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AML Regulations Effective, but Often Slow to Arrive, Says Author

By Fred Williams

A large share of the estimated $300 billion of criminally derived profits that enters the U.S. each year moves through corporate accounts held by shell companies and onward into real estate, both of which are now the target of pending anti-money laundering rules and disclosure requirements.

Ola Tucker, a former compliance officer at Commonwealth Trust Company in Delaware and author of "The Flow of Illicit Funds: A Case Study Approach to Anti-Money Laundering Compliance," recently discussed ongoing efforts to combat financial crime, including efforts to plow criminal cash into U.S. property and move large sums through cryptocurrency, with *ACAMS moneylaundering.com* reporter Fred Williams.

An edited transcript of the interview follows.

U.S. lawmakers and officials appear to have set their sights on eliminating the nexus between real estate, corporate anonymity and all-cash real estate purchases, namely by establishing a beneficial ownership database and making Treasury's enhanced reporting requirements for real-estate title companies permanent and more expansive. If implemented, will either of these approaches significantly block money laundering attempts and alert law enforcement? Or will illicit funds find ways around the rules?

Different versions of the Corporate Transparency Act have been bouncing around Washington for well over a decade with lots of opposition from lobbyists, attorneys, the real estate sector and so on. The rule is still not final and the database has still not been developed by FinCEN. The timeline remains uncertain but experts believe that after the rule is finalized it will be aggressive. So ultimately, I believe that the effectiveness of the CTA will depend on how exactly it's implemented and how the data will be used by enforcement agencies.

Of course there will always be attempts to launder money. Large sums are a huge incentive to circumvent the law and find gaps. Ultimately, I think beneficial ownership registries with expansive reporting requirements and the transparency that follows as a result will be a big deterrent because those were among our largest loopholes. Another important thing about the CTA is it would also help in enforcing sanctions, including those targeting Russian oligarchs … and support the Biden administration's priorities on fighting corruption.

You and others have argued that FinCEN's geographic targeting orders in some ways provide criminals a road map for avoiding detection—just buy real estate outside the designated areas or finance the purchases rather than pay only with cash. That said, what lessons have GTOs imparted, and should the reporting requirements be expanded? Do you know of any prosecutions prompted or supported by GTO-related filings?

GTOs were started a number of years ago. They were supposed to be just temporary, but FinCEN has done a lot of research, collected a lot of data on their effectiveness, touted them as highly effective, reissued them a number of times and expanded them to include other geographic areas over time. And so they have been very effective, we do have that data.

Regarding prosecutions, Bank Secrecy Act reporting, including the filing of these GTOs is confidential, and these confidentiality protections are critical to the effectiveness of financial institutions' submissions under the BSA.

So it's rather difficult to find information about money laundering prosecutions that resulted from a filing under a GTO unless you somehow got access through discovery.

You write in your book that the laundering of sums taken from Malaysia's 1MDB state fund would not have been possible without the help of intermediaries such as real estate professionals, lawyers and title companies, which "should be subject to comprehensive AML/KYC requirements." The ENABLERS Act aims to achieve this, but the American Bar Association argues that legislation would lead to violations of attorney-client privilege rules. Do you agree, or can beneficial ownership be reported in ways without breaching attorney-client privilege?

The ENABLERS Act is another hugely important law to help fill these gaps in our current AML framework. Not only because it targets lawyers, but also because it targets a lot of other so-called gatekeepers. Attorney-client privilege applies to communications to and from clients that are seeking legal advice and assistance in legal proceedings.

Let's be clear though: it does not apply when the purpose of those communications is committing a crime. So if a client seeks advice from an attorney to assist with the furtherance of a fraud scheme or other crime—or the post-commission concealment of a fraud or other crime—that communication is not privileged.

Also, the privilege doesn't start until the parties have agreed to representation. This gives attorneys time to conduct the necessary due diligence on their potential clients prior to agreeing to represent them. Most attorneys already vet their clients to identify any conflict of interest or other problem, and many screen them against sanctions blacklists. So there is ample opportunity for attorneys to vet and weed out certain clients.

I think that certainly it could be made to work without imposing on that very important privilege, which is there for a reason.

Your book also covers the laundering of $230 billion through Danske Bank Estonia from 2007 to 2015. Given that scheme was exposed by an insider, and given the impact of insider leaks such as the Panama Papers and Pandora Papers, does it make sense to use rewards to incentivize whistleblowers to flag AML violations, as the U.S. Securities and Exchange Commission does for tips on investment fraud? What are the drawbacks to this approach?

I teach corporate compliance classes on anti-money laundering and anti-corruption and whistleblowers are a huge current topic. Information gained from whistleblowers, including by the Securities and Exchange Commission, has helped minimize harm to investors and other individuals and institutions, and probably deterred future misconduct.

As insiders, whistleblowers are in a unique position to access information that otherwise wouldn't be available even to reporters through FOIA [Freedom of Information Act], which aren't always granted.

When it comes to rewarding whistleblowers as is done through the SEC's program, you always run into the possibility that someone is only looking for a payday, which is why these programs have controls and safeguards built into them.

Under the SEC program, the whistleblower must retain a licensed attorney. The attorney submits the information on behalf of the whistleblower and shields them from detection by redacting their identifying information.

The whistleblower and the attorney can be held accountable for any deceit or misconduct, and to be eligible for monetary awards, the information provided has to be original, it has to lead to an enforcement action that results in a significant amount of damages. It's not like the whistleblower provides a tip and automatically gets a payout. There's quite a length of time for the proceedings and the award is usually a percentage of the damages, usually 10 to 30 percent.

In fact, the acting director of FinCEN has called their pilot whistleblower program the "fourth line of defense" for financial institutions, which are typically said to have three lines of defense: their business staff, compliance departments and auditors. So that really speaks to how important this information is to help preserve the integrity of financial institutions.

You end the chapter, "Intangible Coins and Blockchains," by writing that the ease with which funds can be moved around the globe quickly and anonymously via cryptocurrency makes it "the value transfer method of choice by transnational criminal

organizations and drug cartels," and call for governments and regulators to understand the technology better and develop global standards for the industry. Do you see progress toward that goal?

We have this new technology, yet Bitcoin was created over a decade ago and although some progress has been made in this area, we still have such a long way to go in terms of regulation. Regulators are still trying to figure out not only the best way to monitor it but the best way to classify it. Is it an asset? Is it a security? There's so much disagreement, so many fine points to consider. At the same time, you have these wide fluctuations and people debating whether it'll even stay around.

Regulations for cryptocurrencies vary substantially around the world, and so far there's no global coordination. The crux is being able to strike a balance between safeguarding consumers and affording the transparency that's necessary to deter criminal activity.

Some say that the regulations we have today are solid and applicable to cryptocurrencies, but we have to acknowledge that some of these rules were established decades ago when technology was dramatically different, when the financial system was structured differently and operated differently. Some regulators are still trying to box crypto into these existing regulatory frameworks that simply don't apply.

And when it comes to money laundering regulations, you know, financial institutions, have to comply with this robust set of rules that are designed to combat money laundering and terrorist financing, including rules on due diligence, recordkeeping, reporting — any cryptocurrency, stablecoins would need to be designed in a manner that facilitates compliance with these rules.

There has been some progress in the area. The EU recently brought crypto assets, issuers and service providers under a regulatory framework for the first time. The Biden administration signed an executive order in March that entails the development of a plan to regulate cryptocurrencies. I think the pace will start to pick up in this area, but the fact remains that the development of new laws and regulations frequently can't keep with the development of new technologies.

Criminals are always ahead in this area and we're definitely seeing that here.

Could central bank digital currencies, including those under consideration by the U.S. Federal Reserve and European Central Bank, bring greater transparency and accountability to cryptocurrency?

When I talk to experts on crypto, everything I've heard is that the government-backed digital currencies are going to be the most stable, and are the future. That seems to be the way it's going. When there's government regulation and there's transparency, there's always a reduction of the type of technology used for criminal purposes.

In addition to teaching, writing and consulting, you hold talks with compliance professionals about their work. What is the question or problem you hear most often?

It's not one big problem, but there are recurring issues that I always hear about and they're all kind of tied together, such as having the necessary technology and staff to handle numerous false positives and large backlogs of transactional alerts, and knowing how much or how little information to include in suspicious activity reports, etc., because there's little guidance.

What is the right amount of due diligence to do on a client? How far back do you go? The questions all go back to not having enough resources in technology or staff, or not having enough guidance.

It's one of those disciplines where a problem in one area is going to ripple through to other areas.

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