

Key AML Developments in Law and Practice: How to Avoid Liability

CLE CREDIT AVAILABLE

Greg D. Andres, Paul J. Nathanson, Daniel P. Stipano and Carol Rodrigues

April 8, 2021



Presenters

Panelists



Daniel P. Stipano
Partner



Greg D. Andres
Partner



Paul J. Nathanson
Partner

Moderator



Carol Rodrigues
Associate

Agenda

1. Key Anti-Money Laundering Legislative and Regulatory Updates
2. Compliance Lessons from Recent Enforcement Actions

Key Anti-Money Laundering Legislative and Regulatory Updates



Overview of U.S. AML Law and Regulations

Money Laundering Control Act of 1986 ("MLCA" 18 U.S.C. §§ 1956 & 1957)

- Criminal AML statute applies to:
 - Criminals who launder their ill-gotten gains
 - Any persons or entities that knowingly participate in those transactions
- Creates federal criminal liability for conduct related to laundering the proceeds of "specified unlawful activity" (over 170 separate crimes)

Bank Secrecy Act of 1970 ("BSA")

- Requires financial institutions to create and maintain records of customer transactions and to report certain financial transactions to the government
- Requires financial institutions to maintain an adequate AML program
- Provisions in Title III of USA PATRIOT Act of 2001 have amended the BSA

Key Provisions of AMLA 2020

- Establishes new **beneficial ownership reporting requirements** for certain entities doing business in the United States designed to combat money laundering through shell companies;
- Modernizes the statutory definition of “**financial institution**” to include, consistent with existing FinCEN regulations, entities that provide services involving “**value that substitutes for currency**” – a category that includes **stored value** and **virtual currency** instruments;
- Requires the Treasury Secretary to establish and regularly update **National AML Priorities**, and requires financial institutions to incorporate them into their AML compliance programs;
- Requires the Treasury Secretary to review and propose changes to financial institution **reporting requirements related to CTRs and SARs** to reduce those that are **unnecessarily burdensome** and determine the appropriate dollar amount threshold for such requirements;
- Increases AML **whistleblower awards** and expands **whistleblower protections**; and
- **Enhances penalties** for BSA and AML violations.

Compliance Lessons from Recent Enforcement Actions



BSA/AML Enforcement Authorities



Treasury Department

- Office of the Comptroller of the Currency (“OCC”)
 - *Acting Comptroller: Blake Paulson*
- Financial Crimes Enforcement Network (“FinCEN”)
 - *Director Kenneth A. Blanco is leaving on April 9, 2021. Michael Mosier will become the Acting Director.*



Department of Justice (“DOJ”)

- *Acting Assistant Attorney General, Criminal Division: Nicholas L. McQuaid*



Federal Deposit Insurance Corporation (“FDIC”)

- *Chairman: Jelena McWilliams*



Board of Governors of the Federal Reserve System

- *Chairman: Jerome Powell*
- *Vice Chair for Supervision: Randal Quarles*
- There is one vacant seat (out of 7) on the Board



Securities and Exchange Commission (“SEC”)

- *Chair: Gary Gensler is awaiting Senate confirmation*



Commodity Futures and Trading Commission (“CFTC”)

- *Acting Chair: Rostin Benham*

Recent AML Enforcement Trends

- **Effective compliance programs are critical to minimizing criminal and civil liability**
 - Transaction monitoring shortcomings (*US Bancorp*)
 - Disregard of red flags (*Central States Capital Markets, UBS Financial Services*)
 - Inadequate resourcing (*IBK, Mashreqbank*)
 - Failure to take risk-based approach (*Deutsche Bank*)
- **Authorities continue to use full expanse of jurisdiction to bring enforcement actions**
 - Criminal authorities continue to charge foreign actors that launder funds through U.S. financial system (*Foreign Trade Bank, Halkbank*)
 - Greater regulatory scrutiny for fintechs (especially payments-related) and crypto firms as they assume an increasingly important role in financial services (*BitMEX, Eric Powers*)
- **Personal accountability for individual directors and management has increased** (*US Bank, Rabobank, MoneyGram*)

10 Compliance Key Steps

1. Understand the risks in your institution.

- AML compliance is risk-based.
- Conducting a risk assessment is an important step in establishing and maintaining a risk-based program.
- Use the risk assessment to inform other aspects of the program.

2. Establish and maintain strong policies, procedures, and controls.

- The strength of policies, procedures, and controls should be commensurate with the risks.
- Policies, procedures, and controls should be updated in accordance with changes in the risk assessment.

3. Promote a strong compliance culture.

- Set the right “tone at the top.”
- The Board and Senior Management should be informed and engaged.
- Good AML compliance behavior should be recognized and rewarded, while bad behavior must be addressed.

10 Compliance Key Steps (cont.)

4. Promptly correct all problems.

- Whether identified by regulators, internal audit, or others, problems with the program must be fully and completely remedied.
- Drill down to understand and address root causes.

5. Stay up to date on changing regulatory requirements.

- Laws, regulations, guidance, and expectations are dynamic.
- Timely training is critical.
- Training should include all relevant staff – not just compliance – and should be appropriately tailored to the audience.

6. Ensure adequate staffing.

- The AML Compliance Officer needs to be competent and independent of the business line.
- Supporting staff should be adequate both in terms of size and knowledge.

7. Internal audit should be comprehensive and independent.

- Audit should cover all relevant functions.
- Internal auditor should report to the Board or a committee of the Board.

10 Compliance Key Steps (cont.)

8. Avoid siloes.

- Subject to applicable legal restrictions, information should be shared throughout the organization
- AML, fraud, cybersecurity functions should freely communicate with each other.
- The AML function should be enterprise-wide and not decentralized in business units.

9. Maintain good supervisory relationships.

- Credibility with the regulator is essential, especially when there are problems.
- Being transparent with your examiner – but also developing and implementing a realistic corrective action plan – helps to build trust and credibility.

10. Don't try to do it on the cheap.

- AML compliance is neither easy nor inexpensive.
- There are many examples of banks and other financial institutions that have tried to cut corners and paid dearly in terms of fines, criminal actions, and reputational damage.

... And a Bonus

11. Keep AML compliance in mind through other crises.

- Avoid the temptation to shift focus to other matters that may be more pressing in the moment – enforcement matters can creep up once immediate shocks have passed unless banks and other financial institutions remember to prioritize compliance.
- BSA/AML compliance should also be part of any strategy involving new partners such as fintechs.

Questions



Appendix



Presenters



Daniel P. Stipano

Daniel is a partner in Davis Polk's Financial Institutions Group. His practice focuses on banking enforcement actions and providing assistance in establishing, maintaining and monitoring Bank Secrecy Act and anti-money laundering compliance programs. His extensive bank regulatory and enforcement experience includes more than 30 years at the OCC, where he served as Deputy Chief Counsel from 2000 to 2016, and as Director of the OCC's Enforcement & Compliance Division from 1995 to 2000.



Greg D. Andres

Greg is a partner in Davis Polk's White Collar Defense & Investigations Group. He recently rejoined the firm after nearly two years as a member of Special Counsel Robert Mueller's team investigating Russian government efforts to influence the 2016 presidential election and related matters. Greg served as the lead trial lawyer in the successful prosecution of Paul Manafort in the U.S. District Court for the Eastern District of Virginia.

Presenters (cont.)



Paul J. Nathanson

Paul is a partner in Davis Polk's White Collar Defense & Investigations Group. He specialized in BSA/AML matters both at the Department of Justice and in private practice. Paul is a former Deputy Chief of the Financial Crimes and Public Corruption Unit at the U.S. Attorney's Office for the Eastern District of Virginia and a former senior advisor at the Treasury Department.

Further Reading

- June 2019 Webcast: U.S. Sanctions and AML Regulation and Enforcement
 - <https://www.davispolk.com/events/webcast-recent-developments-us-sanctions-and-aml-regulation-and-enforcement>
- Davis Polk’s Resource for Financial Regulatory Reform
 - <http://www.finregreform.com/>
- Related Client Memoranda and Publications
 - FinCEN Begins Rulemaking for Beneficial Ownership Registry (Apr. 5, 2021), https://www.davispolk.com/sites/default/files/fincen_begins_rulemaking_for_beneficial_ownership_registry.pdf
 - Bank Fraud for Facilitating Marijuana Transactions (Apr. 2, 2021), https://www.davispolk.com/sites/default/files/2021-04-02_bank_fraud_for_facilitating_marijuana_transactions.pdf
 - The Anti-Money Laundering Act of 2020 – Key Takeaways (Jan. 4, 2021), https://www.davispolk.com/sites/default/files/2021-01-04_the_anti_money_laundering_act_of_2020_key_takeaways.pdf
 - FinCEN Director Highlights Value of BSA Reporting; Focuses on Persistent Beneficial Ownership Information Gap (Dec. 13, 2019), https://www.davispolk.com/sites/default/files/2019-12-13_fincen_director_highlights_value_bsa_reporting.pdf
 - DOJ Clarifies Corporate Enforcement Policy (Dec. 3, 2019), https://www.davispolk.com/sites/default/files/2019-12-03_doj_clarifies_corporate_enforcement_policy.pdf
 - Financial Action Task Force Issues Guidance for the Virtual Asset Sector (July 22, 2019), <https://www.davispolk.com/sites/default/files/2019-07-22-financial-action-task-force-issues-guidance-for-the-virtual-asset-sector.pdf>
 - DOJ Provides Additional Guidance and Clarity Regarding Its Evaluation of Corporate Compliance Programs (May 7, 2019), https://www.davispolk.com/files/2019-05-07_doj_provides_additional_guidance_and_clarity_regarding_its_evaluation_of_corporate_compliance_programs.pdf