

Combating Money Laundering in the United States: The Recent Development

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Abstract

Rapid globalisation has created a borderless economy in the world. Thus, the need for comprehensive legislation becomes paramount to curtail the efforts of money launderers and other entities financing terrorism in and outside national borders. Although the United States of America have been enacting legislation to tackle illicit flows of proceeds of crime and have created a substantial legal framework, the laws are not enough to completely curtail money laundering. Recently, sophisticated techniques adopted by money launderers necessitated amendments to the anti-money laundering laws. Accordingly, the United States has enacted Anti-Money Laundering Act (AMLA) 2020, which amends Bank Secrecy Act 1976 to address the illicit advancements made by money launderers robustly. The Objective of the study is to highlight the recent development in the United States' effort in combating money laundering. The paper does this by first tracing the incremental development of the United States anti-money laundering laws. It then discusses the reforms AMLA 2020 made to the anti-money laundering laws. The paper adopts a doctrinal approach using the pure qualitative research method. The paper finds that AMLA 2020 significantly reformed anti-money laundering laws in the United States. However, more needs to be done to combat money laundering effectively. Therefore, the paper recommends that the United States enact unexplained wealth order law to complement the law enforcement efforts in deploying asset forfeiture laws to forfeit to the government laundered proceeds of crime from criminals.

Keywords: Money Laundering, Terrorism Financing, Unexplained Wealth Order, Whistleblowing, Corporate Transparency.

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1.1 Introduction

Due to the severe and highly sophisticated forms of money laundering and its threats to human rights, democracy, and the rule of law, money laundering has been of concern to political leaders and policymakers worldwide. Criminals in the United States use Financial Institutions and Designated Non-Financial Businesses (DNFB) to hide proceeds of crime.¹ This study appraises the United States approach to combating money laundering by devising innovative and more efficient responses. Recent events showed that criminal groups build financial empires to make executing money laundering schemes easy. The fight against money laundering has become an international effort, and its' regulations now target terrorist's activities, drugs deal, arms sales, fraud and tax evasion, among others. The United States efforts to combat money laundering since the beginning of the 1970s² are built on strategies aiming at confronting criminal organisations through their operations to deprive them of the means to act, unravel the network of their financial links and financing methods, and increase knowledge of how better to combat them.³

Financial Action Task Force defines money laundering by capturing the general elements of the offence:

The conversion or transfer of property, knowing that such property is derived from [an] offence..., to conceal or disguise the illicit origin of the property or of assisting any person who is involved in the commission of such an offence...to evade the legal consequences of his actions; The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from and offence...; The acquisition, possession, or use of property, knowing, at the time of receipt, that such property was derived from an offence...⁴

Rider, describes money laundering as ‘...a process, which obscures the origin of money and its source...a wide approach, which would encompass transactions designed to hide money as well as wash dirty money to clean.’⁵ Thus, money launderers use various strategies

¹ US v Peter Berlin and Others 99 Cr. 914 (SWK) (Lucy Edwards, a Vice President of the Bank of New York, Eastern European Division, helped her husband Peter Berlin to launder Russian criminal assets)

² The United States first enacted Bank Secrecy Act 1970 to launch a direct assault against money laundering

³ Jean-François Thony, ‘Money Laundering and Terrorism Financing: An Overview

<<https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/thony.pdf>> accessed on 07 November 2021

⁴FATF, Annual Report (2019-2020) < [https://www.fatf-](https://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF-annual-report-2019-2020.pdf)

[gafi.org/media/fatf/documents/brochuresannualreports/FATF-annual-report-2019-2020.pdf](https://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF-annual-report-2019-2020.pdf) > Accessed 07 November 2021

⁵Barry A K Rider, ‘Recovering the Proceeds of Corruption’ [2007] 10(1) Journal of Money Laundering Control 5, 15; By way of contrast, TF has been described as ‘the process of conducting financial transactions with clean money for the purpose of concealing or disguising the future use of that money to commit a criminal act (see Stefan D Cassella, ‘Reverse Money Laundering’ [2003] 7 Journal of Money Laundering

to launder the proceeds of crime to avoid raising suspicions of law enforcement agencies. The United States has monitoring systems to enable financial institutions and DNFBs to detect suspicious transactions and report the same to law enforcement agencies. Despite that, a considerable amount of proceeds of crime is being laundered. The United Nations office on drugs and crime (UNODC) estimates that the amount of money laundered globally in one year is 2-5% of global Gross Domestic Product(GDP).⁶ Money laundering has become conflated with other forms of financial and business crime. It is sometimes used more generally to include misuse of the financial system, terrorism financing and evasion of international sanctions.⁷

Concealing the sources of illicit money constitutes money laundering, whether intentional or simply refusing to use financial services that identify or track the sources of such money.⁸ Money laundering is a serious financial crime that is committed by both white-collar and street criminals.⁹ Online banking and cryptocurrencies facilitate money laundering as they have made the transfer and withdrawal of money without detection easy for criminals. However, as the United States has taken a leading role in combating money laundering, financial and non-institutions, and DBFB such as banks and casinos have put anti-money laundering measures to detect and prevent money laundering.¹⁰

The paper proceeds with explaining what money laundering is and the methods through which the money laundering scheme is carried out. It then discusses the extent or magnitude of money laundering. The paper analyses major US anti-money laundering laws. In particular, the paper analyses how Anti-Money Laundering Act (AMLA) 2020 reforms the AML laws and strengthens whistleblower law in the United States. The paper then wraps up with a conclusion and recommendation. The paper concludes that AMLA 2020 will enhance the fight against money laundering. However, more needs to be done. In that regard, the paper recommends that US authorities should enact the "Unexplained Wealth

Control 92, 93); The United Nation's defines TF broadly, in that it classifies assisting terrorist with travel documents as terrorism financing (see International Convention for the Suppression of the Financing of Terrorism (ICSFT) 1999 Article 1(1); However, TACT 2000 s 14 defines "terrorist property" even more broadly (please see Clive Walker, *The Blackstone's Guide to The Anti-Terrorism Legislation* (3rd edn OUP 2014) 83); TF offences are contained in ss 15 – 18 of the TACT 2000

⁶ Thony (n3)

⁷ Sirajo Yakubu, *A Critical Appraisal of the Law and Practice Relating to Money Laundering in the USA and UK* (PhD Thesis, University of London 2017) 234, 243, 245-246 (Riggs Bank failed to establish and maintain AML compliance as required by law. Other incidences of misconduct include: Laundering of hundreds of millions of US dollars by UBS Zurich to countries like Iraq, Iran, Libya in violation of the OFAC (US) sanctions on those countries

⁸ Ashes M and Reid P, *Anti-Money Laundering: Risks, Compliance and Governance* (Thomson Reuters 2013)

⁹ Israel JH and others, 'White Collar Crime: Law and Practice' (2nd edn Thomson West 2003)

¹⁰ John K Villa, 'A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes' [1998] 37 *Catholic University Law Review* 489, 491; see also 31 USC section 5318(h) (Bank Secrecy Act 1970)

Order" law to help law enforcement in their efforts to recover laundered proceeds of crime. The paper commences with an explanation of money laundering.

1.2 Typical Money-Laundering Scheme

Money laundering typically involves three stages which are placement, layering and integration.¹¹

i. Placement is when cash is introduced into the financial system, generally by depositing cash directly or using money mules. A money mule is a person who knowingly or unknowingly transfers proceeds of crime, such as stolen money; money obtained through corruption, drug trafficking, tax evasion, human trafficking, forex violation, etc., on behalf of others, usually through his bank account.

ii. Layering is when the money is moved around by carrying out complex financial transactions to disguise its illegal source. The purpose of this is to create confusion by transferring the money through various accounts.¹²

iii. Integration is when one acquires wealth generated from the transactions of illegal money.¹³ Some of these steps may be omitted depending on particular circumstances. For instance, proceeds of crime that are already in the financial system would not be placed.¹⁴ On the other hand, money laundering could be more complex than the highlight above.

1.3 Methods through which Illicit Proceeds are Laundered

Money laundering can take several forms, although most methodology can be categorised into one of the following types

i. Structuring

Structuring is also known as smurfing. It is a method of placement whereby cash is broken into smaller amounts below the threshold of USD 10,000:00 and deposited into a bank account. The purpose is to defeat suspicion of money laundering and prevent a bank from filing a currency transaction report (CTR) otherwise required by the law. A sub-component of this is smaller amounts of cash to purchase bearer instruments such as money orders and eventually deposit them in small amounts.¹⁵

¹¹ Richard W Harms and others. 'Nature of Money Laundering' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (CCE Editions Limited) 6-950

¹² *ibid*

¹³ Friedrich Schneider and Ursula Windischbauer, 'Money laundering: some facts' *European Journal of Law and Economics* (2010)

<https://www.researchgate.net/publication/23534449_Money_Laundering_Some_Facts> accessed 07 November 2021

¹⁴ Thony (n3)

¹⁵ Jean-Loup Richet, 'Laundering Money Online: a review of cybercriminals methods' (2013) <<https://www.researchgate.net/publication/281064013>> accessed 07 November 2021

ii. *Bulk Cash Smuggling*

Bulk cash smuggling is where cash is physically smuggled across the border to another jurisdiction and depositing it in a foreign bank that offers bank secrecy or less rigorous money laundering enforcement.

iii. *Cash Intensive Businesses*

Cash intensive business involves businesses typically expected to receive its revenue as cash. Such businesses use their accounts to deposit some money derived criminally and claim that it is legitimate earnings. It is the most complex form of money laundering. Some businesses are compatible with this method of money laundering because they have a large ratio between revenue and costs, which makes it hard to identify inconsistencies between revenues and expenses. Such businesses include parking structures, strip clubs, tanning salons, car washes, arcades, bars, restaurants and casinos.¹⁶

iv. *Trade Based Laundering*

In this type of scheme, criminals use commercial transactions to launder illicit gains. Here, businesses under or overvalue their invoices to disguise the movement of money.¹⁷ The art market, among others, is being exploited as a perfect vehicle for money laundering. It is popular due to its numerous unique aspects, such as the subjective value of artworks and the secretive nature of auction houses on the identity of the purchasers and sellers.¹⁸

v. *Shell Companies and Trusts*

Trusts and shell companies depending on the jurisdiction, are allowed to conceal the actual owners of money.¹⁹ Law enforcement has long felt that the lack of a national beneficial ownership registry for business entities facilitated criminals' use of shell companies to hold assets and conduct financial transactions.²⁰

vi. *Round Tripping*

With this method, money is deposited in a foreign company and then transported back as a foreign direct investment which is exempted from taxation. Alternatively, one can transfer money to a law firm or a similar business as funds on account of fees, then cancel the retainer. When the money is remitted back, it will be presented as litigation proceeds.

¹⁶ *ibid*

¹⁷ Naheem Muhammad Ahmad, 'Trade-Based Money Laundering: Towards a Working Definition for the Banking Sector (2015) *Journal of Money Laundering Control*. 18(4) 513-524

¹⁸ Graham Bowley and William K Rashbaum, 'Has the Art Market Become an Unwitting Partner in Crime?' (2017) *The New York Times* (New York 19 February 2017)

<<https://www.nytimes.com/2017/02/19/arts/design/has-the-art-market-become-an-unwitting-partner-in-crime.html>> accessed 07 November 2021

¹⁹ Financial Action Task Force, "Global Money Laundering and Terrorist Financing Threat Assessment" (2010) <<https://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf>> accessed 07 November 2021

²⁰ US Department of the Treasury, 'National Strategy for Combating Terrorists and other Illicit Financing 2020' <https://home.treasury.gov/news/press-releases/sm902> accessed 07 November 2021

vii. *Bank Capture*

This method is where criminals and money launderers buy a controlling interest in a bank in a country with less strict money laundering laws and move money through the bank without scrutiny.²¹

viii. *Digital Electronic Money*

Cybercriminals use various techniques to launder money. Research revealed new techniques that cybercriminals were using. Criminals use digital currency exchangers to convert dollars into a digital currency called Liberty Reserve, which could be sent and received anonymously. For a small fee, the receiver converts the Liberty Reserve currency back into cash.²² The Liberty Reserve was shut down by US authorities charging its founder and others with money laundering.²³ Online gaming, such as Second Life and World of Warcraft, is another increasingly common way of laundering money. It is now possible to convert cash into virtual goods, services or virtual currency and later convert it back into cash.²⁴ Drug dealers use Bitcoin to launder the proceeds of drug trafficking.²⁵ Countries such as Australia are taking legal measures to regulate the cryptocurrency market. The essence is to mitigate the money laundering risk of cryptocurrency, such as Bitcoin.²⁶

1.4 Magnitude/Extent of Money Laundering

The quantum of proceeds of crime being laundered remains unknown due to the secretive nature of money laundering.²⁷ An intergovernmental body set up to combat money laundering known as the Financial Action Task Force (FATF) stated that;

“Due to the illegal nature of the transactions, precise statistics are not available, and it is therefore impossible to produce a definitive estimate of the amount of money that is globally laundered every year. The FATF, therefore, does not publish any figure in this regard”.²⁸ Irrespective of the difficulty in assessing the exact amount of money laundered, money laundering poses a significant policy concern for governments worldwide.²⁹ As a result, governments and international bodies have employed strategies to deter and

²¹ Richet (n16)

²² *ibid*

²³ Jonathan , ‘Liberty Reserve Founder must face on 6 BillioLaundering Case in US’ Reuters (New York 23 September 2015) <<https://www.reuters.com/article/usa-cybersecurity-liberty-reserve-idUSL1N11T2G420150923>> accessed 07 November 2021; Kim Zetter, Wired <<https://www.wired.com/2013/05/liberty-reserve-indicted/>> accessed 07 November 2021

²⁴ Olivia Solon, ‘Cybercriminals Launder Money Using in Game Currencies’ (Wired 28 October 2013) <<https://www.wired.co.uk/article/money-laundering-online>> accessed 07 November 2021

²⁵ FATF (n 20)

²⁶ David Chau, ‘Bitcoin One Step Closer to Being Regulated in Australia Under New Anti-Money Laundering Laws’ (ABC 2017) <<https://www.abc.net.au/news/2017-10-23/bitcoin-one-step-closer-to-being-regulated-in-australia/9058582>> accessed 10September 2021

²⁷ Peter Reuter, ‘Chasing Dirty Money’ (Peterson 2004)

²⁸ FATF (n20)

²⁹ Reuter (n29)

apprehend money launderers. Financial institutions have also devised ways to prevent and detect transactions involving dirty money due to government requirements and protect their reputation.³⁰

Money laundering has existed for as long as large scale criminal enterprises have. Thus, anti-money laundering laws are essential to combat money laundering, and terrorist financing as both crimes involve the transmission of money through the financial system. The only difference is that money laundering is concerned with where the money came from, while terrorist financing deals with where the money is going. According to the Basel anti-money laundering index, the top 10 countries currently facing the most significant risk of money laundering are Mozambique (8.22 risk score), Laos (8.21), Myanmar (7.93), Afghanistan (7.76), Liberia (7.35), Haiti (7.34), Kenya (7.33), Vietnam (7.30), Benin (7.27), and Sierra Leone (7.20).³¹ In 2019 the top ten countries least at risk of money laundering are Estonia (2.68 risk score), Finland (3.17), New Zealand (3.18), Macedonia (3.22), Sweden (3.51), Bulgaria (3.51) Lithuania (3.55), Uruguay (3.58), Slovenia (3.70), and Israel (3.76).³²

1.5 Major US Anti-Money Laundering Laws

1.5.1 Bank Secrecy Act (BSA) 1970

Congress enacted Bank Secrecy Act 1970 to halt banks' use for tax evasion, tax fraud, money laundering, and other financial crimes.³³ The provisions of the Bank Secrecy Act made it compulsory for financial institutions to file currency transaction reports (CTR), suspicious activity reports (SAR) and maintain record keeping.³⁴ In 2004, the Bank Secrecy Act was amended by the Intelligence Reform and Terrorism Prevention Act 2004, which requires specific financial institutions to report cross-border fund transfers as determined by the Secretary of the Treasury.³⁵ Where a bank handles any transaction in currency of more than \$10,000, it must send a currency transaction report to Financial Crimes Enforcement Network (FinCEN). Suspicious activity reports sent to FinCEN are confidential. Any employee of a financial institution that suspects a transaction related to terrorist funding, money laundering, or other illegal activity can report without fear.³⁶ Since the Patriot Act was signed, guidelines for proper AML protocols have become stricter, and

³⁰ Yakubu (n7) p240

³¹ Basel AML Index 2019 <<https://baselgovernance.org/sites/default/files/2019-08/Basel%20AML%20Index%202019.pdf>> accessed 07 November 2021

³² *ibid*

³³ 31 USC section 5311 stated the purpose Bank Secrecy Act 1970 (except section 5315) to require specific reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

³⁴ Bank Secrecy Act 1970

³⁵ Intelligence Reform and Terrorism Prevention Act 2004

³⁶ 31 USC section 5318(g)(2) (these statutes prohibit tipping off) SARs are treated confidentially by both the filing entity and FINCEN

the penalties for failing to meet the protocols have become harsher.³⁷ Penalties include criminal and civil money penalties. Consequently, financial institutions file SARs as a safety measure even if their internal investigations find nothing wrong with an initially suspicious-looking transaction.³⁸

1.5.2 Money Laundering Control Act 1986

Money laundering was not a crime under the Bank Secrecy Act as a launderer who complied with recordkeeping and reporting requirements committed no offence. The Money Laundering Control Act 1986 made money laundering a criminal offence with maximum penalties of 20 years jail term and \$500,000 in fines for each violation.³⁹ Section 1956 created three offences. It provides that a person commits an offence if he transports, transmits or transfer funds from or into the US with the intention to commit an act through which financial benefit can be obtained.⁴⁰ A person commits an offence if he transports, transmits or transfer proceeds of crime to conceal or disguise its sources or ownership.⁴¹ A person commits a crime if he transports, transmit or transfer money however obtained to avoid a transaction reporting requirement under a State or Federal Law.⁴²

1.5.3 Patriot Act 2001

The USA Patriot Act amended the Bank Secrecy Act 1970. The implementation of the Patriot Act has led to a reduction in money laundering and financing of terrorism through the identification of correspondent bank account owners. The Patriot Act encourages sharing of information between the government and financial institutions.⁴³ The Act prohibits the use of certain types of bank accounts,⁴⁴ adds penalties for non-compliance,⁴⁵ and encourages financial institutions to report suspicious accounts to the government.⁴⁶ Financial institutions need to conduct strict background checks as it is necessary to prevent money laundering because criminals escape by investing through complex ownership and company structures.⁴⁷ Additionally, Section 352 requires financial institutions to establish Anti Money Laundering programs which include having an internal compliance officer,

³⁷ Yakubu (n7) 62

³⁸ Jimmy Yicheng Huang, 'Effectiveness of US anti-money laundering regulations and HSBC case study (2015) 18(4) Journal of Money Laundering 525, 526

³⁹ Money Laundering Control Act 1986, s 1956 (a)(1)-(3) and (b) (2012)

⁴⁰ Ibid (a)(2)(A)(2012)

⁴¹ Ibid (a)(2)(B)(i)(2012)

⁴² Ibid (a)(2)(B)(ii)(2012)

⁴³ Patriot Act 2001, s314

⁴⁴ Ibid s313

⁴⁵ Ibid s329& 315

⁴⁶ Ibid s324

⁴⁷ Enrich J Gauvin, 'Bringing out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism' [2003] 55 Baylor Law Review 955, 968

conducting an employee-training program on AML regulations, application of an independent audit function and the application of internal money laundering detection procedures, together with a "Know Your Customer"— a due diligence program – that ascertains the source of assets of prospective clients.⁴⁸ 'Know your Customer' entails employees knowing the customer's identity and understanding the types of transactions the customer is likely to engage. Thus, by knowing one's customer, banks can identify rare or suspicious transactions which may be a sign of money laundering.⁴⁹

The enactment of the Patriot Act in the US due to the 11 September attacks in 2001 influenced other countries to enact similar legislation on money laundering to combat terrorism financing.⁵⁰ The Group of Seven (G7) nations used the Financial Action Task Force on money laundering to put pressure on governments worldwide to increase surveillance of financial transactions and share such information between countries. This development had a positive effect as several countries improved their money laundering laws and strictly monitored financial transactions. Any financial institution that was in breach of such laws faced fines – HSBC, which was fined USD 1.9 billion in December 2012⁵¹ and BNP Paribas, which was fined USD 8.9 billion in July 2014 by the US government.⁵² The United States strengthened border controls to disrupt the smuggling of proceeds of crime across its borders; and introduced central transaction reporting systems where all financial institutions have to report all financial transactions electronically.⁵³

1.5.4 Asset Forfeiture

Initially, the belief was that the most effective way to neutralise organised crime was by removing their leaders.⁵⁴ However, incarcerating leaders of organised criminal groups disrupt neither money laundering nor organised crime groups as the groups have carefully nurtured a succession plan.⁵⁵ As a result, the organisations survived, making the next

⁴⁸ Patriot Act 2001, s 352

⁴⁹ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Convention against Transnational Organized Crime

⁵⁰ Nigel Morris-Cotterill Nigel, 'A Brief History of Money Laundering' 1999

<https://www.antimoneylaundering.net/public/Counter-Money_Laundering/brief-history-money-laundering>
accessed 07 November 2021

⁵¹ News, HSBC agrees 1.9 billion US Penalties (BBC 2012) <<https://www.bbc.com/news/business-20673466>>
accessed 07 November 2021

⁵² News, 'BNP Paribas Agrees to Pay 9 billion to Settle Sanction Violations (2014)
<<https://www.bbc.com/news/business-28099694>>

⁵³ 524 U.S. 321, 353-54; Intelligence Reform and Terrorism Prevention Act of 2004, Pub L No 108-458, section 6302, 118 Stat 3638 (2004); United States v Bajakajian; Also see Sirajo Yakubu pp 49, 60, 221,

⁵⁴ Yakubu p 120

⁵⁵ Earl Johnson, 'Organised Crime: Challenge to the American Legal System' [1963] 54 Journal of Criminal Law, Criminology and Political Science 1, 21-23

attempt by the authorities to interfere with them more difficult.⁵⁶ Asset forfeiture is the process by which the government confiscates and takes ownership of real and personal property that a person illegally obtained.⁵⁷ Racketeer Influenced and Corrupt Organizations Act (RICO) 1970, Anti-Money Laundering Act of 1992, and Civil Forfeiture Reform Act 2002 are some of the statutes that govern the practice of asset forfeiture in the United States. Forfeiture or confiscation is one of the strategic weapons government deploys to disrupt and dismantle the economic infrastructure of criminal organisations.⁵⁸ Confiscating the criminal's assets proves to be one of the best deterrents and punishments.⁵⁹ Any money or property that can be traced directly or indirectly to the underlying crime is subject to forfeiture. Therefore, if the assets were earned while committing a crime, that property is subject to confiscation.

The asset forfeiture scheme has several policy goals. As mentioned earlier, imprisonment of criminals alone was never substantially disruptive to many criminal organisations as any vacant position is promptly filled. Thus, an attack against their criminal assets becomes necessary. Confiscation denies an offender the opportunity to benefit from his crime or to commit further offences in the future.⁶⁰ Another important goal of forfeiture is victim restitution by distributing forfeited assets among the victims of the crimes. In the absence of such victims, the government can keep the forfeited assets and improve law enforcement activities.⁶¹ Asset forfeiture is another mechanism used by the government to fight money laundering and other crimes.⁶² It serves as punishment and sends a strong message to society that crime does not pay, and an expensive criminal lifestyle is not permanent.⁶³

However, lack of evidence makes confiscation even harder. In most cases, while the criminal property is situated in the USA or UK, evidence may be abroad. In many other cases, criminals have laundered the proceeds of crime successfully. To demonstrate how

⁵⁶ Andrew Haynes, 'Money Laundering and Changes in International Banking Regulation' (1993) *Journal of International Banking Law*

⁵⁷ Baicker K and Jacobson M, 'Finders Keepers: Forfeiture Laws, Policing Incentives and Local Budgets' [2007] 91 *Journal of Public Economics*

⁵⁸ Anne C. Pogue, 'If It Weren't for the Flip Side - Can the USA Patriot Act Help the U.S. Pursue Drug Dealers and Terrorists Overseas, without Overstepping Constitutional Boundaries at Home' (2005) *Cornell Journal of Law and Public Policy* Vol. 14

⁵⁹ Andrew Haynes, *Money Laundering and Changes in International Banking Regulation* 1993 *Journal of International Banking Law*

⁶⁰ Owen Sucoff, 'From the Court House to the Police Station: Combatting the dual biases that surround Federal Money-Laundering Asset Forfeiture' [2012] 46 *New England Law Review* 93, 94

⁶¹ Anne C. Pogue, 'If It Weren't for the Flip Side - Can the USA Patriot Act Help the U.S. Pursue Drug Dealers and Terrorists Overseas, without Overstepping Constitutional Boundaries at Home' (2005) 14 *Cornell Journal of Law and Public Policy*

⁶² *ibid*

⁶³ Boles JR 'Criminalising the Problem of Unexplained Wealth: Illicit Enrichment Offences and Human Rights Violations' [2014] 17 *New York University Journal of Legislation and Public Policy*

difficult it is to confiscate criminal assets, in the UK, law enforcement could only 26 pence out of each £100 of proceeds of crime in 2012/2013 fiscal year.⁶⁴

The initial analysis is in line with the position of the major AML scholars. Law enforcement always finds it difficult to prosecute a crime committed elsewhere or where evidence is in another jurisdiction.⁶⁵ Although US AML laws have long-arm jurisdiction, such as the power to subpoena records from foreign banks that maintain a correspondent banking relationship with a US bank,⁶⁶ international forfeiture remains a dream. There are several issues in dealing with international asset forfeiture. Two factors need to be considered. The first is determining whether a forfeiture statute may be applied internationally and whether using the statute extraterritorially would violate principles of international law.⁶⁷ Suppose it appears a statute may be applied internationally. In that case, some countries may agree with U.S. policy on combating international crime and give their full cooperation. On the other hand, some foreign jurisdictions may not be so accommodating. The second factor is the relationship existing between the United States and the jurisdiction holding the potential evidence. Although the United States is influential in the comity of nations, a cordial diplomatic relationship is required. Therefore, good diplomatic relation is needed for any request of mutual legal assistance to work.

This gap in the US AML laws makes disruption of illicit flows difficult, leaving a window for criminals, such as foreign politically exposed persons, drug dealers, and tax evaders, to continue to enjoy their laundered proceeds of crime. Consequently, the United States needs to introduce another legal measure that will make asset forfeiture, especially where the predicate crime was committed abroad, or the evidence is located in another jurisdiction.

1.6 Anti-Money Laundering Act 2020:

AMLA 2020 is the recent development in the United States' effort at combating money laundering. It reformed the US AML laws substantially.

1.6.1 Corporate Transparency

AMLA 2020 introduced a beneficial ownership requirement that mandates firms, both small and large, to provide certain information about their owners to the Financial Crimes Enforcement Network (FinCEN). The rationale is to prevent the misuse of shell companies by money launderers to anonymise legitimate financial information. The information needed includes name, date of birth, residential and business address, and means of identification, such as passport and number. Failure to comply attracts punishments, which

⁶⁴ National Audit Office, *Confiscation Orders* (HL 738, 2013-2014) p5

⁶⁵ Jack de Kluever, 'International Forfeiture Cooperation' *United States Attorneys' Bulletin* (2013) 61(5)

⁶⁶ 31 U.S.C. s. 5318(k)

⁶⁷ Anne C. Pogue, *If It Weren't for the Flip Side - Can the USA Patriot Act Help the U.S. Pursue Drug Dealers and Terrorists Overseas, without Overstepping Constitutional Boundaries at Home*, (2005) 14 *Cornell Journal of Law and Public Policy*

include fine or imprisonment or both. AMLA 2020 requires FINCEN to create a national database of beneficial owners. However, this information is not accessible to the general public.⁶⁸ Law enforcement is now using this information in financial investigations. The beneficial ownership data collected and verified by financial institutions provide answers and potential leads for interviews, subpoenas, and other activities. It yields evidence of criminal intent when true ownership is misrepresented.⁶⁹

1.6.2 Increased Money Laundering Penalties

AMLA 2020 also increased money laundering penalties as anyone found guilty of violating anti-money laundering provisions will face ten years imprisonment. Also, there is a USD 1 million fine for hiding information from financial institutions in transactions over USD 1 million that involves a politically exposed person or their associates or hiding information that involves companies laundering money.⁷⁰ AMLA 2020 also added penalties to persons convicted of BSA violations. The penalties include, where an individual is found guilty of breaching BSA provisions, will pay a fine equal to the profit they gained from their violation.⁷¹ Persons that egregiously breach BSA provisions are banned from sitting on the boards of any other US registered financial institution for ten years.⁷² Those who have repeatedly breached BSA provisions may be subject to increased penalties at the discretion of the Treasury Secretary.⁷³

1.6.3 Expanded Government Subpoena Powers

In addition, AMLA 2020 introduced numerous measures to aid in fighting international money laundering. It also expanded the powers of the US Treasury in issuing subpoenas to foreign banks for records to investigate those involved in money laundering.⁷⁴ AMLA 2020 also expands the government's subpoena power over foreign bank accounts. Previously, the Department of Justice or Treasury could issue subpoenas to any foreign bank maintaining a correspondent account in the United States for records related to such correspondent account[s]. AMLA 2020 now authorised the government to request records relating to correspondent accounts or any account at the foreign bank subject to a BSA/anti-money laundering investigation, a civil forfeiture action, or any federal criminal investigation.⁷⁵ The revised s. 5318(k) also requires foreign banks to authenticate the requested records, making it easier for prosecutors to use them at trial. If the bank fails to comply with the subpoena requirements of new s.5318(k), the government may assess civil

⁶⁸ 31 U.S.C. s 5336

⁶⁹ US Department of the Treasury, 'National Strategy for Combating Terrorists and other Illicit Financing 2020' <https://home.treasury.gov/news/press-releases/sm902> accessed 07 November 2021

⁷⁰ Anti-Money Laundering Act 2020 inserting a new section into BSA 1970 – 31 USC s 5335

⁷¹ AMLA 2020 s 6312 inserting 31 USC s 5322(e)

⁷² AMLA 2020 s 6310 inserting 31 USC s 5321(g)

⁷³ AMLA 2020 s 6310 inserting 31 USC s 5321(f)

⁷⁴ AMLA 2020 s 6308 replacing Para 3 to 31 U.S.C. s. 5318(k)

⁷⁵ AMLA 2020, s 6308 (replacing paragraph (3) to 31 USC s 5318(k))

penalties of up to \$50,000 per day and seek an order from the U.S. district court compelling the foreign bank to appear and produce records or be held in contempt.⁷⁶

The implications of these new provisions are potentially significant. The changes are meant to allow federal investigators to obtain foreign bank records more easily and not have to rely principally on the mutual legal assistance treaty (MLAT) process or other international agreements. Although the law aims to combat money laundering, its broad scope (permitting subpoenas in connection with “any investigation of a violation of a criminal law of the United States”) means that law enforcement may use it to target other serious criminal conduct, including high-profile white-collar crimes, such as corruption, tax evasion, FCPA violations, as well as international drug trafficking and national security violations.⁷⁷

1.6.4 Whistle blowing

AMLA 2020 also extensively reformed whistle blowing as an anti-money laundering measure in the United States.⁷⁸ AMLA 2020 aims to 'improve coordination and information sharing among law enforcement agencies whose duty is to investigate and enforce anti-money laundering regulations. To achieve its aim, AMLA 2020 Anti-money laundering act offers rewards to individuals who report any violations of anti-money laundering law and protects them from any retaliation. The new whistleblower protection provision prohibits employers from engaging in retaliatory acts, such as discharging, demoting, threatening or harassing employees who provide information relating to money laundering and BSA violations to the Attorney General, Secretary of Treasury, regulators and others.⁷⁹ A whistleblower, according to the Act, is one who reports a violation, including those who report violations as part of their job duties. This broad definition means compliance officers, auditors, and attorneys who normally learn of violations during the normal course of their business can also benefit from the whistleblower provisions.⁸⁰

The Act provides that the Secretary of the Treasury 'shall' pay an award to any whistleblower who voluntarily provides information that leads to successful enforcement action. The word 'shall' was used to replace the word 'may', which mandates the department always to award a whistleblower.⁸¹ This change in the law, which suggests that the

⁷⁶ *ibid*

⁷⁷ Holland and Knight, Key provisions of the Anti-Money Laundering Act 2020

<<https://www.hklaw.com/en/insights/publications/2021/01/key-provisions-of-the-anti-money-laundering-act-of-2020>> accessed 25 September 2021

⁷⁸ Anti-Money Laundering Act 2020 s. 6314

⁷⁹ Anti-Money Laundering Act 2020, s. 6314(a) (adding 31 USC s 5323(g).

⁸⁰ Kevin J. Harnisch Glen Barrentine Ilana Beth Sinkin, 'New whistleblower provisions for reporting AML violations' (2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/d91b7bc8/new-whistleblower-provisions-for-reporting-aml-violations>> accessed 07 November 2021

⁸¹ Marilyn Gabriela Robb, 'Strengthened Whistleblower Provisions in the Anti-Money Laundering Act of 2020' (2021) XI (112) *The National Law Review*.

government will always reward such reports, is likely to encourage more whistleblowers to provide useful information voluntarily. Under AMLA 2020, the award is up to 30% of the total monetary sanctions⁸² unlike the previous program, which limited the awards to \$150,000. Furthermore, establishing anti-money laundering and counter-terrorist financing fund to pay whistleblower rewards will help combat money laundering, financial crimes, and terrorism.⁸³

A whistleblower can report to the Department of Justice, Treasury Department, his employer, or someone who the whistleblower reasonably believes has the power and authority to investigate or address the violations of anti-money laundering laws, rules, or rules regulations. Even if it is part of the whistleblower's job to report on such matters, the report may still qualify under the anti-money laundering act. However, the amount to be paid to a whistleblower as a reward is determined based on certain factors. The Secretary of the Treasury is required to consider the significance of the information provided, the degree of the assistance supplied and any other relevant factors.⁸⁴

AMLA 2020 provides better protection to whistleblowers. It prohibits employers from discriminating against employees during or after their employment because the employee exposed violations of US money-laundering laws. Retaliation or discrimination can be in the form of discharge, demotion, suspension, threats and harassment of an employee. The most common type of retaliation is the abrupt termination of an appointment. However, several other activities are considered retaliation, such as a sudden extreme increase in workloads, cutting down hours, making task completion impossible, etc.⁸⁵ Any whistleblower being discriminated against on this basis may file a complaint with the Department of Labor. The department has to issue its decision within 180 days of filing the complaint, failing which the whistleblower can bring an action in court against the employer. The court may instruct the employer to reinstate the whistleblower, double back pay or pay compensatory damages, including counsel fees and litigation costs and 'any other appropriate remedy'.⁸⁶

1.6.5 Additional Measures

AMLA 2020 includes a host of additional measures. Criminals have turned to Art and Crypto Currency markets because of the anonymity they offer. Thus, AMLA 2020 extended the scope of BSA Regulations on anti-money laundering to cover crypto

⁸² Anti-Money Laundering Act 2020, s 6314(a) (adding 31 USC s 5323(b)(1))

⁸³ Sinkin (n84)

⁸⁴ Anti-Money Laundering Act 2020, 31 USC § 5323(c)(1)(B))

⁸⁵ Banisar David, 'Whistleblowing: International Standards and Developments in Corruption and Transparency: Debating the Frontiers between State, Market and Society' I. Sandoval ed. (2011) World Bank Institute for Social Research, UNAMWashington DC

⁸⁶ Marilyn Gabriela Robb, 'Strengthened Whistleblower Provisions in the Anti-Money Laundering Act of 2020' (2021) XI (112) The National Law Review.

currencies and its service providers; art dealers, advisors and consultants. Moreover, the Act expanded the resources dedicated to the enforcement of AML laws. AMLA 2020 amending the BSA to state – consistent with the position taken by regulators for several years – that those who exchange or transmit value that substitutes for currency (e.g., crypto currency) are subject to BSA registration and compliance requirements.⁸⁷ AMLA 2020 also directs Treasury to lead a review on whether to adjust dollar thresholds for CTR and SAR filing and amended the definition of "financial institution" to include those engaged in the business of dealing antiquities.⁸⁸ Information sharing program between financial institutions, foreign branches and affiliates has also been strengthened.⁸⁹

1.6.6 Fill in the Gap: Unexplained Wealth Order

The paper has analysed the United States' relentless efforts in fighting money laundering. The anti-money laundering legislation in the United States have developed over the years; nonetheless, they still have their strengths and weaknesses. The provisions of AMLA 2020 show the US government's focus and determination in fighting money laundering and punishing non-compliance with the anti-money laundering laws. However, lack of evidence, especially where the predicate crime was committed abroad or where the evidence is in another jurisdiction, hinders hinder successful conviction and/or forfeiture. Consequently, the law and practice relating to money laundering in the United States need to be reviewed continuously to close any loophole. The purpose is to improve the efficiency of the laws as fighting criminal behaviours in the financial sector, including money laundering activities, is not an easy task. It is essential to mention that criminals are constantly devising new ways, putting them ahead of law enforcement.

As mentioned above, one of the greatest weapons against financial crime and money laundering is forfeiture of laundered proceeds of crime. Forfeiture deprives criminals of the enjoyment of ill-gotten wealth and reduces their ability to fight criminal prosecution against them. However, evidence is always lacking to support confiscation because, in most cases, the evidence is located abroad while the ill-gotten wealth is within reach of the law enforcement. Thus, Unexplained Wealth Order is the right answer.

In the United Kingdom, CFA 2017 defines UWO as an order requiring the respondent to provide a statement: (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made, (b) explaining how the respondent obtained the property (including how any costs incurred in obtaining it were met), (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as

⁸⁷ *ibid*

⁸⁸ *ibid*

⁸⁹ USA PATRIOT Act Section 314(b) permits financial institutions, upon providing notice to the United States Department of the Treasury, to share information with one another to identify and report to the federal government activities that may involve money laundering or terrorist activity.

may be specified in the order, and (d) setting out such other information regarding the property as may be so specified.⁹⁰ The UWO procedure allows the law enforcement⁹¹ to apply to the High Court for an order to compel the respondent to explain the nature and extent of his interest in the property in respect of which the order is made and how he obtained the property, including how the cost is met.⁹² The respondent could be the owner or someone having possession of the property.

Before the court issues the order, law enforcement must prove that there is reasonable ground for suspecting that the wealth is disproportionate to known income, the respondent is a PEP, he (or an associate) is involved in a serious crime, the property is more than £50,000, and finally, the respondent holds the property.⁹³ If the order is issued, the respondent must respond within the time specified in the order; otherwise, failure to comply within the specified time triggers the presumption that the property is recoverable.⁹⁴ Where the respondent could not give a satisfactory explanation as to the provenance of the property; or where the respondent fails to respond,⁹⁵ then the property is presumed to be recoverable. Thus, it would allow law enforcement to commence civil recovery action against the property under the existing POCA 2002.⁹⁶ Thus, UWO is free standing – it does not require a precursor or parallel civil or criminal proceedings underway before an application is made.⁹⁷

1.7 Conclusion and Recommendation

1.7.1 Conclusion

Money laundering continues to remain a global concern. For example, the UK government's 2018 serious organised crimes strategy put a cost to organised crimes in the UK at more than 100 billion pounds annually. The United Nations estimated that the world could be laundering as much as \$2trillion a year. It shows how money laundering is one of the most significant issues facing the world economy and one that lacks effective measures currently in fighting it. Private and public institutions are exposed more than ever to criminal activity due to the intertwinement of the global financial system and increased cross-border transactions. Money laundering gives oxygen to organised crimes. It pays for human trafficking, facilitates drugs and terrorism. The fight against money laundering is now an international effort, and its' regulations also target terrorist's activities, drugs deal,

⁹⁰ CFA 2017 s 1 inserts s 362A(3) into POCA 2002

⁹¹ The law enforcement agencies are: NCA, HMRC, FCA, DPP and SFO (CFA 2017 s 362A(7))

⁹² CFA 2017 s 1 inserts s 362A into POCA 2002

⁹³ CFA 2017 s 1 inserts s 362B into POCA 2002 (property's worth was reduced from the initial proposal of £100,000.00 as a compromise for the bill to pass the Lords swiftly)

⁹⁴ CFA 2017 s 1 inserts s 362C into POCA 2002

⁹⁵ Jonathan Grimes and Kingsley Napley, 'Analysis - Unexplained wealth orders: Insight and Analysis' [2017] 1355 Tax Journal 12, 13 (stating ignoring to respond to UWO could lead to a charge for contempt of court)

⁹⁶ CFA 2017 s 1 inserts s 362C(2) into POCA 2002

⁹⁷ *ibid*, 12

arms sales, fraud, tax evasion, among others. Historically, the origin of modern money laundering could be traced to the mafia groups of the United States, who as early as the 1920s invented ways to conceal proceeds of crimes. However, the criminal activity, which involves various levels of sophisticated methods and techniques, only got its 'criminal' label in the US in the mid-1980s with the promulgation of the Money Laundering Control Act 1986.

The United States has enacted various legislations, which were subsequently amended to provide different proactive mechanisms to combat money laundering. It started with the Bank Secrecy Act, followed by the Money Laundering Control Act 1986, the Patriot Act 2001, various asset forfeiture laws, and of recent, AMLA 2020, among others. Over the years, these laws provided the enabling ground and the required tools to combat money laundering and other financial crimes. However, criminals always find ways to circumvent the rules, especially with the aid of technology. Consequently, there is always the need to review the impact of laws and find gaps to close them.

Thus, the desire to close the gaps makes authorities in the United States enact AMLA 2020, which significantly reformed the US AML regime. As analysed above, AMLA 2020 has now strengthened the fight against money laundering. It introduced corporate transparency, expanded Government subpoena power, increased money laundering penalties, reformed whistleblower programmes, and provided additional AML measures. Whistleblowing has been generally construed to refer to the act of disclosing wrongdoing to the appropriate authority. It has proved to be a vital tool in the hands of the government to combat money laundering and recover proceeds of crime that have already been laundered.

Unexplained Wealth Order, in countries that have enacted it, such as the UK, has made confiscation of proceeds of crime much easier despite lack of evidence. Despite the reform AMLA 2020 introduced, a gap remains. Lack of evidence still hinders the efforts of law enforcement in the United States to combat money laundering. Consequently, law enforcement needs additional powers to make forfeiture of money laundering easy.

1.7.2 Recommendation

Despite the changes AMLA 2020 made to anti-money laundering laws in the United States, there is the need to do more to turn the tide against money launderers. Money laundering involves processes aimed at turning dirty assets into clean ones. The surfacing of unexplained wealth raises the suspicion of the legitimacy of such wealth even where there is no evidence.

Based on the UNCAC Article 20 definition of illicit enrichment, the term “unexplained wealth” can be described as a significant increase in the assets of public officials that they

cannot reasonably explain in relation to their lawful income.⁹⁸ Before UNCAC, several countries have enacted in their legal codes the offence of illicit enrichment.⁹⁹ Therefore, the unexplained wealth order (UWO) is the legal mechanism through which law enforcement can attack illicit enrichment or unexplained wealth. It is an excellent tool to combat money laundering as it aids in forfeiting laundered proceeds of crime where otherwise lack of evidence would make it impossible.

Based on the preceding analysis and conclusion, it is recommended that the United States enact the Unexplained Wealth Order law, which will help attack money laundering more effectively even when the proceeds of crime have already been successfully laundered.

⁹⁸ United Nations Convention Against Corruption 2003 Article 20

⁹⁹ Jeffrey R. Boles 'Criminalising the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations' [2014] 17 New York University Journal of Legislation and Public Policy 835, 849-52