



Anti-money Laundering Considerations for Security and Commodity Derivatives

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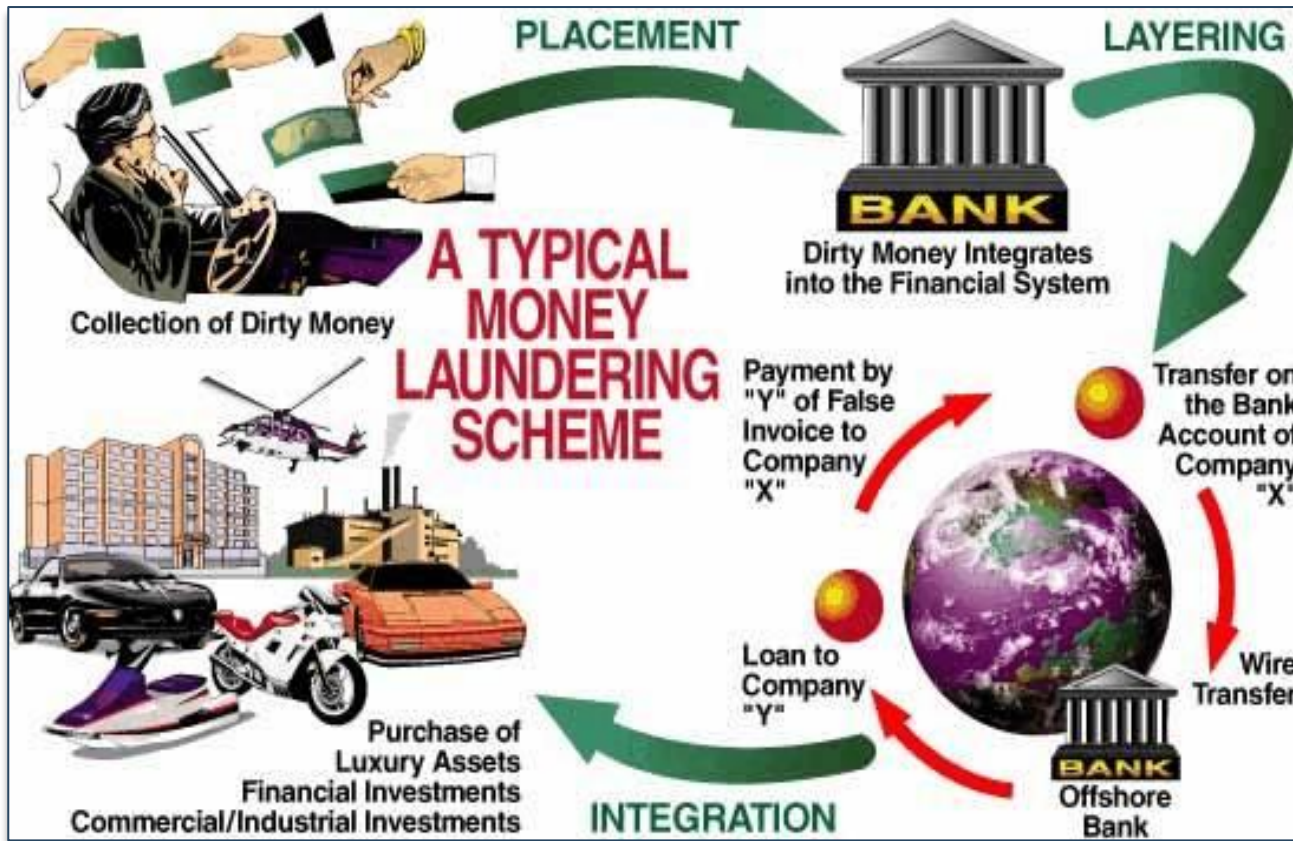


Agenda

- The AML landscape
 - Criminal, civil and regulatory
- Securities and capital markets
- Commodities and derivatives

What is money laundering?

The process of making illegally-gained proceeds (i.e., “dirty money”) appear legal (i.e., “clean”)



Criminal money laundering

1. Knowledge

- The illegally-gained property being transacted **is the proceeds of unlawful activity**
- Includes “willful blindness”

2. The existence of proceeds derived from a “**specified unlawful activity**”

3. A financial transaction

- Virtually any exchange of money counts
- Includes attempted transactions
- In a scheme with multiple transactions, each transaction may be a **separate chargeable offense**

4. Intent

- Legal authority: **18 U.S.C. § § 1956; 1957**





AML regulation -- US

- **Bank Secrecy Act (BSA)**
 - Financial institutions are required to assist U.S. regulators in identifying and preventing money laundering
- **Financial Crimes Enforcement Network (FINCEN) regulations**
 - Money services businesses and money transmitters must comply with BSA regulation
 - Includes other non-bank financial institutions

International efforts

- **Financial Action Task Force**
 - Intergovernmental organization that develops anti-money laundering policies
- **EU 6th Anti-Money Laundering Directive (AMLD)**
- **United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances**
 - Establishes international offenses relating to money laundering
- **World Bank**
 - Provides countries with tools for increasing transparency and for going after “dirty money”





Predicate crimes

- There at least **200 Specified Unlawful Activities** that can give rise to anti-money laundering exposure.
 - **Some of the most** prevalent are **foreign bribery (FCPA and violations of foreign law), sanctions, and other extraterritorial acts.**
 - Others include mail and wire fraud, insider trading, manipulation, tax evasion or other tax crimes, counterfeiting or forgery, environmental crimes, illegal gambling, illegal arms sales, illegal drug sales, trafficking, terrorism, terrorist financing, racketeering, smuggling, slavery, etc.
 - Illegal acts outside the U.S. may be a predicate if dual criminality
- Historically it has been the **predicate offense** that has driven the investigation and received compliance focus.
- But lately AML investigations are occurring **concurrently** or even before the predicate crime is investigated.

Cases: US regulatory settlements

- **Small and large -- emphasis on compliance programs**
- **December 2018 – SEC, FinCEN and FINRA Orders:**
 - \$15M (\$5M each) for BSA violations
 - AML Program:
 1. Failure to file SARs
 2. Insufficient controls over Non-Resident Alien accounts
 - Program unable to address risks associated with wires, internal bank and cash transfers, ATM transactions
 - Program insufficient to detect money laundering in connection with higher-risk accounts: NRAs, cross-border transfers, cash transactions, use of offshore companies
- **January 2021 – FinCEN Order:**
 - \$390,000,000 for BSA violations
 - Failure to file SARs and CTRs relating to Check Cashing business unit
 - Negligence and willful BSA violations, allegedly leading to large volume of high-risk transactions facilitating financial crime



Cases: use of money laundering laws to prosecute individuals

- **Harald Joachim von der Goltz:**
 - German-US national pleaded guilty to tax evasion, false statements and money laundering violations in connection with Panama Papers
 - First Panama papers individual U.S. Prosecution
- **Lawrence Hoskins:**
 - Convicted by jury in 2019 of FCPA, money laundering charges
 - FCPA conviction quashed; money laundering remains
- **Venezuelan Public Sector Corruption (PDVSA et al)**
 - Multiple-prosecution, long-running corruption investigations into Venezuelan public sector
 1. US persons charged with FCPA and AML violations
 2. Venezuelan officials charged with money laundering offense





Key takeaways

1. “Everything is Money Laundering” – charges increasingly used to bring enforcement actions in the United States *arguably* more obviously addressed elsewhere

2. Focus on illicit international funds flows continues

3. AML and sanctions compliance now seen as a national security issue

4. AML Compliance more important than ever

5. Trend towards more individual prosecutions very unlikely to abate under Biden Administration



Securities and capital markets



Five pillars



Policies, procedures and controls necessary to comply with anti-money laundering regulations



An officer responsible for AML compliance



CIP – risk-based procedures for conducting customer/counterparty due diligence (KYC), ongoing transaction monitoring, and reporting of suspicious activity



Annual training of personnel



Independent audit and review

Recent activity and hot topics

- National Defense Authorization Act, passing into law the Anti-Money Laundering Act of 2020 (AML Act)
- SEC Division of Examinations Risk Alert (March 29, 2021)
- Beneficial ownership
- International reach, cooperation and information sharing
- What is an “effective and reasonably designed” AML program?



Risk issues and mitigating risk

- Due diligence and complex structures
- Red flag and high risk jurisdictions and activity
- KYC, KYC, KYC
- Know your business
- Understand your source of funds
- Anomalies and involvement of third parties
 - Account opening
 - Trading patterns or lack of trading
 - Payment of funds involving third party
- Use of third party vendors for due diligence
- Cooperation between institutions





Key takeaways

1. AML inquiries will lead investigations – no longer taking a back seat

2. Whistleblowers have a seat at the table

3. A realization that the reporting process must be effective

4. A focus on beneficial owners

5. Identifying risk and the shifting landscape of the business



Commodities and derivatives

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Commodity Exchange Act and regulation

- **17 CFR 42.2: Every FCM and IB shall comply with the Bank Secrecy Act**
 - FCMs are financial institutions under BSA
 - IBs are treated as broker-dealers by FINCEN
- **Financial institutions include commodity brokers or dealers, dealers in precious metals, and persons involved in real estate transactions.**
- **CPOs, CTAs, Swap Dealers, MSPs, RFEDs**
 - 18 U.S.C. § § 1956, 1957:
 - Knowingly engaging in financial transactions involving proceeds of unlawful activity
 - Knowingly engaging in monetary transactions in criminally derived property over \$10,000
 - Includes attempts to engage in such transactions



FCMs and IBs

- **Implementing regulation jointly promulgated by the CFTC and Treasury at 31 CFT 1026.220 requires implementation of a customer identification program (CIP)**
 - Reasonableness is key
- **NFA Compliance Rule 2-9 adopts five pillars:**
 - Policies
 - Testing
 - Monitoring
 - Training
 - Ongoing diligence re SARS filing
- **Associated persons**
- **Reliance on other financial institutions to perform identification and verification procedures permitted in certain circumstances**
 - But must report suspicious activity, either separately or jointly





Enforcement actions

- AML enforcement actions have been brought by DOJ, the Federal Reserve, OFAC, FinCen, SEC, CFTC, New York Attorney General, DFS and NY County DA's Office
- Sanctioned broker dealer for illegal transactions with parties in Iran, Sudan, Cuba and Libya, some involving swaps
- Sanctioned foreign bribery scheme, which allegedly included using a small broker dealer to transact in commodities and derivatives above or below market price
- Sanctioned IB for failure to file SARs relating to unauthorized trading by an Associate Person
- Sanctioned bank for mirror or wash-like transactions
- Sanctioned broker dealer for inadequate CIP/KYC and recordkeeping violations
- Sanctioned foreign bank for inadequate AML policies and procedures, and recordkeeping, in NY branch office and for illegal transactions with Iran

Other entities

- **CPOs, CTAs, SDs, MSPs, RFEDs:**
 - File IRS Form 8300
 - FBAR on FinCen 114/114a
 - OFAC sanctions requirements
 - Project finance or other finance transactions
 - FinCen: BSA covers transactions denominated in value that substitute for currency
 - FATF identifies commodities as area of risk
 - Currency or crypto transactions
 - Cooperation with law enforcement



OFAC



Crypto-currency and digital products

- FinCen: BSA applies to “convertible virtual currencies”
- KYC trumps privacy
- Decentralized finance meets AML and OFAC
- Jurisdiction: US persons, US transactions, US facilities
- Actual delivery





Key takeaways

- 1. Risk assessment – ID exposure areas and relevant red flags**
- 2. Know your country risks**
- 3. Know your counterparty risks**
 - Beneficial ownership**
- 4. Know your transaction risks**
 - Trading patterns and products**
 - Know your source of funds**
- 5. Adequate due diligence – adjust market conduct monitoring to include AML, automated and manual**
- 6. Diligently file SARs**
- 7. Ongoing risk assessments and auditing**

State law – NY Martin Act

- Feb. 2021 NYAG alert: “people and entities dealing in virtual or ‘crypto’ currencies that are commodities or securities in the state of New York...must register with the Office of the Attorney General” under the Martin Act.
- Definition of commodity interest broader than CEA
- Broker dealer, sales person, investment adviser registration





Thank you to our speakers

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