

AML and Bank Secrecy Act Compliance: Increased Enforcement and Customer Identification Requirements

THURSDAY, SEPTEMBER 9, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Rachel Maimin, Partner, **Lowenstein Sandler**, New York

Michael M. Rosensaft, Partner, **Katten Muchin Rosenman LLP**, New York

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Recording our programs is not permitted. However, today's participants can order a recorded version of this event at a special attendee price. Please call Customer Service at 800-926-7926 ext.1 or visit Strafford's website at www.straffordpub.com.

AML and Bank Secrecy Act Compliance 2021

September 9, 2021

Michael M. Rosensaft

Katten Muchin Rosenman LLP

575 Madison Avenue

New York, NY 10022

Rachel Maimin

Lowenstein Sandler

1251 Avenue of the Americas

New York, NY 10020

Speakers



Michael M. Rosensaft
Partner
White Collar and Internal Investigations
Katten Muchin Rosenman



Rachel Maimin
Partner
White Collar Criminal Defense
Lowenstein Sandler LLP

Topics

- Anti-Money Laundering Act of 2020
- AML Compliance Guidelines
- Cryptocurrency Developments
- Enforcement
- Challenge to SEC's Power to Enforce BSA
- COVID Concerns

Anti-Money Laundering Act

Anti-Money Laundering Act of 2020

- I. Beneficial Ownership Reporting
- II. Increased Foreign Subpoena Power
- III. Effects on Cryptocurrency Companies
- IV. Expansive Whistleblower Program
- V. Enhanced Penalties
- VI. Informational Sharing between Financial Institutions

I. Beneficial Ownership Reporting

- As part of the Act, Congress enacted the Corporate Transparency Act (“CTA”), which requires disclosures about beneficial ownership information
- Information will include full legal name, residential or business address, and unique identifying number
- All beneficial owners will need to be reported: “exercises substantial control over an entity or owns or controls 25 percent or more of the ownership interests of an entity”
- Information will be placed in a FinCEN database
- Database will be available to federal law enforcement, regulators, intelligence agencies, some state agencies
- Database may also be accessible by financial institutions

I. Exemptions

- Certain Entities Are Excluded (mostly because there are already similar reporting requirements). This exemptions include:
 - Public Companies
 - Entities who filed tax returns in the last calendar year with revenue over \$5 million, more than 20 employees, and offices in the United States
 - Shelf Companies
 - Certain 501(c) charitable organizations and trusts
 - Pooled investment vehicle operated by a bank, broker-dealer, registered investment company, registered investment advisor
 - Banks
 - Insurance Companies

I. Beneficial Ownership Proposed Rule

- FinCEN will present its final rule to Congress by Jan. 1, 2022. It has asked for comments on the following questions, among others:
 - The CTA requires reporting by corporations, LLCs, and “other similar entities,” who are “other similar entities”?
 - Companies must report any “beneficial owner” who owns or controls not less than 25% or “exercises substantial control over the entity”. What does it mean to control a company? Can there be only one beneficial owner?
 - Should a trust or special purpose vehicle be included?
 - What information should FinCEN be required to provide about a company’s corporate affiliates, parents, and subsidiaries?
 - What information should FinCEN be required to provide about the reporting company’s relationship to the beneficial owner?

II. Foreign Subpoena Power

- Agencies can subpoena records from foreign entities if the entity maintains a correspondent bank account in the United States.
- Any records can then be subpoenaed from the correspondent bank, even if the illegal activity is unrelated to the correspondent account
- Legal issues
 - Conflicts with foreign law (*In re Sealed Case*)
 - Foreign privacy laws (privacy cannot be “sole basis” for quashing subpoena)
 - Personal jurisdiction over foreign banks

III. Effects on Cryptocurrency Companies

- “Financial institution” amended to include businesses involved in the exchange of “value that substitutes for currency or funds”
- Codifies FinCEN’s position that cryptocurrency exchanges are money service businesses
- Cryptocurrency “tumblers” – laundering of crypto included as MSB
- NFTs
 - Not likely that regulators would take the view that NFTs are currency as they are not fungible
 - January 2022, Congress will receive results of study by FinCEN as to whether to expand BSA reporting requirements to art dealers

IV. Whistleblower Program

- Authorizes Treasury Secretary to reward whistleblowers regarding BSA violations up to 30% of fines recovered by the government as long as fines exceed \$1 million.
- Whistleblower protections
- Whistleblower does not have to report initially to the government
- Explicitly contemplates BSA/AML compliance personnel as whistleblowers

V. Penalties

- Criminal liability for knowingly concealing, falsifying, or misrepresenting monetary transactions related to a senior foreign political figure found to be a primary money laundering concern. (10 years in prison)
- If violator was a partner, director, officer, or employee of a financial institution at the time the violation occurred, they must repay the financial institution any bonus paid that year
- Repeat violators of the BSA may be fined three times the profit gained or loss avoided, or twice the maximum statutory penalty
- It is a crime to knowingly files false beneficial information or willfully fails to provide complete beneficial information
- For beneficial owner reporting requirements, non-disclosure amasses penalties of \$500 per day

VI. Information Sharing

- Codifies FinCEN Exchange to facilitate “voluntary public-private information sharing” among government agencies and financial institutions
- Financial institutions may share SARs with foreign branches, subsidiaries, and affiliates (excluding certain jurisdictions)
- FinCEN must give feedback to financial institutions on SARs

AML Compliance Guidelines

AML Compliance: Guidelines

- Federal Reserve, FDIC, National Credit Union Administration, Office of the Comptroller of the Currency issued guidance and later FAQs to companies on the minimum requirements of a BSA/AML compliance program:
 - Customer identification program with risk-based procedures
 - a system of internal controls that assure ongoing compliance;
 - independent testing;
 - designated individual or individuals responsible for monitoring BSA/AML compliance
 - training for appropriate personnel

AML Guidelines: Independent Testing

- AML program should be tested periodically to ensure that an adequate AML program is maintained.
- Independent testing must be conducted by individuals who are not responsible for the execution of the anti-money laundering program, which may include a review by a third party.
- Testing should occur periodically.
- Upon completion of the independent testing, a written record should be made to summarize the findings, including an explicit statement about the anti-money laundering program's adequacy and effectiveness. The report should be provided to senior management, the MLRO, and any other relevant individuals.

AML Guidelines: Money Laundering Officer

- The MLRO is responsible for:
- monitoring the implementation of the AML policies;
- receiving internal reports of suspicious transactions;
- investigating matters raised in internal reports;
- filing appropriate forms and reporting suspicious transactions to the appropriate authorities;
- ensuring that all relevant staff are appropriately trained;
- conducting risk assessments;
- arranging for independent testing; and
- keeping up to date with AML developments in the law.

AML Guidelines: Training

- Training is dependent on function of employee
- Training must happen during hiring and periodically thereafter
- Records must be kept of training
- Internal training versus training by third parties

AML Guidelines: FAQs

- **“Keep Open” Requests**

- Should a financial institution maintain a suspicious account based on a “keep open” request.

AML Guidelines: FAQs

- **“Keep Open” Requests**

- Should a financial institution maintain a suspicious account based on a “keep open” request.
- A financial institution may decide to maintain an account based on a written “keep open” request from a law enforcement agency, however, it is not obligated to do so. Ultimately, the decision to maintain or close an account should be made by a financial institution in accordance with its own policies, procedures, and processes.

AML Guidelines: FAQs

- **Grand Jury Subpoenas**

- Is receipt of a grand jury subpoena sufficient to require a company to file a SAR?

AML Guidelines: FAQs

- **Grand Jury Subpoenas**

- Is receipt of a grand jury subpoena sufficient to require a company to file a SAR?
- The receipt of a law enforcement inquiry, such as a grand jury subpoena, does not by itself indicate that the criteria requiring the filing of a SAR have been met.
- The financial institution should determine whether SAR filing is necessary based on its assessment of all information available and applicable regulatory requirements. Any SAR should focus on the facts and circumstances that support a finding of suspicious activity rather than the subpoena or inquiry itself

AML Guidelines: FAQs

- **Closing Customer Accounts**

- Should a financial institution close an account for which it has filed a SAR?

AML Guidelines: FAQs

- **Closing Customer Accounts**

- Should a financial institution close an account for which it has filed a SAR?
- No. There is no BSA regulatory requirement to terminate a customer relationship after the filing of a SAR or any number of SARs. The decision to maintain or close a customer relationship as a result of the identification of suspicious activity is a determination for a financial institution to make.

AML Guidelines: FAQs

- **Adverse Media Reports**

- Should a financial institution file a SAR based on adverse media?

AML Guidelines: FAQs

- **Adverse Media Reports**

- Should a financial institution file a SAR based on adverse media?
- No. The existence of negative news related to a customer or other activity at a financial institution does not by itself indicate that the criteria requiring the filing of a SAR have been met.

AML Compliance: Cryptocurrency

AML Compliance: Cryptocurrency

- Cryptocurrency companies
 - Secretary of the Treasury Janet Yellen: “Cryptocurrencies have been used to launder the profits of online drug traffickers; they’ve been a tool to finance terrorism”
 - Under Secretary of the Treasury’s Division on Financial Crimes and Terrorism Nominee Brian Nelson: prioritize implementation of the AML Act “including new regulations around cryptocurrency”; and “prevent virtual currency . . . from undermining our AML system”
 - SEC Chair Gary Gensler: cryptocurrency is used to “skirt our laws” and is “like the Wild West . . . rife with fraud, scams, and abuse.”

AML Compliance: Cryptocurrency

- National Defense Act
 - “Financial institution” amended to include businesses involved in the exchange of “value that substitutes for currency or funds”
 - Brought in line with FinCEN’s position who had penalized cryptocurrency exchanges since 2019 for failure to file CTRs and SARs, and failure to implement a robust AML program
 - NFTS as art
 - March 9, 2021 FinCEN issued notice related to traders in antiquities and art
 - Section 6110(a) specifically provides antiquity dealers are financial institutions and directs FinCEN to implement regulations
 - Section 6110(c) requires FinCEN to study whether money laundering is facilitated through sale or art
 - 2021 NFT market exploded to more than \$2 billion by some reports

AML Compliance: Cryptocurrency

- Infrastructure Bill (H.R. 3684)
 - AML provisions would require brokers to file informational returns with IRS for \$10,000+ transactions
 - If enacted, the IRS will be able to use these reports to identify large transfers of cryptocurrency assets, conduct money laundering investigations, and secure additional taxable income.
- Who qualifies as a broker?
 - “Any person who (for consideration) regularly provides any service responsible for effectuating transfers of digital assets, including any decentralized exchange or peer-to-peer marketplace.”

AML Compliance: Cryptocurrency

- Sens. Warner and Portman wanted to include software developers, miners, node operators, and software developers.
- Sens. Toomey, Lummis, and Wyden would have excluded miners and wallet providers.
- The compromise text, supported by Treasury Secretary Yellen, would have excluded software developers, transaction validators, and node operators. Failed to pass by one vote, leaving the vague definition.
- Anonymous source from the Treasury Department told Bloomberg News that Treasury was already working on guidance to limit the scope of the term “broker”.

AML Compliance: Private Equity

AML Compliance: Private Equity and Hedgefunds

- Hedgefunds
 - FBI Report: “Hedge funds and private equity firms receive funds from entities registered in nations that maintain laws conducive to masking underlying beneficial owners, thereby making it harder for US financial institutions and regulators to determine the source of funding. Additionally, hedge funds and private equity firms have been used to facilitate transactions in support of fraud, transnational crime, and sanctions evasion.”
 - Talks about reviving 86-page Obama-era rule that required increased reporting by investment advisors who oversee private equity and hedge funds, but was dormant during Trump administration
 - Rule has already undergone comment process and could be quickly finalized

AML Compliance: Penalties

AML Compliance: Penalties

- AML penalties worldwide exceeded \$10 billion in 2020
- Recent examples
 - December 2020 - financial institution was made to pay a \$12.5 million penalty for unspecified AML violations
 - January 2021 - financial institution was fined \$390 million for AML failures including failure to file SARs
 - January 2021 - financial institution was fined \$45 million for “inadequate compliance”
 - March 2021 - FINRA imposed a \$1.5 million fine on a member for failing to submit SARs
 - August 2021 - \$100 million settlement by cryptocurrency exchange for failing to file SARs and conduct due diligence

Additional Considerations

AML Jurisdiction: Alpine v. SEC

- SEC's oversight over AML regulations challenged in *Alpine Security Corp. v. SEC*
- Comes on heels of *Liu v. SEC*, which limited powers of SEC to seek disgorgement
- Petition
 - Power to administer AML regime in BSA was vested with the Secretary of Treasury who has never delegated that power
 - SEC argues that it can enforce BSA requirements under its authority to make rules governing books and records under the Exchange Act

AML Jurisdiction

- Second Circuit
 - Walker, J., Cabranes, J., and Sack, J. noted that the Exchange Act and BSA are not in conflict and they must give effect to both. In addition, FinCEN and SEC have worked together in formulating BSA regulations.
- Amicus
 - Amicus filed by former FinCEN Officers in support of granting the cert because the Second Circuit’s decision “threatens to undermine the BSA statutory regime and harm U.S. efforts to fight money laundering”
 - Amicus filed by CATO Institute in support of granting the cert because BSA entrusted Treasury, a politically accountable agency, to enforce the Act, not the SEC,
- Response due September 20, 2021

AML and COVID

- Covid-19 has created new opportunities and channels for money laundering.
- Compliance procedures are expected to be put in place to address these threats.

Closing Thoughts

Katten



AML and Bank Secrecy Act Compliance 2021

Michael M. Rosensaft

Katten Muchin Rosenman LLP

575 Madison Avenue

New York, NY 10022

Rachel Maimin

Lowenstein Sandler

1251 Avenue of the Americas

New York, NY 10020