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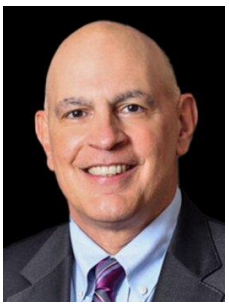
The Current State Of The AML Act, And Where We're Headed

By **Daniel Stipano** (June 27, 2023, 1:27 PM EDT)


Daniel Stipano

It has been over two years since the Anti-Money Laundering Act of 2020 was enacted.[1]

The AMLA was the culmination of many years of effort and reflected a consensus among the financial services industry, regulators and lawmakers that the then-existing anti-money laundering/countering the financing of terrorism, or AML/CFT, framework had become obsolescent and was in dire need of updating.

At the time of enactment, the AMLA was touted as the most significant AML legislation since the USA Patriot Act was enacted in 2001 and the first true AML reform legislation. Its enactment was met with expectations that the primary AML law in the United States, the Bank Secrecy Act[2] — now over 50 years old and showing its age — would finally be modernized and brought into the 21st century.

Unfortunately, the AMLA's impact to date has been minimal to nonexistent. That is because little in the AMLA is self-effectuating, and the statute requires the Financial Crimes Enforcement Network, a bureau within the U.S. Department of the Treasury, to issue a host of regulations, as well as conduct various studies and issue reports, to implement the law.

FinCEN is a chronically underfunded and underresourced agency with an outsized mission: It not only functions as the U.S. financial intelligence unit, but it also wears many other hats, including conducting examinations and investigations of financial institutions, taking enforcement actions, and issuing regulations to implement the BSA.

Largely due to FinCEN's resource constraints, its implementation of the AMLA has proceeded at a snail's pace.

The Corporate Transparency Act

Where progress has been made, it is mostly with respect to implementation of the Corporate Transparency Act,[3] a separate part of the AMLA that is aimed at exposing the true owners of opaque legal entities used to launder money or otherwise facilitate illicit transactions.

Like the AMLA itself, the CTA was many years in the making.

Financial transparency has been a concern of law enforcement and regulators for decades, and efforts

to address this concern date back to at least the mid-2000s when the U.S. received a "partially compliant" rating for customer due diligence, or CDD, from the Financial Action Task Force, an international AML/CFT standard-setting body of which the U.S. is a member.[4]

The partially compliant rating largely stemmed from the lack of any explicit legal requirement for U.S. financial institutions to collect beneficial ownership information from their legal entity customers.

Following the 2006 FATF mutual evaluation, the government moved to address this deficiency in its AML/CFT framework.

In 2012, a rulemaking was commenced that culminated in the issuance of a final CDD rule in 2016.[5] The rule required banks, securities broker-dealers and other financial institutions to identify and verify the identities of the beneficial owners of their legal entity customers. The CDD rule became applicable to covered institutions in 2018.

The government also pursued legislation to create a centralized database of beneficial ownership information. This proved to be a challenge.

Although various bills were introduced in Congress over the years to authorize creation of such a database, those bills were unable to garner enough support to secure passage. It was not until the CTA was enacted as part of the AMLA that Congress finally passed legislation authorizing creation of a beneficial ownership database, i.e., a registry.

Among all AMLA requirements, FinCEN has clearly prioritized implementation of the CTA.

FinCEN determined to implement the CTA through a series of three rulemakings: The first rule would impose requirements on certain legal entities to provide beneficial ownership and other information (the BOI rule); the second rule would govern access to the information (the access rule); and the third rule would make conforming changes to the beneficial ownership requirements of the existing CDD rule (the revised CDD rule).

To date, only the BOI rule has been finalized.[6]

The BOI rule, which becomes effective on Jan. 1, 2024, requires domestic and foreign "reporting companies" — basically legal entities that are formed or registered by making a filing with a secretary of state or similar office — to submit reports containing information about the entity, its beneficial owners and, in some cases, the individuals who form or register the company.

Entities formed prior to Jan. 1, 2024, are required to submit their initial reports within one year, or by January 2025, while entities formed or registered after Jan. 1, 2024, are required to submit their initial reports within 30 days of formation or registration.

Additionally, entities formed after Jan. 1, 2024, are required to provide information on the individuals that formed or registered the company. Reporting companies are also required to file amended or corrected reports, as necessary.

While the BOI rule will result in the collection of millions of records on beneficial owners of domestic and foreign reporting companies, there are 23 exceptions from the definition of "reporting company" that will exempt many legal entities from the reporting requirement, including an exception for "large

operating companies," defined as an entity with more than 20 full-time employees in the U.S. and over $5 million in gross receipts or sales.

The number and nature of exceptions will ensure that the registry will not include records on a sizable number of companies that could present substantial AML/CFT risk.

Additionally, the definition of "beneficial owner" in the BOI rule is ambiguous and much broader than that in the existing CDD rule, which will lead to interpretive questions and compliance challenges.

In late 2022, FinCEN proposed the access rule.[7] As proposed, the access rule would only allow financial institutions that were subject to the beneficial ownership requirements of the CDD rule to access the registry.

This limited access to banks, securities broker-dealers, mutual funds, futures commission merchants and introducing brokers. It would mean that other types of financial institutions that are subject to an AML/CFT program requirement, such as money services businesses and crypto exchanges, would not have access to the registry.

Additionally, those institutions that could access the registry could only do so with the consent of their customers and, in response to a request, would only receive a transcript showing the identifying information of their customers' beneficial owners that the customer provided to FinCEN.

The proposed rule limited the use of such information to facilitating compliance with the beneficial ownership requirements of the CDD rule. The information could not be used for any broader purposes such as risk evaluation, transaction monitoring and suspicious activity reporting, nor could it be shared with any party outside the U.S.

Not surprisingly, the severe limitations placed on financial institutions' use of the information obtained from FinCEN, coupled with the lack of any mechanism to ensure the accuracy of the data, resulted in widespread criticism of the proposal not only from the financial services industry, but also from members of Congress who felt that the proposal had strayed too far from Congress' intent.[8]

At this point, it is not clear what the final form of the rule will look like, but it seems likely FinCEN will at least have to make some substantial changes to address the concerns expressed by commenters on the proposal.

The third and final rule implementing the CTA is the revised CDD rule.

While FinCEN has yet to issue a proposal, the revised CDD rule is likely to deviate in significant ways from the existing rule.

This is because the CTA not only directs FinCEN to delete all but the first paragraph of the beneficial ownership requirements in the existing CDD rule, but it also requires FinCEN to amend the rule to conform to the requirements of the CTA — and, by extension, the BOI rule.

There are major differences in the existing CDD rule and CTA that will need to be addressed, including the much broader definition of "beneficial owner" in the CTA and BOI rule and the many more and broader exceptions to the definition of "reporting company" in the CTA versus the parallel definition of "legal entity customer" in the existing CDD rule.

These changes alone are likely to significantly increase financial institutions' costs and burdens and create compliance headaches.

Finally, apart from these rulemakings, FinCEN is required to create the registry to house the information it receives from reporting companies. It is not known where FinCEN stands with respect to this project, but it is clearly a major undertaking that will consume substantial resources — in addition to the resources needed to complete the remaining CTA rulemakings.

In light of this, it seems questionable whether FinCEN will be able to meet its target date of Jan. 1, 2024, for operationalizing these requirements.

The primary purposes of the CTA included assisting law enforcement through greater financial transparency while, at the same time, lessening the regulatory burden of banks and other financial institutions by providing access to the registry. At this point, it is not clear that implementation of the CTA will achieve either of those objectives.

National AML/CFT Priorities

Another major provision in the AMLA is the requirement that the Treasury Department issue national AML/CFT priorities for financial institutions and regulators.

Treasury was required to issue the priorities within 180 days of enactment of the statute, and it did so on June 30, 2021, by issuing a set of eight priorities.[9]

The priorities are extremely broad in their scope and cover the AML/CFT landscape, addressing such areas as corruption, cybercrime, domestic and international terrorist financing, fraud, drug trafficking organizations, and human trafficking and human smuggling.

The AMLA requires financial institutions to incorporate the priorities into their AML/CFT programs, and regulators will be required to evaluate institutions on how well they have done so.

At the time of issuance, Treasury and the banking regulators advised financial institutions that they should consider how they will incorporate the priorities into their programs,[10] but there has been no progress beyond that.

It is expected that later this year, FinCEN will issue a proposal to revise the existing program rules to establish criteria for measuring program effectiveness, including incorporation of the priorities into financial institutions' programs. The proposal is likely to provide guidance as to how financial institutions should accomplish this.

The national AML/CFT priorities are a centerpiece of the AMLA, as they go to the heart of the statute's purpose of transforming the existing AML/CFT framework into a more risk-based system focused on the matters that are of greatest importance to law enforcement.

Like much of the AMLA, the priorities are meant to help alleviate the regulatory burden associated with AML/CFT compliance by allowing financial institutions to deploy their compliance resources in the priority areas.

However, it seems questionable that this provision, once implemented, will really achieve this purpose, as there appears to be no intent on the part of FinCEN or the regulators to roll back requirements in other areas.

Rather, it seems likely that implementation of the priorities will be an additive requirement for financial institutions and set of evaluative criteria for the regulators, increasing and compounding the costs and burdens of AML/CFT compliance.

Other Key AMLA Provisions

There are many other important provisions in the AMLA. These include a no-action letter process; suspicious activity report reform and a SAR sharing pilot program; and BSA/AML modernization.

All of these provisions, as well as others, are in early stages of implementation and, in some cases, FinCEN has yet to begin implementing them.

For example, on June 30, 2021, FinCEN announced that it had issued a report concluding that it should establish a no-action letter process to respond to inquiries concerning the application of the BSA and other AML laws and regulations to specific conduct.[11]

And, on June 6, 2022, FinCEN issued an advance notice of proposed rulemaking[12] to solicit comments on questions relating to the implementation of a no-action letter process. However, FinCEN has yet to propose a rule that would implement this process.

FinCEN has taken no steps publicly to implement SAR reform, although on Jan. 25, 2022, FinCEN issued a notice of proposed rulemaking[13] that would establish a limited-duration pilot program, permitting participant financial institutions to share SARs with their foreign branches, subsidiaries and affiliates. The proposal has yet to be finalized.

FinCEN also issued, on Dec. 15, 2021, a request for information seeking comments on ways to streamline, modernize and update the AML/CFT regime[14] as part of its review of BSA regulations and related guidance, as required by the AMLA.

However, FinCEN has not taken any further steps with respect to the request for information.

Conclusion

The AMLA represents an ambitious effort on the part of Congress to modernize and update the AML/CFT framework. However, more than two years after enactment, it has had little impact because of the slow pace of implementation.

At this stage, it is not at all clear that the AMLA will have the transformative effect that its drafters intended in terms of enhancing the effectiveness and efficiency of the AML/CFT regime.

In fact, it is possible that it will be a step backward in some areas, and it seems likely that a net outcome will be to increase, rather than reduce, the costs and burdens of AML/CFT compliance on financial institutions.

Because in nearly all areas FinCEN is still at a very early stage of implementation, it will be many years

before the full impact of the AMLA is felt. In the meantime, financial institutions and other stakeholders should consider how the AMLA will ultimately affect them, and stay engaged in the implementation process.

Daniel P. Stipano is a partner at Davis Polk & Wardwell LLP. He previously served at the Office of the Comptroller of the Currency for more than 30 years.

[1] Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, (Jan. 1, 2021) (the NDAA).

[2] The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 18 U.S.C. 1956, 1957, and 1960, and 31 U.S.C. 5311–5314 and 5316–5332 and notes thereto.

[3] The CTA is Title LXIV of the NDAA (Pub. L. 116-283, Division F, Title LXIV) (Jan. 1, 2021).

[4] See Financial Action Task Force, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States (June 23, 2006).

[5] Department of the Treasury, Financial Crimes Enforcement Network, "Customer Due Diligence Requirements for Financial Institutions," 81 Fed. Reg. 29398 (May 11, 2016) (codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, and 1026).

[6] Department of the Treasury, Financial Crimes Enforcement Network, "Beneficial Ownership Information Reporting Requirements," 87 Fed. Reg. 59498 (September 30, 2022) (codified at 31 C.F.R. pt. 1010).

[7] Department of the Treasury, Financial Crimes Enforcement Network, "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities," 87 Fed. Reg. 77404 (December 15, 2022) (to be codified at 31 C.F.R. pt. 1010).

[8] See, e.g., Letter from Patrick McHenry, Chairman, Committee on Financial Services, and Blaine Luetkemeyer, Chairman, Subcommittee on National Security, Illicit Finance, and International Financial Institutions, to Janet Yellen, Secretary of the Treasury, and Himamauli Das, Acting Director, Financial Crimes Enforcement Network (February 14, 2023).

[9] Department of the Treasury, Financial Crimes Enforcement Network, "Anti-Money Laundering and Countering the Financing of Terrorism National Priorities," (June 30, 2021).

[10] See Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency, State Bank and Credit Union Regulators, "Interagency Statement on the Issuance of the Anti-Money Laundering/Countering the Financing of Terrorism National Priorities," (June 30, 2021).

[11] Financial Crimes Enforcement Network, "A Report to Congress: Assessment of No-Action Letters in

Accordance with Section 6305 of the Anti-Money Laundering Act of 2020," (June 28, 2021).

[12] Department of the Treasury, Financial Crimes Enforcement Network, "No-Action Letter Process," 87 Fed. Reg. 34224 (June 6, 2022) (to be codified at 31 C.F.R. pt. 1010).

[13] Department of the Treasury, Financial Crimes Enforcement Network, "Pilot Program on Sharing of Suspicious Activity Reports and Related Information With Foreign Branches, Subsidiaries, and Affiliates," 87 Fed. Reg. 3719 (January 25, 2022) (to be codified at 31 C.F.R. pt. 1010).

[14] Department of the Treasury, Financial Crimes Enforcement Network, "Review of Bank Secrecy Act Regulations and Guidance," 86 Fed. Reg. 71201 (December 15, 2021) (to be codified at 31 C.F.R. Chapter X).