efforts to counter money laundering and terrorist financing (both domestic and international), it casts a much wider net than pure AML/CTF enforcement. In ways large and small, AMLA promises to have a significant impact on how the government approaches the investigation and prosecution of all manner of financial crimes for years to come.

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[60] AMLA, § 6308(a)(2) (amending Section 5318(k) to provide for a $50,000/day assessment for failure to comply with a subpoena, and for the government to seek additional penalties after 60 days of noncompliance).

[61] AMLA 2020, § 6308(a)(2) ("[A]n assertion that compliance with a [section 5318(k)] subpoena . . . would conflict with a provision of foreign secrecy or confidentiality law shall not be a sole basis for quashing or modifying the subpoena.").

[62] *See* Fed. R. Evid. 901.

[63] *See, e.g.*, Dept. of Justice, Justice Manual § 9-13.525.

[64] Mark A. Rush & Jared A. Kephart, *Lifting the Veil on the MLAT Process: A Guide to Understanding and Responding to MLA Requests*, K&L Gates: Legal Insight (Jan. 20, 2017), *available at* http://files.klgates.com/files/102230_ge_alert_01202017.pdf (noting that statistics about how long an MLAT request takes are "often difficult or impossible to locate," but that, in 2014, "OIA had over, 4800 pending requests in 2014, even after instituting an internal policy for 'refusing cases on *de minimus* grounds'").