Updates
December 14, 2021

AMLA 2020 Series Part 5: New Penalty Targets Transactions Involving Senior Foreign Officials

On New Year's Day 2021, Congress passed the Anti-Money Laundering Act of 2020 (AMLA 2020). As we reported last April, the AMLA 2020 included sweeping reforms aimed at strengthening protections against money laundering, terrorism financing, and other illegal activities. In previous installments to this series, we discussed the AMLA 2020's new beneficial ownership disclosure requirements, enhancements to the Bank Secrecy Act (BSA) whistleblower program, expansion of anti-money laundering (AML) obligations to antiquities dealers, and expansion of subpoena power over foreign financial institutions.

In this fifth installment, which has been published by New York University School of Law's *Program on Corporate Compliance and Enforcement* blog, we examine two new criminal penalties established by the AMLA 2020. In a nutshell, these penalties prohibit concealing or falsifying information related to ownership or control of funds in transactions involving senior foreign political figures and entities designated to be of primary money laundering concern. This is a potentially significant new tool providing for criminal prosecution targeting a broad swath of intermediaries who may be involved in facilitating transactions involving senior foreign political officials, including brokers, nominees, attorneys, and any other person or entity that may communicate with a financial institution in the course of a transaction falling under these provisions.

New Enforcement Risk for Intermediaries in Transactions Involving Senior Foreign Political Figures Under 31 U.S.C. § 3553

First, the AMLA 2020 amends the BSA to criminally prohibit the concealment, falsification, or misrepresentation from or to a financial institution of any material fact concerning the ownership or control of assets in any transaction involving assets controlled by (1) a senior foreign political figure; (2) the immediate family of the senior foreign political figure; or (3) a close associate of the senior foreign political figure, where the aggregate value of the assets involved is least $1 million. The new law also prohibits attempts at concealment, falsification, or misrepresentation.

Generally, a "senior foreign political figure" is a senior official—i.e., someone with substantial authority over policy, operations, or the use of government-owned resources—in the executive, legislative, administrative, military, or judicial branches of a foreign government. The term also encompasses senior officials of foreign political parties and senior executives of a foreign government-owned commercial enterprise. Finally, the term includes any corporation or entity formed by or for the benefit of a senior foreign political figure.[1] An "immediate family member" is the spouse, parent, sibling, or child of the senior foreign political figure, or the parents and siblings of the senior foreign political figure's spouse.[2]

The term "close associate" is not well defined, but 2001 guidance from the U.S. Department of the Treasury (Treasury) describes it as "a person who is widely and publicly known to maintain an unusually close relationship with the senior foreign political figure, and includes a person who is in a position to conduct substantial domestic and international financial transactions on behalf of the senior foreign political figure."

Expansion of This Prohibition to Transactions Involving Entities of Primary Money Laundering Concern

The AMLA 2020 extends this new penalty to information provided to financial institutions in relation to transactions involving entities designated by the secretary of the Treasury to be of "primary money laundering concern."

Treasury Department statutes and regulations allow the secretary of the Treasury to designate certain financial institutions operating outside the United States as entities of "primary money laundering concern."[3] The secretary can then prohibit (or place conditions on) the opening or maintenance of U.S. correspondent accounts or payable-through accounts maintained on behalf of entities designated "primary money laundering concerns."

Similar to transactions involving senior foreign political officials, the AMLA 2020 amends the BSA to prohibit the concealment, falsification, or misrepresentation (or attempt at the same) from or to a financial institution of any material fact concerning the source of funds in a transaction involving an entity found to be of "primary money laundering concern." In addition, the transaction at issue must violate at least one of the Treasury secretary's prohibitions or conditions on correspondent accounts or payable-through accounts.

Key Takeaways

- Most critically, these prohibitions apply to "any person"—not just U.S. persons—involved in providing (or concealing) information to or from a financial institution. This creates a significant new incentive for intermediaries to engage transparently with financial institutions. Importantly, as with other criminal offenses for "knowing" violations of law, prosecution could be based on an argument that a defendant "consciously avoided" the violation, for instance, because he or she was aware of a high probability of the concealment or misrepresentation, and consciously avoided confirming it.
- Violations of either of the two new prohibitions carry stiff penalties. Violators will face up to 10 years in prison, fines of up to $1 million, or both. The new laws also provide for criminal and civil forfeiture of any property involved in the offense, any property traceable thereto, and for civil forfeitures, any property involved in a conspiracy to commit the offense.
- It is important to note that the amendments to the BSA do not apply directly to financial institutions. Rather, they criminalize the concealment or misrepresentation of material information *from or to* a financial institution. Thus, these new penalties are aimed towards deterring third parties who conduct illegal financial transactions on behalf of a senior foreign political figure or entity of primary money laundering concern. However, financial institutions may be required to report suspected violations on a suspicious activity report (SAR). Accordingly, financial institutions must familiarize themselves with the new prohibitions and consider whether circumstances in which diligence responses are found to be inaccurate, misleading, or incomplete merit reporting.
- Efforts to conceal, falsify, or misrepresent relevant information to a financial institution do not need to succeed in order to result in criminal liability. Even attempts are subject to prosecution under these provisions. Thus, if financial institutions discover or suspect inaccurate, incomplete, or misleading diligence responses, their related SAR filings could trigger criminal investigations.
- The AMLA 2020 leaves open several key questions. For example, the new law does not define the term "material fact," leaving the term open to interpretation by the courts and regulators. Additionally, the new prohibition on transactions involving senior foreign political officials applies only to transactions involving an aggregate amount of $1 million over "one or more transactions," but provides no further guidance on how to calculate that aggregate amount.

All parties involved in providing information to financial institutions in connection with third-party transactions should take note of this new provision and redouble efforts to ensure robust diligence and vetting of any information provided to financial institutions in relation to such transactions.

Endnotes

[1] Defined at 31 C.F.R. § 1010.605(p).

[2] *Id.*

[3] 31 U.S.C. § 5318A.

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