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TOOLS OF THE TRADE: THE IMPACT OF NEW MECHANISMS OF THE ANTI-MONEY LAUNDERING ACT AND CORPORATE TRANSPARENCY ACT ON SANCTIONS ENFORCEMENT

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INTRODUCTION

In recent years, Congress, the Executive Branch, commentators, and analysts have devoted substantial attention to the problems of corruption and money laundering through legislation, executive action, various

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reports, and published analyses.[1] The time is right to focus on these issues. Although it is difficult to estimate the impact of financial crime on the economy and society more broadly, some estimates range up to $5.8 trillion.[2]

In January 2021, the United States Congress passed the Anti-Money Laundering Act ("AMLA") of 2020 and Corporate Transparency Act ("CTA")[3] as part of the National Defense Authorization Act ("NDAA") for Fiscal Year 2021.[4] The respective purposes of the Acts are to expand anti-money laundering enforcement capabilities and establish beneficial ownership reporting requirements with the objective of improving corporate transparency.[5] Describing the legislation as some of the most significant for regulating financial flows since the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act") of 2001, [6]

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1. *See* Daniel L. Stein et al., *Biden Highlights Anti-Money Laundering as a Tool to Combat Corruption*, REUTERS (Jan. 19, 2022, 10:11 AM), https://www.reuters.com/legal/legalindustry/biden-highlights-anti-money-laundering-tool-combat-corruption-2022-01-19/.

2. Some of the most recent estimates from entities like the United Nations and Office on Drugs and Crime are similarly high but had been published in the late 1990s to early 2000s. *See What Is Money Laundering?*, FIN. ACTION TASK FORCE, https://www.fatf-gafi.org/en/pages/frequently-asked-questions.html#tabs-36503a8663-item-6ff811783c-tab (last visited Mar. 17, 2023) [hereinafter FIN. ACTION TASK FORCE]. Consequently, current estimates tell an interesting story of what kinds of financial crime matter to different entities. The $5.8 trillion estimate comes from the former head of an association of banks working on anti-money laundering standards. *See* JOHN CUSACK, FCN GLOBAL THREAT ASSESSMENT 7 (2019), https://thefinancialcrimenews.com/wp-content/uploads/2019/11/FCN-GTA.11.2019.Pub-Final.-2.pdf; *The War Against Money-Laundering Is Being Lost*, ECONOMIST (Apr. 12, 2021), https://www.economist.com/finance-and-economics/2021/04/12/the-war-against-money-laundering-is-being-lost.

On the more conservative end, however, accounting firm PricewaterhouseCoopers published a survey that estimates economic losses at $42 billion, although it is narrower in its focus on the types of fraud and financial crime. *See* PRICEWATERHOUSECOOPERS, FIGHTING FRAUD: A NEVER-ENDING BATTLE: PWC'S GLOBAL ECONOMIC CRIME AND FRAUD SURVEY 2020 3 (2020), https://www.pwc.com/gx/en/forensics/gecs-2020/pdf/global-economic-crime-and-fraud-survey-2020.pdf.

3. Pub. L. No. 116-283, 134 Stat. 4547–4633. The Act amended several sections of the United States Code. *See id; see also* 31 U.S.C. § 310 (listing and strengthening FinCEN authority); § 316; § 5301; § 5311 (including those provisions related to international coordination, reporting requirements, and "review of regulations and guidance"); § 5312(a); § 5313 (providing for review of reporting threshold requirements); § 5318 (listing requirements of anti-money laundering programs); § 5321 (introducing punitive measures for violators); § 5322; § 5330(d); § 5333; § 5334 (introducing training for federal examiners); § 5335 (prohibiting persons from concealing sources of assets in transactions); § 5336 (providing the background for the introduction of the Corporate Transparency Act and beneficial ownership reporting requirements).

4. Pub. L. No. 116-283, 134 Stat. 3388–4159.

5. *See* Anti-Money Laundering Act §§ 6002, 6402.

6. Pub. L. No. 107–56, 115 Stat. 272.

commentators have suggested that these tools will have significant effects on foreign and other criminal investigations.[7]

Sanctions imposition and enforcement have historically aligned with the development of anti-money laundering concepts and tools.[8] The Financial Crimes Enforcement Network ("FinCEN") describes money laundering as "disguising financial assets so they can be used without detection of the illegal activity that produced them," thus "transform[ing] the monetary proceeds derived from criminal activity into funds with an apparently legal source."[9] Such criminal activity may include sanctions evasion—which involves the laundering of money to "sanctioned entities, to sanctioned jurisdictions and/or for the purchase of sanctioned goods"—through the use of shell companies, trade finance vehicles, and correspondent banking.[10] These actions can lead to violations by criminal individuals, groups who intentionally evade sanctions, and financial

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7. U*SA PATRIOT Act*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act (last visited Mar. 17, 2023); *see infra* text accompanying notes 22–28; *see also* Andres Fernandez & Eddie A. Jauregui, *Key Provisions of the Anti-Money Laundering Act of 2020*, HOLLAND & KNIGHT (Jan. 13, 2021), https://www.hklaw.com/en/insights/publications/2021/01/key-provisions-of-the-anti-money-laundering-act-of-2020. Most commentary on the new act is coming out in advisory articles published by law firms or other legal information sites. *See infra* note 16.

8. Peter A.G. van Bergeijk, *The Second Sanction Wave*, VOX, CEPR POL'Y PORTAL (Jan. 5, 2022), https://voxeu.org/article/second-sanction-wave; *The Growing Use of Economic Sanctions*, U.S. GOV'T ACCOUNTABILITY OFF. (June 18, 2020), https://www.gao.gov/blog/growing-use-economic-sanctions. These trends in economic sanctions use have been accompanied by growing legislative and executive attention toward financial crime and money laundering, which has only accelerated with the most recent acts. *See History of Anti-Money Laundering Laws*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/history-anti-money-laundering-laws (last visited Mar. 17, 2023).

9. *What is Money Laundering?*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/what-money-laundering (last visited Mar. 17, 2023). The definition is similar to that found with global organizations. For instance, the Financial Action Task Force defines it as the "processing of these criminal proceeds [from acts to generate a profit for the individual or group that carries out the act] to disguise their illegal origin," thus "enabl[ing] the criminal to enjoy these profits without jeopardising their source." *See* FIN. ACTION TASK FORCE, *supra* note 2. FinCEN—a network established by the Department of Treasury that was transformed into a bureau under the PATRIOT Act—"oversee[s] and implement[s] policies to prevent and detect money laundering" through financial community partnerships requiring reporting and recordkeeping and law enforcement support via information sharing. *Basic Facts About Money Laundering and FinCEN*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/resources/advisories/fincen-advisory-issue-1 (last visited Mar. 17, 2023).

10. *See* Josh Hanna et al., *Preventing and Detecting Sanctions Evasion Schemes*, ACAMS TODAY (Sept. 5, 2019), https://www.acamstoday.org/preventing-and-detecting-sanctions-evasion-schemes/. In contrast to other criminal proceeds, funds coming from sanctioned sources involve money that would otherwise be legitimately transacted without the designation. *Id.*

institutions that unintentionally facilitate the activity.[11]

In fact, the recent events around the war in Ukraine—from earlier sanctions imposed in the wake of the 2014 annexation of Crimea, to the more severe actions taken after Russia's overt invasion in February 2022—demonstrate how anti-money laundering and sanctions go hand in hand.[12] Gaps in sanctions coverage that allow financial flows to circumvent those programs contribute to inefficiencies in meeting the objective of sanctions, which is to change the behavior that brought about the measures.[13] These inefficiencies demonstrate the importance of sanctions being backed by robust anti-money laundering measures.[14] However, legislative efforts in anti-money laundering and sanctions regimes are siloed, making investigation, enforcement, and litigation on related issues less than straightforward, despite the close relationship of the two areas.

Considering this connection between money laundering and sanctions evasion, AMLA and CTA—while providing new and useful tools for monitoring and controlling financial flows—have the potential to fall short of legislative goals in two ways: first, in failing to explicitly connect the area of anti-money laundering mechanisms with other related areas of law, like sanctions enforcement; and second, in failing to unambiguously address the transnational nature of money laundering activities. Clear coordination with sanctions enforcement as well as a transnational approach are necessary, not only for the most effective implementation of this legislation, but also for policy reasons if the U.S.

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11. *See id.*

12. The sanctions package features a wide range of tools with incredible impact on the Russian economy, including those against Russian financial institutions, such as the Central Bank, in order to stymie efforts to access foreign reserves, and others aimed at politically connected individuals and their entities in major industries. Press Release, U.S. Dep't of the Treasury, U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs (Feb. 24, 2022), https://home.treasury.gov/news/press-releases/jy0608. However, the U.S. government also permitted a number of waivers, which proved to be crucial to Russia's relative recovery following the last sanctions in 2014. *See* Fatima Hussein, *Russia Eyes Sanctions Workarounds in Energy, Gold, Crypto*, AP NEWS (Mar. 1, 2022), https://apnews.com/article/russia-ukraine-vladimir-putin-cryptocurrency-technology-business-d6a6d1bb3f664a555a2871eef3cd0e8c.

13. *See* RICHARD NEPHEW, THE ART OF SANCTIONS: A VIEW FROM THE FIELD 9 (2017) (discussing the roles of pain and resolve in the effective use of sanctions).

14. There are reports, for instance, that the Russian government may be looking to energy sales, gold reserves, and Chinese currency, in addition to utilizing financial institutions and the bank accounts of elites who did not fall under the most recent round of sanctions. *See* Hussein, *supra* note 12; *see also* Casey Michel, *How the West Undermines Its Own Sanctions*, ATLANTIC (Mar. 9, 2022), https://www.theatlantic.com/ideas/archive/2022/03/russia-oligarchs-evade-sanctions-anonymous/626968/. With thanks to Casey Michel for an insightful conversation early in the research process for this Commentary.

government seeks to bring issues of financial crime and money laundering within national security interests.

This Commentary discusses the effectiveness of additional enforcement authorities under AMLA and transparency requirements under CTA for the purposes of deterring and punishing sanctions violations. It considers the development of U.S. anti-money laundering law over time, as well as how the Acts add to the legal toolkit. It also evaluates court enforcement of sanctions violations under existing legislation and analyzes the potential impact of these acts on future enforcement. Finally, it addresses the policy implications of a national security approach to anti-money laundering for government stakeholders, corporate entities subject to the new legislation, and lawyers who, as of now, remain largely unregulated in this area. Not only do the Acts feature provisions that give transnational effect to anti-money laundering measures—which is required given the nature of the activity—but, alongside cases that bring together anti-money laundering and sanctions violations, these tools of the trade may also assist in harmonizing these areas. Addressing their siloed relationship will have important effects for the U.S. government's national security approach to anti-corruption as well as government, corporate, and legal stakeholders.

I. DEVELOPMENT OF U.S. ANTI-MONEY LAUNDERING LAW

Before analyzing AMLA and CTA in terms of their transnational reach and implications for sanctions enforcement, one must consider the development of U.S. anti-money laundering measures over time in order to determine what the Acts add—or do not add—to the body of law. As noted above, AMLA and CTA have been repeatedly hailed, largely in law firm analyses and other public sources, as consisting of some of the most significant changes to the Bank Secrecy Act ("BSA")[15] since the PATRIOT Act following the attacks of September 11, 2001.[16] After covering the

15. 31 U.S.C. § 5311 et seq.

16. *See, e.g.*, Fernandez & Jauregui, *supra* note 7; D. E. Wilson, Jr., *U.S. Anti-Money Laundering Laws Get an Upgrade: Enhanced Authorities, New Regulations, Impact on Correspondent Accounts, Whistleblower Changes, and New Transparency Requirements*, VENABLE LLP (Mar. 26 2021), https://www.venable.com/insights/publications/2021/03/us-anti-money-laundering-laws-get-an-upgrade; Robert W. Downes et al., *The Corporate Transparency Act – Preparing for the Federal Database of Beneficial Ownership Information*, BUS. L. TODAY (Apr. 16, 2021), https://businesslawtoday.org/2021/04/corporate-transparency-act-preparing-federal-database-beneficial-ownership-information/; Carl A. Fornaris et al., *The Anti-Money Laundering Act of 2020: Congress Enacts the Most Sweeping AML Legislation Since Passage of the USA PATRIOT Act*, NAT'L L. REV. (Jan. 19, 2021),

history of anti-money laundering law and recent related executive actions, this Commentary engages in a plain text reading of the Acts to determine transnational effects and implications for sanctions enforcement, which are significant not only for effectiveness, but also for the development of financial crime as a national security issue in its own right.

A. History of Anti-Money Laundering Law

Anti-money laundering law in the United States, which addresses the issue of individuals and entities converting illegally obtained funds into ones that appear to come from legal sources,[17] arguably got its start with the BSA.[18] Congress passed the BSA in 1970 based on concerns of improper use of the U.S. banking system for money with unknown origins.[19] Its purpose is to require banks to collect materials for investigations, implement risk programs to track crime-related funds, protect the U.S. financial system, and establish information sharing frameworks to prevent these crimes.[20] According to FinCEN, which enforces the BSA, financial institutions are specifically required "to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $10,000 (daily aggregate amount), and to report suspicious activity that might signify money laundering, tax evasion, or

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https://www.natlawreview.com/article/anti-money-laundering-act-2020-congress-enacts-most-sweeping-aml-legislation-passage.

17. For definitions of money laundering, see *supra* note 9.

18. *See* Michael L. Schwary, *Feature: What the General Practitioner Should Know About the Corporate Transparency Act*, 65 ORANGE CTY. LAW. 32, 34 (2023) ("The BSA was designed to reduce financial crime, tax evasion, and other violations of U.S. law by requiring the maintenance of records and the making of certain reports that 'have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.'"). Thus, U.S. anti-money laundering law preceded the development of other international standards, like those from the Financial Action Task Force, founded in 1989. *The Financial Action Task Force*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/resources/international/financial-action-task-force (last visited Mar. 17, 2023). *See generally* Navin Beekarry, *The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law*, 31 NW J. INT'L L. & BUS. 137 (2011) (covering the state of international anti-money laundering standards).

19. Bryan E. Gates, *History of the Bank Secrecy Act*, *in* 2A I.R.M. ABR. & ANN. § 4.26.5.2 (Oct. 2012). In fact, the legislative history shows how Congress had a twofold objective in passing the legislation: (1) "generating information" and (2) "driving a wedge between financial institutions and customers trying to launder money." *See* Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 356 n.153 (2003).

20. 31 U.S.C. § 5311.

other criminal activities."[21] The legislation was groundbreaking in terms of its impact on financial flows, but its focus on the transnational nature of financial crime and money laundering activities would actually be driven by efforts to counter terrorism by affecting its financing.

Congress passed the PATRIOT Act in the wake of the attacks of September 11, 2001, to "deter and punish" terrorist acts while also enhancing tools to prevent them, including in the financial sphere.[22] It expanded on BSA requirements to encompass foreign entities and persons that were previously not subject to the statute, including customers using correspondent accounts[23] and financial institutions maintaining correspondent accounts for foreign counterparts.[24] The Act also prevented the use of "Foreign Shell Banks"[25] and allowed the issuance of summons or subpoenas to foreign banks with U.S. correspondent accounts.[26]

As such, the PATRIOT Act brought anti-money laundering into the realm of national security, but within the specific context of terrorism.[27] But, the U.S. government subsequently allowed numerous exemptions to

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21. *FinCEN's Legal Authorities*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/fincens-legal-authorities (last visited Mar. 17, 2023).

22. *USA PATRIOT Act*, *supra* note 7. In testimony before a Senate subcommittee, Dennis Lormel—Chief of the Terrorist Financing Operations Section, Counterterrorism Division of the Federal Bureau of Investigation—remarked on the need to focus efforts on terrorism financing:

> Identifying and tracking the financial structure supporting terrorist groups is critical to dismantling the organization and preventing future attacks. As in ordinary criminal investigations, "following the money" identifies, links, and develops evidence against those involved in criminal activity. In the early stages of the investigation into the events of September 11, 2001, it was financial evidence that quickly established links between the hijackers and identified co-conspirators.

Tools Against Terror: How the Administration Is Implementing New Laws in the Fight to Protect Our Homeland: Hearing Before the Subcomm. on Tech., Terrorism and Gov't Info. of the S. Committee on the Judiciary, 107th Cong. (2002) (statement of Dennis Lormel, Chief of the Terrorist Financing Operations Section, Counterterrorism Division of the Federal Bureau of Investigation).

23. *USA PATRIOT Act*, *supra* note 7; *see* USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 311, 115 Stat. 272.

24. *USA PATRIOT Act*, *supra* note 7; *see* PATRIOT Act § 312.

25. *USA PATRIOT Act*, *supra* note 7; *see* PATRIOT Act § 313.

26. *USA PATRIOT Act*, *supra* note 7; *see* PATRIOT Act § 319(b). Other relevant sections include those on beneficial ownership, Know Your Customer ("KYC") programs, Suspicious Activity Report ("SAR") filings, AML program development, and expansion of the definition of financial institution. *See USA PATRIOT Act*, *supra* note 7; PATRIOT Act §§ 314, 325–26, 351–52, 356, 359, 362.

27. *See infra* Part III. There has been much debate over the necessity of other PATRIOT Act provisions related to privacy. *See* John T. Soma et. al., *Balance of Privacy vs. Security: A Historical Perspective of the USA PATRIOT Act*, 31 RUTGERS COMPUT. & TECH. L.J. 285, 309–15 (2005).

anti-money laundering requirements under the Act that have extended to today. [28] Because of the PATRIOT Act's specific context and exemptions, AMLA and CTA are arguably more significant for the field.

B. Related Initiatives

Alongside legislative acts, there have been other important developments on the anti-money laundering front generally. The focus on anti-money laundering broadened under the administration of President Barack Obama, with the activity being viewed as a challenge in itself rather than the means to another illegal activity, like in terrorism financing.[29] President Joseph Biden has built on this foundation in more aggressively pursuing financial crime.[30]

In fact, Congress passed the Acts under the 2021 NDAA at the same time as the entrance of the administration of President Biden, who campaigned on the promise of introducing anti-corruption measures and ultimately followed through with various executive actions, including a Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest and related U.S. Strategy on Countering Corruption. [31] These initiatives demonstrate further government support for developments in the area of anti-money laundering.

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28. *See* Alexander Cooley & Casey Michel, *U.S. Lawyers Are Foreign Kleptocrats' Best Friends*, FOREIGN POL'Y (Mar. 23, 2021, 10:34 AM), https://foreignpolicy.com/2021/03/23/u-s-lawyers-are-foreign-kleptocrats-best-friends/.

29. *See* Press Release, White House, Fact Sheet: Obama Administration Announces Steps to Strengthen Financial Transparency, and Combat Money Laundering, Corruption, and Tax Evasion (May 5, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/05/05/fact-sheet-obama-administration-announces-steps-strengthen-financial.

30. *See FACT SHEET: The Biden-Harris Administration is Taking Action to Restore and Strengthen American Democracy*, THE WHITE HOUSE (Dec. 8, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-the-biden-harris-administration-is-taking-action-to-restore-and-strengthen-american-democracy/.

31. *See Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, THE WHITE HOUSE (June 3, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/; UNITED STATES STRATEGY ON COUNTERING CORRUPTION PURSUANT TO THE NATIONAL SECURITY STUDY MEMORANDUM ON ESTABLISHING THE FIGHT AGAINST CORRUPTION AS A CORE UNITED STATES NATIONAL SECURITY INTEREST, THE WHITE HOUSE (Dec. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf. In fact, Congress overrode former President Donald Trump's veto shortly before he left office. Philip Ewing, *Congress Overturns Trump Veto on Defense Bill After Political Detour*, NAT'L PUB. RADIO (Jan. 1, 2021, 2:35 PM), https://www.npr.org/2021/01/01/952450018/congress-overturns-trump-veto-on-defense-bill-after-political-detour.

While AMLA and CTA share many of the same objectives as prior statutes and simultaneous executive initiatives, they add concrete tools in combatting money laundering and other financial crimes based on challenges that have since emerged.

C. Anti-Money Laundering Act

Congress included AMLA in the 2021 NDAA, listing several purposes for the legislative changes: (1) information sharing among agencies and financial institutions; (2) modernization of related laws for "new and emerging threats"; and (3) reinforcement of the risk-based nature of financial institutions' activities. [32] Perhaps most significantly for sanctions enforcement, the Act expands FinCEN's reporting authorities to combat money laundering and the funds covered in registering money transmitting businesses. [33] It also facilitates information exchange, [34] interagency cooperation, [35] and foreign cooperation through attaches, liaisons, and support programs.[36]

Importantly, some sections explicitly mention the need to combat sanctions evasion, but Congress appears to continue to treat it as an issue siloed from money laundering. The interagency personnel rotation program between federal regulators, the Department of Justice ("DOJ"), Federal Bureau of Investigation ("FBI"), Department of Homeland Security ("DHS"), Department of Defense ("DOD"), and others is meant "[t]o promote greater effectiveness and efficiency in combating money laundering, the financing of terrorism, proliferation financing, serious tax fraud, trafficking, sanctions evasion and other financial crimes."[37] At the same time, the Act amends some sanctions regimes, including the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010; Ukraine Freedom Support Act of 2014; and Otto Warmbier North Korea Nuclear Sanctions and Enforcement Act of 2019. [38] And it introduces specific tools with transnational and sanctions effects.[39]

Section 6210 requires a financial technology assessment focused on money laundering, which, again, is listed separately from sanctions

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32. Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, § 6002(1)–(4), 134 Stat. 4547–48.
33. *See id.* § 6102(c)–(d) (codified as amended at 31 U.S.C. §§ 5318(a)(2), 5330(d)).
34. *See id.* § 6103 (codified as amended at 31 U.S.C. § 310).
35. *See id.* § 6104.
36. *See id.* §§ 6106, 6108–09, 6111–12 (codified as amended at 31 U.S.C. §§ 310, 316).
37. *Id.* § 6104.
38. *See id.* §§ 6110, 6112 (codified as amended at 22 U.S.C. §§ 8501 et seq., 8921(4)).
39. *See id.*

evasion and other financial crimes.[40] Section 6212 introduces a pilot program on information sharing related to suspicious activity reports with foreign branches, subsidiaries, and affiliates.[41] Section 6214 encourages information sharing among public and private sectors "for purposes of countering illicit finance, including proliferation finance and sanctions evasion."[42] Sanctions also feature heavily in the reasoning behind Section 6215 on Financial Services De-Risking, which means:

> actions taken by a financial institution to terminate, fail to initiate, or restrict a business relationship with a customer, or a category of customers, rather than manage the risk associated with that relationship consistent with risk-based supervisory or regulatory requirements, due to drivers such as profitability, reputational risk, lower risk appetites of banks, regulatory burdens or unclear expectations, and sanctions regimes.[43]

This Title more explicitly ties together the areas of anti-money laundering and sanctions enforcement, even though it still treats them as separate rather than mutually reinforced.

Title LXIII, which focuses on communications, oversight, and processes,[44] provides perhaps the most useful foreign tool. Section 6308, which amends Section 5318(k) of Title 31 of the U.S. Code, provides:

> [T]he Secretary of the Treasury or the Attorney General may issue a subpoena to any foreign bank that maintains a correspondent account in the United States and request any records relating to the correspondent account or any account at the foreign bank, including records maintained outside of the United States.[45]

The provision is especially strong because it allows nondisclosure to accountholders and enforcement authority that clearly requires an extraterritorial reading when applied to foreign banks[46] AMLA thus

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40. *Id.* § 6210(a).

41. *Id.* § 6212. Interestingly, this provision carves out prohibitions on information sharing with entities located in China, Russia, or jurisdictions that are deemed state terrorism sponsors, sanctioned, or otherwise "determined cannot reasonably protect the security and confidentiality of such information." *Id.*§ 6212(a), § 5318(g)(8)(C)(i).

42. *Id.* § 6214(a).

43. *See id.* § 6215(a)(6)–(8), (c)(1).

44. *See id.* §§ 6301–6314.

45. *Id.* § 6308(a), § 5318(k)(3)(A)(i). This provision applies to records that are the subject of "(I) any investigation of a violation of a criminal law . . . (II) any investigation of a violation of this subchapter; (III) a civil forfeiture action; or (IV) an investigation pursuant to section 5318A." *Id.*

46. *Id.* § 6308(a), § 5318(k)(3)(C)–(D).

introduces tools that allow for much greater transnational effect but may fall short in making an explicit connection to sanctions enforcement.

D. Corporate Transparency Act

Some of the most concrete provisions associated with AMLA are actually embedded in CTA,[47] which establishes "uniform beneficial ownership information reporting requirements" for corporate structure transparency, discourages use of shell companies, assists with criminal pursuits and national security protection, and creates a "secure, nonpublic database at FinCEN for beneficial ownership information."[48] The most significant provision introduces extensive beneficial ownership reporting and details the entities required to do so as well as authorizes FinCEN to manage the information.[49]

CTA in particular is groundbreaking given that the federal government had long stayed out of such corporate matters, yet it begins to address a serious loophole in addressing money laundering that is created by the gap between state and federal law.[50] Like AMLA, CTA could be interpreted to have transnational effect given that Congress explicitly tied the practice of masking true owners to the use of both domestic and foreign entities.[51] However, as compared to earlier Titles in the law, there is no mention of sanctions or applicability of these requirements to that area. As such, it is important to consider how courts may address the sanctions effect of AMLA and CTA.

II. SANCTIONS ENFORCEMENT

The Office of Foreign Asset Controls ("OFAC") falls under the U.S. Department of Treasury and administers and enforces individual, entity, and country sanctions.[52] Individuals and entities may be added to the

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47. Corporate Transparency Act of 2020, Pub. L. No. 116-283, 134 Stat. 4604–33.

48. *Id.* § 6002(5)–(6).

49. *Id.* § 6403 (codified as amended at 31 U.S.C. § 5336). FinCEN has since released its own guidance on the Act. *See Appendix A- Financial Crimes Enforcement Network Programs,* FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/sites/default/files/shared/20210615%20AMLA%20FinCEN%20One%20Pager_FINAL.pdf (last visited Mar. 17, 2023).

50. *See* Corporate Transparency Act § 6402(5).

51. *Id.* § 6402(3)–(4). Tellingly, Congress refers to the structure as one that resembles a matryoshka, or Russian nesting doll. *Id.*

52. *OFAC Embargoes and Sanctions*, VISUAL OFAC, https://www.visualofac.com/resources/sanctions-and-embargoes/ (last visited Mar. 17, 2023).

Specially Designated Individuals and Blocked Persons List, which include "front companies, parastatal entities, and individuals determined to be owned or controlled by, or acting for or on behalf of, targeted countries or groups."[53] Country sanctions, by contrast, seek to stop "the transfer of assets to designated countries and use other trade restrictions to further U.S. foreign policy objectives."[54] Importantly, these programs are considered "separate and distinct from, and in addition to" other statutory requirements like those found under the BSA.[55] The government pursues these programs for various reasons, including deterrence, punishment, and others, in response to a wide range of unfavored activities.[56] The question then becomes whether these programs could be impacted by the new tools available under AMLA and CTA.

There are several recent cases in which courts have found sanctions violations: (1) Halk Bank, involving sanctions on Iran; (2) France's Societe Generale S.A., involving sanctions on Cuba; and (3) Italy's GVA International Oil and Gas Services, involving sanctions on Russia.[57] In the case of Halk Bank, a senior official "was convicted of conspiracies to defraud the United States, to violate the IEEPA, to commit bank fraud and to commit money laundering, as well as a substantive count of bank fraud" by using "deceptive measures to provide access to international financial networks, including U.S. financial institutions, to the Government of Iran, Iranian entities, and entities identified by the Department of the Treasury Office of Foreign Assets Control as [SDNs]."[58] Thus, the activity of evading sanctions was aided by banking access, and this individual was penalized for both.[59] In the case against

53. *Id.*

54. *Id.*

55. *Id.*

56. *See* NEPHEW, *supra* note 13, at 9 (describing these purposes in the context of pain).

57. Press Release, U.S. Dep't of Just., Turkish Banker Convicted of Conspiring To Evade U.S. Sanctions Against Iran And Other Offenses (Jan. 3, 2018), https://www.justice.gov/usao-sdny/pr/turkish-banker-convicted-conspiring-evade-us-sanctions-against-iran-and-other-offenses; Press Release, U.S. Dep't of Just., Manhattan U.S. Attorney Announces Criminal Charges Against Société Générale S.A. for Violations of the Trading With The Enemy Act (Nov. 19, 2018), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-soci-t-g-n-rale-sa-violations; Press Release, U.S. Dep't of Just., Italian Company Admits Guilt in Scheme to Evade U.S. National Security Trade Sanctions (May 26, 2021), https://www.justice.gov/usao-sdga/pr/italian-company-admits-guilt-scheme-evade-us-national-security-trade-sanctions.

58. *See* Turkish Banker Convicted of Conspiring to Evade U.S. Sanctions Against Iran and Other Offenses, *supra* note 57. *See generally* United States v. Türkiye Halk Bankasi A.S., 426 F. Supp. 3d 23 (S.D.N.Y. 2019).

59. *See* Turkish Banker Convicted of Conspiring to Evade U.S. Sanctions Against Iran and Other Offenses, *supra* note 57.

Société Générale, the bank ultimately created an agreement to pay penalties for conspiracy to violate sanctions regimes, but was not charged with money laundering.[60] Similarly, the case against GVA International Oil and Gas Services and its officials did not include money laundering charges.[61]

By contrast, a few other cases make clear the connection between money laundering and sanctions violations. The case against HSBC demonstrated how anti-money laundering and sanctions enforcement interact within one case. The charges fell under separate statutes despite their interconnected nature, and the result is a somewhat mild one with a deferred prosecution agreement.[62] The bank violated the BSA by failing to maintain anti-money laundering requirements and, due to this failure, also violated the International Emergency Economic Powers Act ("IEEPA") and Trading with the Enemy Act ("TWEA") because of transactions with customers in sanctioned countries.[63] The agreement included forfeiture worth $1.256 billion, civil penalties worth $665 million, and enhanced compliance and oversight requirements.[64] The case was significant because commentators saw it indicating a trend toward settlements; however, it also differed from other cases because the bank here faced dual charges under anti-money laundering and sanctions violations.[65] Indeed, the DOJ proceeded similarly in its later case against BNP Paribas.[66] With these two different types of cases, the question becomes whether AMLA and CTA provide tools that could more effectively connect these related charges.

To determine the secondary effects of AMLA and CTA on sanctions enforcement, this Commentary has established that the Acts arguably could have a transnational effect and contemplate a connection with sanctions violations. Considering the new tools offered by AMLA and CTA, the rulings in the Halk Bank, Société Générale, and GVA International cases could have more easily included anti-money

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60. *See* Manhattan U.S. Attorney Announces Criminal Charges Against Société Générale S.A. for Violations of the Trading with The Enemy Act, *supra* note 57.

61. *See* Italian Company Admits Guilt in Scheme to Evade U.S. National Security Trade Sanctions, *supra* note 57.

62. Press Release, U.S. Dep't of Just., HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations.

63. *Id.*

64. *Id.*

65. *See id.*

66. *See* Joanna Diane Caytas, *Weaponizing Finance: U.S. and European Options, Tools, and Policies*, 23 COLUM. J. EUR. L. 441, 458 (2017).

laundering charges, which arguably go hand-in-hand with sanctions violations, like in the HSBC case. The legislative purposes and statutory provisions indicate not only intention of a transnational effect,[67] but AMLA also lists sanctions enforcement among other crimes considered and provides ways for the federal government to access information and collaborate with foreign partners,[68] thereby making a finding of both sanctions and money laundering violations more possible.

Perhaps then the most useful provision is the one allowing for the U.S. government to subpoena foreign branches, subsidiaries, and affiliates,[69] giving a boost to the government in building cases that involve both money laundering and sanctions violations. The government thus expands the range of entities that may be targeted beyond those under the PATRIOT Act and does so under anti-money laundering charges. This potentially broadens cases brought against a foreign financial institution—or even corporation, in the case of GVA International—to what was seen in the case against HSBC.[70]

III. POLICY IMPLICATIONS

Considering the potential impacts of AMLA and CTA abroad and in terms of sanctions enforcement, there are various policy implications for (1) a national security approach to financial crime; (2) government and corporate stakeholders; and (3) the regulation of lawyers working in areas that touch anti-money laundering and sanctions enforcement.

A. Financial Crime and National Security

There is potential for both praise and criticism of the idea of couching financial crime, including money laundering, in national security terms.[71] However, the idea of finance tools serving national security aims is not new. Writing in 2013, Juan Zarate explained how the United States expanded its toolkit against states and actors, like Iran, North Korea, and Al Qaeda, beyond what he calls "classic sanctions or trade embargoes," making money movement and illicit activities around

67. *See* Anti-Money Laundering Act of 2020, Pub. L. No. 116-283 § 6002(1)–(6), 134 Stat. 4547–48.

68. *Id.* §§ 6102–12.

69. *Id.* § 6308.

70. *See id.*

71. *See, e.g.*, Edoardo Saravalle, *Recasting Sanctions and Anti-Money Laundering: From National Security to Unilateral Financial Regulation*, 2022 COLUM. BUS. L. REV. 550, 585–88 (2022); Nicholas Gilmour & Tristram Hicks, *National Security vs the Threat of Money Laundering*, *in* THE WAR ON DIRTY MONEY 268, 268–79 (2023); Sahar F. Aziz, *Security and Technology: Rethinking National Security*, 2 TEX. A&M L. REV. 791, 791 (2015).

sanctions more difficult.[72] In Zarate's estimation, sanctions and these enhanced financial tools are directed toward national security goals related to terrorism, nuclear proliferation, and instability.[73]

Considering their place in the push toward addressing financial crime, AMLA and CTA have arguably done more to integrate this area of law as one within national security than even the PATRIOT Act, which treated money laundering largely as a tool used to support terrorism.[74] Given the direct relation of sanctions to national security themes, AMLA and CTA tools are primed for greater effectiveness in this area, as long as the statutes have the requisite transnational reach and appropriate substantive effect to influence related areas, like sanctions enforcement. Where there are opportunities for efficiency, however, there is also room for critique.

AMLA and CTA are not immune from the same potential inefficiencies that were observed with the PATRIOT Act and its long-lasting exemptions.[75] Alongside new beneficial ownership reporting requirements for new corporate forms,[76] the Act includes more than twenty exemptions that could prove significant in evaluating its effectiveness, including exemptions for (1) registered securities issuers, (2) entities already publicly disclosing such information, (3) retail foreign exchange dealers, (4) registered public accounting firms, and (5) pooled investment vehicles with U.S. investment advisers, broker-dealers, or banks.[77] The recent events around Russia's invasion of Ukraine and unprecedented sanctions in response show how sanctions regimes and anti-money laundering measures are mutually reinforcing in addressing national security issues.[78] But, while national security is front and center

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72. JUAN ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW WAR OF FINANCIAL WARFARE ix–xi (2018).

73. *See id*.

74. This evaluation contrasts with that of commentators who immediately began parroting each other that this legislation was the most significant since the PATRIOT Act. *See supra* note 1.

75. *See* Cooley & Michel, *supra* note 28.

76. *GT Alert: The Anti-Money Laundering Act of 2020: Congress Enacts the Most Sweeping AML Legislation Since Passage of the USA PATRIOT Act*, GREENBERG TRAURIG (Jan. 19, 2021), https://www.gtlaw.com/en/insights/2021/1/the-anti-money-laundering-act-2020-congress-sweeping-aml-legislation-since-passage-usa-patriot-act. This unsigned writeup, which was released shortly after the passage of the Act, is another example of firms describing the legislation as the most significant since the PATRIOT Act. *See id*.

77. *Id*. This guidance essentially lists those entities that do not have to worry about these provisions, thereby providing assurance to those that already exist and advertising those structures with fewer demands from regulators.

78. *See* Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, § 6002(D), Stat. 4547–48; *supra* Part I.

in the Acts themselves,[79] their own exemptions and those associated with the separate sanctions regimes could impact effectiveness in meeting those goals.

Drafters of this legislation anticipated another national security effect that the anti-money laundering measures could have, including on sanctions enforcement. In accordance with AMLA, the Treasury Department published in April 2023 its de-risking strategy, which relates to "actions taken by a financial institution to terminate, fail to initiate, or restrict a business relationship with a customer, or a category of customers, rather than manage risk associated with that relationship consistent with risk-based supervisory or regulatory requirements."[80] That marginalization could give rise to evasion of sanctions, which Treasury describes as "a critical lever in U.S. national security and foreign policy."[81] The strategy, which includes various evaluations of anti-money laundering programs alongside modernization of sanctions regimes,[82] demonstrates will to address at least one way that anti-money laundering and sanctions enforcement interact.

B. Corporate Compliance

The way that these statutes are interpreted, particularly CTA, will have an impact on how corporations design their compliance programs and what they need to report to the government. As noted above, some of the most significant considerations for corporations, particularly multinational ones, will include the use of subpoenas on foreign branches, subsidiaries, and affiliates as well as beneficial ownership reporting requirements.[83] Perhaps more than other stakeholders, anti-money laundering and sanctions compliance requirements compound the most for corporate entities.

There will be claims that the new requirements contribute to the burden on corporations as they are faced with navigating additional compliance.[84] At the same time, expanded compliance will allow for better preparedness to meet growing challenges of attempts to launder money, circumvent regulation, and evade sanctions.[85] Rather than a

79. The Acts were included under the NDAA. *See supra* text accompanying note 4.

80. U.S. DEP'T OF THE TREASURY, AMLA: THE DEPARTMENT OF THE TREASURY'S DE-RISKING STRATEGY 3–4 (2023).

81. *Id.* at 5.

82. *Id.* at 39–47.

83. *See supra* Sections I.C–D.

84. *See supra* note 17.

85. *See, e.g.*, Alexander Dill, *Banks' Enhancements in Risk Management Provide a Prudential Backstop in this Deregulatory Cycle*, AM. BAR ASS'N (Jan. 30, 2020), https://www.americanbar.org/groups/business_law/publications/committee_newsletters/ba

burden, AMLA, and particularly CTA, provide an opportunity to engage in more robust and perhaps efficient compliance measures. But the facial disconnect with sanctions violations gives institutions little guidance and thus incentivizes duplicative efforts, leaving open an area that could benefit from greater effectiveness.[86] But effectiveness could also suffer with the help of those who interpret the law themselves.

C. Regulation of Lawyers

The role of lawyers and their interpretation of such requirements are also coming under the microscope as they engage in activities that aid questionable financial flows.[87] Following Russia's invasion of Ukraine in February 2022, this scrutiny dramatically increased, with such incidents as a British MP reading out the names of lawyers representing Russian oligarchs as well as law firms dropping lobbying work and reviewing client relationships.[88]

The lack of action by lawyers themselves, however, is apparent. Advocates of introducing new limits similar to those in banking and finance urge that there is immediate need for action,[89] yet have few suggestions on how exactly to proceed.[90] As such, lawyers themselves

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nking/2020/202001/fa_4/ (discussing Section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

86. *See supra* Sections I.C–D.

87. Cooley & Michel, *supra* note 28; *see also* Joel Schectman, *U.S. Lawyers Are a Money Laundering Blindspot, Some Argue*, WALL ST. J. (May 11, 2015, 5:30 AM), https://www.wsj.com/articles/BL-252B-7002 (discussing the settlement between the Swiss Vaidan Bank AG and the DOJ under an amnesty program). Notably, the DOJ struck a similar deal with a law firm for failing to register under the Foreign Agents Registration Act ("FARA") for its Ukraine work, which suggested expansion of this strategy to entities other than financial institutions. *See* Press Release, U.S. Dep't of Just., Prominent Global Law Firm Agrees to Register as an Agent of a Foreign Principal (Jan. 17, 2019), https://www.justice.gov/opa/pr/prominent-global-law-firm-agrees-register-agent-foreign-principal.

88. Kate Gill, *Tory MP Names and Shames UK Lawyers Allegedly Working for Russian* Oligarchs, YAHOO NEWS UK (Mar. 2, 2022), https://uk.news.yahoo.com/tory-mp-names-shames-uk-113104043.html. Some international law firms have terminated lobby registrations on behalf of Russian clients, while others are reviewing client relationships with sanctions in mind. Jacqueline Thomsen, *Law Firms Cut Russian Client Ties as International Sanctions Spread*, REUTERS (Mar. 1, 2022, 5:12 AM), https://www.reuters.com/legal/legalindustry/law-firms-cut-ties-with-russian-clients-sanctions-bite-2022-03-01/.

89. In a recent briefing hosted by the Helsinki Commission, one witness responded to a question on what could be done by saying that legislation needed to be passed with the details to come later. Comm'n on Sec. & Coop. in Eur., *Briefing: Enabling Kleptocracy*, YOUTUBE (Sept. 29, 2021), https://www.youtube.com/watch?v=9tXrzy3XwlY.

90. This lack of a path forward is due in part to the exclusive nature of the field and its self-governance. Proponents of regulations argue that lawyers must be more responsible

must get involved in order to more effectively regulate the activity and demonstrate that they are serious about change.

The recently introduced ENABLERS Act[91] seeks to amend the BSA with the goal of "expand[ing] the scope and authorities of anti-money laundering safeguards."[92] In particular, it adds several categories of service providers, including attorneys, to the list of entities defined as a financial institution: investment advisers, art traders, lawyers and law firms, trusts and company service providers, accountants and accounting firms, public relations specialists, and third-party payment providers.[93] The bill faces opposition from key groups, such as the American Bar Association ("ABA"),[94] but it highlights the role of lawyers in addressing financial crime like money laundering and sanctions evasion.

CONCLUSION

This Commentary has considered the Anti-Money Laundering Act of 2020 and its accompanying Corporate Transparency Act, analyzing their transnational effects as well as the connection to sanctions enforcement, given the role that money laundering plays in circumventing those regimes. The Acts may have extraterritorial effect, not only in their attempts to encourage international collaboration in this area, but also because of the scope given to tools, such as subpoenas.[95] However, the connection between anti-money laundering and sanctions enforcement is wanting.[96] This Commentary also examined cases where sanctions violations were alleged as well as the HSBC case, where the government

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gatekeepers, while the American Bar Association ("ABA") has raised concerns related to client confidentiality. *See* Schectman, *supra* note 87. Even AMLA begins to focus on similar roles, including consultants involved in antiquities, but it does not yet reach attorneys. *See* 31 U.S.C. § 5312(a).

91. The full name of the Act is the "Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act" ("ENABLERS Act"). H.R. 5525, 117th Cong. § 1 (2021).

92. *Id.*

93. *See id.* § 2.

94. The organization finds that any regulation of attorneys' activities conflicts with the duty to maintain client confidentiality or the "obligation not to reveal information gained in the course of representing a client to outside parties, including the government." Mayze Teitler, *ENABLERS in the Legal Profession: Balancing Client Confidentiality Against Preventing Money Laundering*, GLOB. ANTICORRUPTION BLOG (Nov. 15, 2021), https://globalanticorruptionblog.com/2021/11/15/enablers-in-the-legal-profession-balancing-client-confidentiality-against-preventing-money-laundering/ (citing Rule 1.6 of the Model Rules of Professional Conduct). The author suggests that there should be a distinction between when lawyers act in a financial advisor capacity versus a more traditional, legal one. *Id.*

95. *See supra* Sections I.C–D.

96. *See supra* Sections I.C–D.

brought both sanctions and anti-money laundering charges.[97] The tools in the Acts could lead to similar cases.

AMLA and CTA constitute an important step in the direction of the U.S. government objective to categorize financial crime and money laundering as national security threats. And in fact, when paired with sanctions evasion, the connection of these practices with national security becomes clear, as seen with the war in Ukraine. As such, the Acts have important implications for government stakeholders who have new tools to use, corporations that will need to further develop compliance programs, and even lawyers who are increasingly under the magnifying glass. Anti-money laundering and sanctions enforcement will only grow in importance, so their effectiveness must be prioritized.

97. *See supra* Part II.