Consumer Finance Monitor (Season 5, Episode 42): How Will the Anti-Money Laundering Act of 2020 (AMLA) and the Corporate Transparency Act (CTA) Impact Banks' Anti-Money Laundering (AML) Compliance Under the Bank Secrecy Act (BSA)? A Discussion with Special Guest Matt Haslinger Chief BSA/AML/OFAC Officer, M&T Bank

Speakers: Peter Hardy, Terry Grugan, and Matt Haslinger

Peter Hardy:

Welcome everyone to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. It's a weekly show brought to you by the Consumer Financial Services Group at Ballard Spahr. I'm Peter Hardy and I'll be monitoring today's program along with my partner Terry Grugan. Terry and I are partners at Ballard Spahr in the Philadelphia office. We're co-leaders of the Anti-Money Laundering team along with Beth Moskow-Schnoll and Michael Robotti. And we're members of the White Collar Defense and Internal Investigations Group.

For those of you who want even more information, don't forget about one of our blogs, consumerfinancemonitor.com. We've hosted the blog since 2011, so there's a lot of relevant industry content in there, and we regularly host webinars and subjects of an interest to those in the industry. So to subscribe to that blog, Consumer Finance Monitor, please visit us at ballardspahr.com. If you like this podcast, let us know. Give us a review on Apple Podcast, Google, or wherever you get your podcasts. Also, please let us know if you have ideas for other topics that we should consider covering, or speakers that we should consider as guests on our show. And I've chatted a bit about the Consumer Finance Monitor, and I also need to tell you about another blog, Money Laundering Watch, which is another excellent blog offered by Ballard Spahr, so check it out. And you're not going to be surprised to hear that we've blogged repeatedly about many of the issues that we're going to be talking about here today.

So today, Terry and I are very pleased to be joined by Matthew Haslinger, who is the Chief BSA/AML and OFAC officer for M&T Bank. Matthew is a prosecutor at the US Department of Justice, the Bank Integrity Unit of what's known as CAMLS, the Money Laundering and Asset Recovery section. And when he worked there, he was involved in the investigation and prosecution of complex, national and international money laundering and sanctions related matters. In 2012, he returned to his hometown of Buffalo, New York, where he began to work as the head of the FIU, the Financial Investigations Unit and M&T Bank. And there he was responsible for day to day operations and strategic decision making as it related to enterprisewide transaction monitoring, customer investigations, and suspicious activity reporting for the bank. Matt later took the role of BSA/AML officer for M&T Securities, and then about two years ago, in 2020, Matthew was appointed the chief BSA/AML officer for M&T Bank. And in that capacity, he's now responsible for oversight, implementation and strategic direction of the enterprisewide programs for the Bank Secrecy Act, anti-money laundering and government sanctions compliance.

So Matt is a perfect guest for us here today because we are here to talk about the Anti-Money Laundering Act or AMLA of 2020, which was actually passed on January 1st, 2021. We're also going to be talking about the Corporate Transparency Act or CTA, and those are combined very long statutes. Congress has tasked the Financial Crimes Enforcement Network or FinCEN, which is a unit of the Department of Treasury with a lot of things to do under the AML Act. Some of them FinCEN has implemented others, many others they have not. We can't talk about everything today, but we're going to talk about a lot

of it and we're going to have a particular focus on how financial institutions and particularly banks are looking at the AMLA and how they're reacting, preparing, and how they should prepare. So we're very happy to have Matt with us here today to talk about all of that.

But first, before we get the perspectives of Matt, I'm going to turn first to Terry. And Terry, why don't you just kind of walk us through a little bit of the context and background of the Anti-Money Laundering Act and why it's important to the industry?

Terry Grugan:

Happy to do so. Thank you, Peter. So the last meaningful change to the BSA, the Bank Secrecy Act occurred through the USA Patriot Act 2001, which means outside of FinCEN's customer due diligence rule enhancements, the BSA has not undergone any real material change in two decades. Now, of course, 20 years is a long time in real terms, but in terms of technological innovation and financial, economic and geopolitical developments and changes, it really reflects several generations of development. For years, it's been noted from all sectors, governmental and financial institutions, domestic and foreign, that the BSA was in need of updating. Significant technological innovations in the financial industry, over the past 20 years, rendered compliance programs crafted under the bank the Patriot Act at best, inefficient and at worst, outright wasteful. Because they would generate and capture vast amounts of information that ultimately had little to no utility to law enforcement efforts to police modern money laundering and terrorist financing practices.

And so over the years, the compliance cost to compliance utility ratio became increasingly unbalanced. While FinCEN has tried over the years to modernize the BSA through intermittent rule making and various initiatives and notices, those efforts really just addressed symptoms of the underlying issues, the BSA being outdated and resulted in haphazard and sometimes inconsistent rules. And so the AMLA represents more foundational and thorough updating to the BSA. These changes actually start with revising the very purpose of the BSA. While the original purpose of the BSA was limited to reporting and record keeping, focusing on the identification of records that have a high degree of usefulness to law enforcement, the AMLA really expands on the BSA's purpose, recognizing the growth and sophistication of illicit financial transactions and enforcement efforts. So now the stated goals of the BSA are fivefold. First, to require reports and records that are highly useful to law enforcement and intelligence and counter intelligence activities.

We'll get to this in more detail, but achieving this goal necessarily requires information flowing not only from financial institutions to the government, but from the government to financial institutions as well. Second, to prevent money laundering and terrorist financing through financial institutions establishment of reasonably designed risk based AML programs. Third, to facilitate the tracking and tracing of illicit funds. Fourth, to assess and evaluate money laundering, terrorist financing, tax evasion, and fraud risks to financial institutions and in the United States. And fifth, to establish frameworks for sharing information among financial institutions, service providers, regulatory authorities, treasury and law enforcement.

And while the AMLA has expanded the purpose of the BSA, its substantive provisions are intended to achieve these goals in a much more efficient manner, really focusing on the emergence of technology and how financial institutions can leverage technological innovations in their monitoring compliance programs and in ways that we'll discuss in more detail. With that basic background, I'll turn it over to Matt for any other color insight on the background and purpose of the AMLA that you'd like to add.

Matt Haslinger:

Thanks, Terry. And let me just start by saying thank you to Peter and Terry for having me. Really excited by our discussion today, especially given it's around AMLA, such an important piece of legislation. As Terry alluded to, banks like M&T and others in the industry, other financial institutions in the industry have been calling on Congress for, really for years now to examine and modernize the anti-money laundering regime here in the United States. The call has been mostly about efficiency and effectiveness of the regime in achieving its goals. The challenge historically, at least from my perspective, has been that the alignment of the regulatory compliance regime and really the examination regime has not been really directly in line with law enforcement's goals. There really hasn't been that alignment, which sometimes is expected by the examiner. So you'll have some things that are expected by examiners, which doesn't really add true value to law enforcement.

And an obvious example of this is structuring SARs, something we talk a lot about in the industry. Financial institutions for years now have been filing millions of structuring SARs, really due to regulatory expectation. But few of those SARs are actually actionable by law enforcement. We know this and talking to law enforcement and by getting some feedback and data from law enforcement. So now we have AMLA. It's really, as Terry said, the first significant change to the BSA/AML regime and since the USA Patriot Act in 2001, outside of maybe from the FinCEN's CDD rule, which we had back in 2016 and really wanted to effect in 2018. But really it's the first piece of legislation that's looking to create some better alignment between our regulatory environment as well as to meet the goals ultimately of the spirit of the BSA and really the goals of law enforcement.

Obviously, there's a lot of excitement in the industry around AMLA right now, as well as a healthy dose I'd say, of skepticism, especially around the potential that FinCEN rule making could have on how we operate, how we interact with other banks, how we're examined, and most importantly, how we engage with law enforcement to protect our communities. So I think the hope in the long term is that any new rules will better align our examiner expectations directly with the needs and wants of law enforcement. But we also hope that the new rules will allow banks to modernize their AML programs and really give us the flexibility that we need to be more innovative in how we address financial crimes risk, and really to keep up with those illicit actors that in some instances are really ahead of where we're at today.

Peter Hardy:

Thank you both. That was a fabulous introduction and setting the table for a lot of the issues that we're going to be talking about today. So obviously we'll be focusing on AMLA, but before we dive into AMLA, let's talk for just a little bit about its sister legislation, which I referenced in the beginning Corporate Transparency Act or the CTA. And man, I want to ask you about it, but just so everyone's on the same page. The Corporate Transparency Act and we're starting off here because FinCEN just recently issued the final regulations regarding the collection and definition of beneficial ownership under the CTA. So it's a good place for us to start today. What the CTA requires very generally is for defined companies and there's tens of millions of them to file with FinCEN a report that lists their beneficial ownership information. And without going into too much detail, because I want to leave it to Matt, there's essentially two prongs of BO, beneficial ownership.

There's the ownership prong and there's the control prong. Okay, so all these companies have to file this report and FinCEN is creating this massive database that will be accessible to regulators and law enforcement, including abroad and financial institutions. And FinCEN still actually has to promulgate regulations regarding this database and various privacy concerns. And then the other thing that FinCEN has to do, because it's basically three parts of the regulations, is issue regulations aligning the customer due diligence rule CDD, which Matt referenced a few minutes ago to conform with the regulations that they just issued.

So that's a very long winded way of saying the CTA applies to lots of different companies. It doesn't apply directly to banks, but it certainly affects banks. And what does apply directly to banks is the CDD rule. So with that is kind of prelude, man, I want to ask you, what is the effect of the CTA on you and your colleagues? And particularly what are your thoughts here in terms of the fact that FinCEN is going to conform and that means expand, as far as I can tell, the CDD rule to line it up with the CTA?

Matt Haslinger:

Yeah, it's a great question, Peter. I think the short answer to your question is we don't know yet, but let me unpack that a bit. So I'm going to echo some of the background that you gave. So what is the CTA? What's the purpose? The purpose is designed to crack down on the use of shell companies. Congress noted in enacting the CTA that the states were really not collecting or verifying corporate ownership information. While they may have been documenting the creation at public entities, they really weren't, for the most part, states weren't collecting and verifying the ownership structure of those entities. And as a result, bad actors were concealing their ownership in those state corporate structures and conducting transactions as a result through financial institutions in the name of those corporate structures. And if you read Treasuries 2020 AML/BSA Strategy report, these concerns are really reverberated in that report. Treasury noted that the lack of required reporting of UBO information is really a key vulnerability exploited by illicit actors.

So in order to close the vulnerability, CTA effectively creates a national registry, as you said, of beneficial owners for most domestic businesses and some foreign businesses with US presence. But those companies are the companies that are required

to report, and I'll get to that in a minute because it's not all companies, but those that are required to report will have to disclose personal identifying information about their owners and their controlling parties. And FinCEN will then give that information to law enforcement in some financial institutions like banks like M&T, to access to this database in order to do the work that they do. The CTA at this point defines a beneficial owner as anyone that exercises substantial control or owns 25% or more of an entity. So this is very similar to the CDD rule in terms of requirements both kind of set a 25% threshold. However, there are some differences with the CDD rule.

Peter Hardy:

Just real quick, what is the CDD? Well, it sounds like you're about to say it. I'm sorry. What is the CDD rule? Just so everyone's…

Matt Haslinger:

Yeah, so the customer due diligence rule is essentially the rule that financial institutions need to collect beneficial ownership information on all their customers. Now, there are some exceptions, but it's relatively consistent with the CTA. But as I was saying that there's some significant differences that I think the CTA could have an impact on the CDD rule. So for example, the CTA is not applicable to all companies, but only reporting companies. Reporting companies are essentially going to be your small businesses. So any business with more than 20 full time employees that makes more than 5 million in gross sales and has a US based headquarters, they're not going to be required to disclose beneficial ownership or information through the Fin Center registry. That's an important distinction because the CDD rule does not have those eligibility limits as it really applies to all customers, with few exceptions.

The CTA also has a number of other exceptions that need to be considered as well in terms of comparing CTA versus CDD. Another important call out of the CTA is that the registry is only going to be accessible to financial institutions to comply with customer due diligence requirements with the consent of the reporting company, with the consent of the entity that's reporting defense sense. So that's an interesting requirement as well. I think we need to see what FinCEN is going to put out around access to the registry and what the consent requirement really looks like and what the expectation is going to be around that. A few other differences between CTA and CDD. The CTA is not applicable to shelf companies, certain charitable trusts as well as certain pooled investment vehicles. So there's differences in terms of what banks are required to collect under the customer due diligence rules versus what's required to be reported through the CTA.

And there's a difference in terms of how we're collecting that information. Obviously banks today are collecting directly from the customer and banks going forward will be expected to at least get consent of the customer in order to leverage the CTA. But going back to your original question, Peter, when I'm thinking about the impacts of the CTA on the CDD rule, the answer to that question was really going to depend on how FinCEN promulgates rules to amend or change the CDD rule to come in line with a potentially conflicting CTA expectation. And this overlap or potential conflict between the CDD rule and CTA was not lost on Congress at all. In fact, a part of this CTA requires FinCEN to revise the CDD rule to quote, unquote bring the rule into conformance with the UBO requirement. One thing I can say is I think there's no doubt that the banks will still have to comply with the CDD rule, that's not going away.

What's really being considered is how we will be able to leverage the registry in order to comply with CDD requirements. As of today, we are still waiting FinCEN to propagate rules around two key items. You mentioned that FinCEN promulgated rule on September 30th around what the reporting companies are required to do and what that information is going to look like. But what we're waiting for FinCEN to promulgate rules on is, one, bank access to the registry, who will get access, what are the expectations around customer consent? So, that's the first piece. And then the second piece is really the alignment of the CDD requirements with the CTA. Specifically, will banks be able to rely on customer information in the registry? And then what happens if the registry information differs from due diligence that's collected directly from the customer? Will banks be required to provide feedback to FinCEN on that? The validity of that data? Will there be a feedback loop to FinCEN? So those are all outstanding questions at this point.

If you're taking an optimistic view, it's possible that FinCEN may promulgate rules that create some level of efficiency and effectiveness. For example, FinCEN could deem CDD obligation satisfied so long as the bank taps into the registry. That's obviously something I'm hoping for. Or we could see FinCEN revise the CDD rules so it applies to the same reporting

entities as required under the CTA. So the regulatory alignment in terms of what entities are subject to that UBO collection, though I think this is probably unlikely, that obviously would create a huge efficiency for banks. But if either of these things happen, this could create enormous efficiencies for financial institutions by streamlining that UBO collection, which is a major operational function today for financial institutions. But until the rules are promulgated, we're still going to have to collect information from customers at significant cost as well as significant customer friction. So ultimately to the question of how will the CTA impact CDD, I really think we have to wait and see what comes out of those rules promulgated by FinCEN.

Peter Hardy:

Okay, thanks a lot for that. I want to ask you a quick follow up question on that. So as you know, the CDD rule defines beneficial ownership with the control prong and the ownership prong. Ownership, like you said, is 25%. Control prong is one person under the CDD rule. If I'm a company and I'm opening up a bank account, I only need to designate one control person. So FinCEN has now just made clear under the CTA that anyone and everyone who is in sufficient control, and that term is pretty broadly defined in the CTA, everyone has got to be listed in the reporting under the CTA.

So my assumption, I could be wrong, my assumption is that FinCEN's going to try to out some new regs, under the CDD rule and basically expand the definition of control. And so now if I'm opening up a bank account and I'm covered by the rule, I'm going to have to list all of my control people. The flip side of that is the bank now has to change its systems, I'm thinking. Let's assume that my prediction is correct. What's your reaction to that and how much of a hassle is that going to be?

Matt Haslinger:

Peter, I was trying to give an optimistic view of the CTA and CDD alignment. That is absolutely the skeptic, and I think healthy skeptic view of potential CDD and CTA alignment. Yeah, it's a challenge. Anytime financial institutions have to collect additional data, store that data and leverage that data for investigations or screening purposes, it creates more work at significant cost. So I think this strikes that really the spirit of AMLA and the CTA, which was really to create efficiencies and effectiveness around the BSA regime. What we're seeing here, if there is a change in CDD requirements where they're going to align the controlling party prong in the CDD role, that will create more work and will be an operational headache for many financial institutions across the industry.

Peter Hardy:

So now let's switch gears here and focus directly on AMLA. And Terry walked us through the expanded goals and the purpose of the BSA. So with all of that in mind, that kind of big picture existential stuff, what's one of the provisions that you think is one of the most important in terms of impact of AMLA on banks and financial institutions?

Matt Haslinger:

Peter, yes. Another excellent question there. So I'd say probably the most actionable piece of the AMLA to date, maybe two actual pieces of AMLA to date, Section 6101 and section 6206, which I think are kind of paired nicely together. 6101 being the national priorities and 6206 being the requirement for FinCEN to develop and issue trends reporting on suspicious activity. Again, we're still writing for rules to be promulgated around program expectations for the national priorities. But we, like many banks in the industry that I've talked to, have started making program changes to ensure we are assessing our risks and focusing on the eight priorities. Similarly, well, section 6206 of the AMLA I think pairs nicely with the national priorities. That section amended the BSA to require FinCEN to publish semi-annually or more often more frequently, the threat pattern and trend information to provide meaningful information about the preparation, use, and value of SARs filed by banks as well as other reports under the BSA. So you got your CTRs, TRFs.

But that data to me, the pattern and trend information is really the most valuable to a BSA program. That's how we tune our BSA program. That's how we conduct risk assessment and that's how we set our deployment strategy into the future. Where the national priorities are very high level, I think they're useful, but they're very high level. the pattern and trends advisories that we've seen from FinCEN even historically. And the ones that we, I'm assuming we'll see going forward are typically very tactical and actionable. For example, in October, 2021, we saw FinCEN issue a ransomware trend analysis. This was talked about significantly in industry circles. Many banks, including ours, started assessing their policies and procedures as they relate

to ransomware events, whether events targeting the bank itself or events targeting the bank's customers. So at M&T we put together a cross functional ransomware playbook. We're bringing in various departments across the bank, including cybersecurity, fraud, AML, sanctions, and risk management to work with a customer, when we come to find out that that customer is facing a ransomware event.

So very actionable. If FinCEN is telling us, hey, this is a risk that you need to look into, banks and financial institutions can react to that, assess their risk and then deploy against that risk. Other examples of tactical advisories, November, 2021, FinCEN issued a notice calling attention to environmental crimes. And then a month later in December, the analysis FinCEN issued around wildlife trafficking. These were great because the red flags outlined in those advisories really helped the industry better assess their risk and where applicable, proactively develop analytics to determine their risk and deploy against it. So in those examples at M&T we assessed our training around the red flags. We also made adjustments to our negative news, our adverse media screening protocols to ensure we're capturing those environmental crimes and those wildlife trafficking crimes so we can look into customers that potentially were posing a risk there.

So I think those two sections of AMLA really were helpful to financial institutions in their, they gave us some information really to focus on. The national priorities in particular I think are, the goal of the national priorities is really to allow banks to assess the risks around those priorities and then prioritize. So when I think about prioritization, I think about taking a look at the resources we have available. Obviously they're not infinite, so I look at the resources I have available, technology resources, people resources, and I move them towards the national priorities. And obviously I'll also be moving them towards anytime there's a FinCEN trend report that comes out semi-annually.

Peter Hardy:

Okay, great. I have a comment and a question before I hand the baton off to Terry and my comment, which is I'm not asking you to respond, at putting back on my skeptics hat and you are more polite than I. I believe you referred to the priorities as general. So as folks listening to us may know, like you said, there's eight priorities and it's drugs and fraud and anyway, by the time you get to the end of the eight, it's essentially pretty much any crime that you can conceivably think of. And I know that the final regs are still coming, they haven't finished it up yet. And I'm not exactly offering an original thought here because a lot of people have said this. But one issue with the priorities and the whole purpose was to allow banks to, as you say, allocate your resources accordingly, is that they've prioritized everything in my mind and therefore nothing because everything's a priority.

Again, I'm not asking you to respond, that's just my own personal rant if you will. But I do have a question. I don't know that the following has been listed under the threat pattern and trend information, but obviously FinCENs put out a fair amount of material this year on sanctions. And I feel like we just would be remiss if we didn't at least reference the issue of sanctions because it's so important and hot right now, particularly with what's going on in the Ukraine. So how has the bank been responding to that issue?

Matt Haslinger:

Yeah, I know you said I didn't have to respond to your comment, but I'd like to just quick comment on that or response comment on the national priority.

Peter Hardy:

Refute me, as you see fit.

Matt Haslinger:

So on the national priorities comment. I agree. The BSA sort of set forth the requirement to invest for banks to investigate and report on money laundering, counterterrorism and other illicit activities. So to some extent the national parties are extremely broad and really don't move the needle much for financial institutions in what they were already expected to do. I'm going to cut into skepticism just a little bit because I know that's kind of a widely held view that the national priorities hasn't really moved the needle much, but here's where I think it's moved the needle. One of the national priorities that's explicitly set

out is fraud. And for a lot of financial institutions, really for the industry, from my opinion, there's been confusion around where fraud sits in terms of AML obligations and expectations. So I think the fact that fraud is highlighted is one of the national priorities.

I think banks and other financial institutions really should sit down and think about where they divide the line between their banking operations as it relates to fraud loss that's lost to the customer and loss to the bank and the AML programs that investigate maybe fraud crimes that are perpetrated by the customer of the financial institution. I think this was something that was very gray before, but the fact that it's a national priority now tells me that there is some level of obligation in a BSA/AML program around fraud. And it's going to be incumbent on financial institutions to figure out where they snap the line as it relates to fraud loss and AML investigations in the fraud space.

So to your second question around sanctions, the Ukraine, Russia crisis certainly has sparked life into what was otherwise a sleepy sanctions regime, at least in my mind. We're a domestic financial institution, not a significant amount of sanctions risk, but I think we have a best in class program around our sanctions risk. But in the Ukraine, Russia crisis, I think challenged us in a lot of different ways. It challenged us in the frequency of sanctions issuances as well as the nuanced nature of the sanctions issuances. So it forced us to be a little bit more nimble than we've historically needed to be. And it's also kind of informed, I think our AML program in that there's now a heightened risk around kleptocracy and the risk that kleptocrats bring to the table. Obviously politically exposed persons is something that's a risk that we're always screening for, to detect politically exposed persons and then assess the risk of that PEP in terms of money laundering and sanctions risk. But certainly the Ukraine, Russia crisis has highlighted these risks, the sanction screening risk more generally as well as the politically exposed person's risk.

Peter Hardy:

That's really interesting. So with that, I'm going to, as I said, hand the baton to Terry who also be chatting with you about some other issues.

Terry Grugan:

Thanks again, Peter. Matt, as we mentioned earlier, one of the key goals of the AMLA is to enhance the usefulness and effectiveness of information sharing between and among financial institutions, treasury and law enforcement. Historically, two of the most fundamental ways financial institutions share information of the VSA are through the filing of SARs and currency transaction reports, CTRs. But as you alluded to earlier, there's serious question and debate as to just how effective traditional SAR and CTR filings are and have been. The AMLA imposes reporting requirements on DOJ intended to address this question. Right?

Matt Haslinger:

Yeah, I think I'm in a unique position to speak on suspicious activity reports and their usefulness because in my former role at the Department of Justice for a short time I was the head of the National SAR Review teams. As many of your listeners will know, there's SAR review teams across the country usually hosted either by the US Attorneys Office or by local field offices of the Internal Revenue Service. And those SAR review teams are really intended to look at suspicious activity reports and make them actionable. That is, read them and kick off criminal and civil investigations based on that intelligence. I will say that in my experience historically there wasn't a huge success rate out of those SAR review teams, and there's a lot of different reasons for that, mainly because law enforcement had typically been leveraging other intelligence sources to start their investigations.

So it was really difficult as a SAR review team to initiate an investigation as a result of suspicious activity report. But I can tell you, now that I'm on the bank side, there's very often suspicious activity reports that we file that we know are actionable. And I mentioned earlier, Terry, that the sort difference between the regulatory regime and for example, structuring SARs where we're filing for our regulators and then in other instances there are absolutely SARs that we think are very immediately actionable by law enforcement. So I'm hoping that the AMLA will build back that gap and create a private public information sharing mechanism to bridge the gap between kind of sorting through what's being filed for regulatory purposes and really what's being filed that could be immediately useful to law enforcement. At M&T we have something we call our law enforcement notable SAR meetings.

We meet in two of our primary metropolitan areas with all of the federal state and some local, major local law enforcement agencies within those metropolitan areas. And what we do is we, through the SAR sharing regulatory language, we're able to provide, have our investigators provide information directly to law enforcement agents. So we give them the suspicious activity report, we give them the relevant supporting documentation and then we provide them context around that SAR that's useful and actionable for them. And explain to them why we think it's actionable with a lens of former law enforcement agents. I have many folks within my organization that are former law enforcement. In fact the head of my FIU is former DEA, regional agent in charge. So he's very familiar with SAR data as well as what could be actionable from a SAR context. So I'm hoping that the AMLA will create, again, build that bridge and allow us to build out programs like that with law enforcement to make that information sharing mechanism a little bit more streamlined.

Terry Grugan:

Thank you. And to that, that really cuts to one of the key features of the AMLA I believe, in enhancing coordination among all these various actors. So in order for financial institutions to understand what would be most useful and effective for law enforcement, it needs to obtain that information from FinCEN, which then needs to obtain that information from DOJ in terms of determining what is actionable. So the AMLA builds in structures for DOJ to report to FinCEN on what it's finding actionable, correct?

Matt Haslinger:

Yeah, exactly. And so that's where the bridge, or maybe I'm calling it a bridge, but maybe it's more of a feedback circle, right? DOJ provides that information to FinCEN in terms of what they found to be actionable in suspicious activity reports. FinCEN then provides some level of data to the industry around what it has seen as useful in SAR filing, especially around the priorities and around the trends that they're seeing. And then that information that comes full circle, obviously the financial institutions will use that information to tune their programs, to conduct their risk assessments, to tune their programs and to initiate their deployment strategies around those risks. And create additional suspicious activity reports that will be again, useful to the Department of Justice and other agencies, not just DOJ agencies, but any federal law enforcement agency that's leveraging SARs.

Terry Grugan:

That certainly makes a ton of sense in terms of trying to continuously enhance the usefulness of this reporting. But in practice, are we seeing that efficiency play out? Is law enforcement complying in terms of providing the data it's supposed to provide to FinCEN is, has your experience been FinCEN communicating effectively with financial institutions on what law enforcement is finding useful and actionable?

Matt Haslinger:

Yeah, and you and Peter really are trying to turn me into a skeptic here. But yes, not yet, let me put it that way, not yet. And this has been an industry challenge for years now. I know historically FinCEN has had some initiatives to try to create that feedback circle to gain data from law enforcement and then provide that data back to the industry on SAR filing. There's a lot of different challenges around that. Obviously suspicious activity reports are confidential and law enforcement investigation intelligence is also confidential. It's been a industry challenge for years.

But AMLA at least opens the door to the opportunity that that feedback loop can be created and at least express the industry's interest and Congress's interest in getting that done. Because in order to ultimately be efficient and effective, which I think is the spirit of AMLA, I think you need to have that feedback loop. The industry, financial institutions need to have that feedback loop and law enforcement needs to have that feedback loop. We need to be working together and FinCEN is playing that middleman role in order to provide that information in both directions. So at least there's the potential for structure there. It'll be really odd to FinCEN to promulgate rules and also to create additional structure in order to get that work done.

Terry Grugan:

So these are broad goals of the AMLA in terms of design assisting development of useful and effective programs, but the AMLA contains provisions. And you touched a little bit on this provisions for coordination with the broader law enforcement community and specific rules on engagement as part of this AMLA incorporated section 6306 around account maintenance. How is that provision? What is that provision and how is that helpful to the banks?

Matt Haslinger:

Yeah, so let me go back to your initial point around law enforcement, feedback and what we're seeing today. I think FinCEN has, actually a few years back has kicked off some initiatives to try to provide information to the industry around what they're seeing and what they're hearing from law enforcement. One of the mechanisms there is the FinCEN exchange. So we do have that, that's already established and typically that's the major institutions that are out there, that are participating in that. And that's one mechanism that FinCEN has used and I'm assuming will be using going forward in order to provide data and provide information to the industry on what they're seeing, both from an AML and counter terrorism perspective. But section 6306 you alluded to, is the safe harbor for account maintenance. And so this section of AMLA requires law enforcement to notify FinCEN that they intend to request to financial institutions to keep an account open. It also provides financial institutions with a safe harbor if they do decide to keep the account open, provided they comply with the provisions of 6306.

This is something that the keep open, a process, just kind of what we call it at M&T, it's something the industry's had, most financial institutions have had in place for years now. The one difference here is now we have an explicit safe harbor around keeping open those accounts. I will say that I know that historically there's been instances where law enforcement is investigating customers at a financial institution and the financial institution recognizes that the activity is concerning, is a risk, is potentially suspicious, but they may or may not know about a law enforcement outstanding investigation. And so they close out the accounts. And what happens there is it essentially resets that law enforcement investigation. So they have to follow the money to the new financial institution, they have to develop a relationship with that financial institution and then they have to work through that financial institution's compliance program in order to get special activity report supporting documentation or they have to send new subpoenas to the financial institution, it creates challenges for law enforcement.

This new section is recognition by Congress and the industry that, hey, we need to think about mechanisms to keep accounts open when law enforcement is actively engaged on investigating a customer. And we need some level of cooperation between the public and private sector to share information. And if the private sector is intending to keep those accounts open, they should have safe harbor, they should be protected, if that relationship was to go south. So that's the idea there, at M&T, what we did when we saw this section come out, we reviewed our existing approach to maintaining accounts for law enforcement. We adjusted some procedure in terms of our retention extensions when we don't have information from law enforcement that suggests they're actively investigating the customer. But obviously we want to promote any situation where the customer is under investigation. We want to promote that account maintenance, so is to not disrupt law enforcement's investigation.

Terry Grugan:

Very helpful, thank you. I'm going to shift gears a little bit. The AMLA also includes provisions that have a foreign reach. And this is a question start for Peter. The AMLA expands the government's ability to acquire information from US banks regarding correspondent banks held by foreign financial institutions, correct?

Peter Hardy:

Yes, it does.

Terry Grugan:

So historically under the Patriot Act has the government had the ability to subpoena in non-US banks?

Peter Hardy:

Yes. So let me just give a little background here in terms of, let's level set first on what is a correspondent bank account, what are we talking about? And a correspondent bank account is essentially an account that's established at a US bank but for a foreign bank. And the foreign bank can then receive deposits, make the payments or disbursements through this account. And essentially it allows a non-US bank, a foreign bank to conduct business in the US without a physical presence. Also, part of this, the foreign banks customers in effect are receiving services from the US bank without becoming an actual client of the US Bank. And correspondent banking has always kind of been, well it's been identified as a higher risk area. FinCEN has targeted US banks for failing to conduct sufficient due diligence. The national strategy for combating terrorism and other illicit financing has identified correspondent banking as a significant threat to the US financial system.

Just to pile on the FFIEC, which issues the BSA/AML examination manual, notes that correspondent accounts can present risk due to the one large amount of dollars flowing through them. Some of these accounts, because it's really, the customer is a bank and then all of that banks customers really have a lot of activity in these things. Also, there's a perception that there's opacity in the bank accounts, which leads to concerns regarding layering and ultimately the concealment of illicit funds. Another issue is that US banks can't really rely totally on the foreign bank to conduct a due diligence on their own customers, I mean they have to, but I mean they're in that position and the question is, is enough really being done? And some of the foreign banks are located in jurisdictions that don't really have necessarily the same AML requirements as the US.

So all of that is prelude to answering your question, which is yes, the Patriot Act back in 2001 allowed DOJ and actually the Department of Treasury to issue subpoenas to non-US banks with correspondent accounts in the US. But this power was limited to records related to the correspondent account itself, including the records maintained outside of the US. And I think what your question's getting at is the AMLA has expanded significantly the US governments subpoena power. So now basically, in addition to being able to gather records related directly to the correspondent account, and that's still important for all the reasons that I just went through, AMLA now allows DOJ and treasury to subpoena records of any account at the foreign bank. So it's not just limited anymore to the correspondent account. And these records can be maintained outside the US. The magic language in the statute is that the records have to be subject of criminal investigation, a suspected violation of the BSA, civil forfeiture action or an investigation pursuant to transactions of primary money laundering concerns.

So there's got to be some sort of hook. But the statute essentially is all about making the life of primarily the DOJ easier. The foreign bank has to authenticate the records and the US financial institution that's maintaining the correspondent bank for the foreign bank has got to maintain records in the US. So this is just all about making the subpoena process easier regarding the owners of record and the beneficial owners of the foreign bank. And there's got to be a person in the US authorized to accept service of subpoena. All of this essentially is to kind of cut through some of the practical problems that DOJ has typically encountered with attempting to get records that are located overseas. It can be a very cumbersome process as Matt well knows, there's a entire process involving what are called MLATs, name all treaties and it's slow and you don't always get what you want.

And the DOJ can have its statute limitations lengthened when it's investigating such crimes. And I did MLATs myself back in the day when I was with DOJ and they weren't always awesome in terms of the documents that you actually got your hands on. So here, this just gets right to the point and there's a couple of other little nuggets thrown in here as well for DOJ. First of all, and not surprisingly, AMLA prohibits the foreign banks from notifying their customers or any person named in the subpoena of its existence. There is liability of non-compliance for about $50,000 I believe, if non-compliance continues after 60 days, which is interestingly enforceable through seizure of the funds held in the correspondent bank account. The ACT also allows DOJ to compel compliance by holding the foreign bank in contempt. And also too and of interest to US banks, the US financial institution has got to terminate the correspondent relationship with the foreign bank if the foreign bank fails to comply.

So there's all sorts of sticks involved in this. There is a provision that permits the subpoenaed foreign bank to petition in federal district court to modify or quash. And there's case law out there on such actions prior to AMLA. But here's the final thing, which is AMLA provides that the basis for such a motion to quash cannot be solely foreign confidentiality law. So meaning, let's say that I'm DOJ and I want to get my hands on records that are located in Switzerland, or there's plenty of countries out there that have confidentiality laws that are stronger than what we're used to in the US. And some of them have blocking laws, which is actually, it's, okay, dear residents of foreign country, if you get a subpoena from the United States

government, you cannot comply with it. And so this is an argument that is obviously raised from time to time by the foreign banks.

So what AMLA says is, well, you can still raise it and it's a consideration, but it can't be the only reason for your argument. And honestly, when you look at the case law, almost always the end result is the federal district court says, well if you want to do business in the US then you got to live with this so fork over your records. But this does streamline that entire process. It basically makes investigations of foreign activity easier. So there's a lot packed in there. And I don't know, Matt, if you know or M&T have done anything to kind of handle this new provision or just correspondent banking accounts in general. Because the flip side is AMLA also says, well, also it's important not derisk, not to kick out customers because you're just perceived as higher risk. So there's, shall we say, a mixed message going on in here.

Matt Haslinger:

Yeah, well certainly anytime you have an instance where you have a customer's customer, as you mentioned, the customer's the correspondent bank, and they have their own clients, it's always created an enhanced risk. But now that you have this very powerful tool by the Department of Justice to sort of dig into that activity, to uncover any additional risk, obviously that's going to heighten the risk for any financial institution that's engaging in correspondent bank activity. But as I said, very powerful tool by law enforcement and pairs nicely, again with other parts of the AMLA. The national priorities for example, they've mentioned that transnational criminal activity is one of the priorities. That's something that they're very concerned with. So this is just another tool for attorneys, the Department of Justice to help really mitigate some of the risks around transnational activity. And financial institutions should be aware of that enhanced subpoena power and should take action where they deem appropriate to assess the risk around those correspondent relations that they may maintain.

Peter Hardy:

Well, so ladies and gentlemen, we've been going at it here for an hour. We really appreciate you tuning in and listening to this. We hope you have found it useful. We hope you've found it interesting. And Terry and I obviously want to really thank Matt for not only his time, but his many insights here. It's always fascinating to hear directly from industry how they're handling these issues and how they're maintaining their AML programs, which are very, very complex programs involving a lot of people. So thanks everyone.

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