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More Money More Problems: Examining the Impact of the Anti-Money Laundering Act of 2020 on Banks and Regulators

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I. INTRODUCTION

When examining the crime of money laundering, banks play a crucial role in reporting suspicious activity and placing institutional safeguards against it.[1] The act of money laundering, representing funds obtained through criminal activity as derived from a legitimate source, is one that finances criminal organizations, narcoterrorism, and even human trafficking.[2] In the wake of the Financial Crimes Enforcement Network ("FinCEN") files leak of September 2020, it is evident that the U.S. Department of Justice ("DOJ") has not vigorously pursued money laundering prosecutions and has arranged sweetheart deals in the rare instances the DOJ has prosecuted banks, leading to minimal arrests.[3] As a result, many bankers have little to fear if investigative journalists or regulators discover them handling exorbitant amounts of laundered drug cartel money.[4] Although new legislation has been enacted–the Anti-

1. *See* Jason Leopold et al., *The FinCEN Files*, BUZZFEED NEWS (Sept. 20, 2020, 1:01 PM), https://www.buzzfeednews.com/article/jasonleopold/fincen-files-financial-scandal-criminal-networks [https://perma.cc/4HSQ-5D4M] (assessing the "hollowness of banking safeguards" in the wake of the FinCEN files leak and labelling Suspicious Activity Reports filed by banks as "vital for law enforcement investigations").

2. *Id.*; *see also* James Chen, *Money Laundering*, INVESTOPEDIA (Mar. 16, 2021), https://www.investopedia.com/terms/m/moneylaundering.asp [https://perma.cc/HQZ3-DNFV] (describing what money laundering is and how it works).

3. Leopold, *supra* note 1*; see also* Jack Kelly, *Explosive Exposé Alleges Banks Aid Drug Kingpins, Criminals And Terrorists: Here's How This Could Be Stopped Right Now*, FORBES (Sept. 21, 2020, 3:44 PM), https://www.forbes.com/sites/jackkelly/2020/09/21/explosive-expos-alleges-banks-aid-drug-kingpins-criminals-and-terrorists-heres-how-this-could-be-stopped-right-now/?sh=6f0cbcde6b3f [https://perma.cc/J84M-DNGY] (criticizing the issues with an honor system of banks filing Suspicious Activity Reports (SARs) with the Department of the Treasury (USDT) and one of its divisions, FinCEN, and how they serve as an initial alert for law enforcement).

4. *See* Spencer Woodman, *HSBC Moved Vast Sums Of Dirty Money After Paying Record Laundering Fine*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Sept. 21, 2020), https://www.icij.org/investigations/fincen-files/hsbc-moved-vast-sums-of-dirty-money-after-paying-record-laundering-fine/ [https://perma.cc/7G65-4ERN] (reporting on continued money laundering violations by HSBC during a probationary period for a deferred-agreement prosecution which did not indict HSBC or any bank executives involved in helping funnel $881 million belonging to the Mexican Sinaloa Cartel and other Mexican gangs throughout their worldwide branches).

Money Laundering Act of 2020 ("AML Act")–there is still a blatant disconnect between statutory language and enforcement mechanisms.[5]

For example, HSBC Bank ("HSBC") faced scrutiny after admitting to helping funnel $881 million of unlawfully obtained money controlled by the violent Sinaloa Cartel and other Mexican drug cartels.[6] A criminal prosecution could have resulted in HSBC being barred from operating in the United States.[7] Despite internal recommendations to criminally prosecute HSBC, U.S. DOJ officials elected to enter into a deferred-prosecution agreement ("DPA"), citing the maintenance of financial stability as the predominant priority.[8] In a DPA for civil enforcement, the government agrees not to bring charges against the defendant in return for the defendant's agreement to certain requirements or conditions.[9] In the case of corporate defendants, these agreements avoid the collateral consequences of innocent employees losing their jobs, permit victims to be repaid through victim compensation funds, and allow the offending corporation to restore its image.[10] Still, a preference for DPAs may lead to individual offenders amassing a perception of being untouchable and fearless of any federal investigations they may face in the wake of any allegations of money laundering.[11]

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5. *See infra* Part IV (discussing the HSBC scandal the full extent of the misconduct alleged against them across multiple departments); *but see* Carl A. Fornaris, *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), https://www.natlawreview.com/article/anti-money-laundering-act-2020-congress-enacts-most-sweeping-aml-legislation-passage [https://perma.cc/U6NH-KZH4] (detailing how the AML Act increases civil penalties and attempts to modernize the AML and combat the financing of terrorism systems by expanding regulation to include the antiques market and cryptocurrency channels).

6. *See* Jill Treanor & Dominic Rushe, *HSBC Pays Record $1.9bn Fine to Settle US Money-Laundering Accusations*, GUARDIAN (Dec. 11, 2012, 12:47 PM) https://www.theguardian.com/business/2012/dec/11/hsbc-bank-us-money-laundering [https://perma.cc/U4A8-YZ8V] (examining the details behind HSBC's deferred prosecution agreement with American authorities).

7. *See* Woodman, *supra* note 4 (detailing how HSBC officials faced up to criminal 175 criminal charges before the Deferred Prosecution Agreement conditionally dismissed these charges).

8. Mica Rosenberg, *Top U.S. Officials Rejected Push to Prosecute HSBC - Lawmakers' Report*, REUTERS (July 11, 2016, 1:15 PM), https://www.reuters.com/article/uk-hsbc-moneylaundering-idUKKCN0ZR249 [https://perma.cc/77GV-BLJM].

9. *See What's a Deferred Prosecution Agreement?*, MOLOLAMKEN, https://www.mololamken.com/knowledge-Whats-a-Deferred-Prosecution-Agreement [https://perma.cc/Z8N7-9VPK](last visited Jan. 20, 2022) (defining DPA and explaining why they may be preferable to use against corporation defendants).

10. *Id*.

11. *See infra* Part IV (describing the downfall of Arthur Anderson and the collateral consequences of criminally charging Enron after the discovery of widespread fraud).

If these emboldened bankers faced potential imprisonment or the delicensing of their banks, they would prioritize the authenticity of the accounts they managed over the desire to facilitate massive transactions from illegal entities. Congress should enact legislation that enforces stricter penalties on banks that are complicit with the flow of illicit funds and impose "silver bracelets" on criminally liable bankers who have acted with blatant disregard of the AML laws.[12]

Money laundering is a white-collar crime[13] for which there has been a steep drop in criminal prosecutions.[14] White-collar crime is a subset of crime that is financial in nature and is characterized by fraud and concealment, not the threat of physical force or violence.[15] According to Syracuse University's Transactional Records Access Clearinghouse, there was a 53.5% decrease in white-collar prosecutions from 2011 to 2021.[16] Furthermore, the Federal Bureau of Investigation ("FBI"), the principal enforcing agency of white-collar crime, has increasingly shifted its resources towards combatting terrorism and now prosecutes less than half the cases it was handling in 2001.[17]

This Note will delve into present issues facing anti-money laundering enforcement in five distinct parts. Part II clarifies the context in which money laundering arises, describes Congressional attempts to regulate it, and the authority Congress has delegated to regulate money laundering.[18] Part III discusses the criticisms of Congress for its limited regulation and punitive measures to defend the integrity of the American financial marketplace.[19] Part IV examines the challenges faced in regulating money laundering, particularly in the rapidly developing

12. *See* Kelly, *supra* note 3 (quoting former senior U.S. Justice Department lawyer Paul Pelletier in stating that "bankers will never learn until you start putting 'silver bracelets' (handcuffs) on people").

13. *See White-Collar Crime*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/white-collar-crime [https://perma.cc/AMK3-4S4J] (last visited Jan. 20, 2022) [hereinafter *White-Collar Crime*] (defining money laundering and the role of the FBI in combatting it).

14. *See White-Collar Crime Prosecutions for 2021 Continue Long Term Decline*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, https://trac.syr.edu/tracreports/crim/655/ [https://perma.cc/Y5NM-DVQR] (last visited Jan. 20, 2021) [hereinafter *Prosecutions*] (illustrating the decrease from 10,162 prosecutions in 2011 to the estimate of 3,545 reported in 2021).

15. *White-Collar Crime*, *supra* note 13.

16. *Prosecutions*, *supra* note 14.

17. *Id*.

18. *Infra* Part II.

19. *Infra* Part III.

virtual financial industry, and how banks can address those challenges.[20] Finally, Part V offers suggestions to deter money laundering and provide more effective Congressional regulation of the financial marketplace.[21]

II. BACKGROUND

Federal law defines money laundering as "the movement of illicit cash or cash equivalent proceeds into, out of, or through the United States, or into, out of, or through United States financial institutions."[22] Cash equivalents are highly liquid investments, usually with a maturity of three months or less.[23] The fundamental purpose of moving the criminally obtained cash through financial institutions is to make these "dirty" funds look "clean" and legitimate.[24] There are three steps in money laundering: (1) the initial placement of funds, (2) layering the funds to obscure the path of the dirty money, and finally, (3) the integration of those funds back into the economy disguised as clean money.[25] With regard to banks' roles in money laundering, these financial institutions serve as an integral vehicle in which the illegal proceeds, whether obtained through corruption or criminal enterprises, are "laundered" through.[26] To understand the issues in combatting money laundering, one must understand how it works and the various forms.

A. Three Steps of Money Laundering

20. *Infra* Part IV.

21. *Infra* Part V.

22. In addition, the "illicit cash or cash equivalent proceeds" refers to the money obtained through criminal activity. 31 U.S.C. § 5340(2)(A).

23. Alicia Tuovila, *Cash and Cash Equivalents (CCE)*, INVESTOPEDIA (June 14, 2020), https://www.investopedia.com/terms/c/cashandcashequivalents.asp [https://perma.cc/G7VW-8ZUP].

24. Money is dirty when it is derived from illegal activity and conversely, clean money is obtained from lawful activity; money laundering essentially attempts to make the origins of dirty money appear clean. Chen, *supra* note 2.

25. *All You Need to Know About the Three Stages of Money Laundering*, TAXPROFESSIONALS.COM, https://www.taxprofessionals.com/california/santa-clara/news/all-you-need-to-know-about-the-three-stages-of-money-laundering-197 [https://perma.cc/7NRS-9FDA] (last visited Sept. 18, 2021) [hereinafter *Three Stages*].

26. *See* Robert Barrington, *Are Banks Enablers Or Victims Of Financial Crime?*, INT'L BANKER (Dec. 15, 2020) https://internationalbanker.com/banking/are-banks-enablers-or-victims-of-financial-crime/ (arguing that "[b]anks are a key part of the money-laundering chain, and to that extent, are undoubtedly facilitators and enablers").

The first step of money laundering—the placement of the dirty money—often involves selecting a financial institution to place the illicit funds through initially.[27] Financial institutions need to be wary of complications that arise when customers have strong connections to individual bankers because where an organization or individual directing a money laundering operation has an intimate relationship with the banker, this could lead to an apparent failure of due diligence at best and bank complicity at worst.[28]

One such area of banking where these individualized relationships are prevalent is in private banking, which is "the personal or discreet offering of a wide variety of financial services and products to the affluent market, and these operations typically offer all-inclusive personalized services."[29] Usually, private banks have a steep minimum balance requirement to open an account, ranging from $250,000 to $1 million.[30] Private banking accounts get personalized attention, catering to that specific client's needs, whether for wire transfers, depositing checks, or even connecting the customer with financial specialists in other fields such as a trust and estate advisor.[31]

One particular financial instrument susceptible to fraud is the money order, as it is less bulky than cash, replaceable if lost, and may be purchased anonymously.[32] For example, Mexican criminal organizations typically ship money orders purchased in American metropolitan hubs such as El Paso, Miami, and New York City to Mexico and other Latin American countries where money order regulations are more relaxed and not documented as comprehensively as they are within the U.S.[33] Under current federal reporting requirements, any "deposit, withdrawal, exchange of currency or other payment or transfer" in currency of $10,000 or above must be reported in the form of a Currency Transaction

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27. *Three Stages*, *supra* note 25.

28. *See* U.S. DEP'T OF JUST., U.S. MONEY LAUNDERING THREAT ASSESSMENT 1, 3 (2005), https://home.treasury.gov/system/files/246/mlta.pdf [https://perma.cc/YF4X-HG77] [hereinafter ASSESSMENT] (describing that "money laundering through private banking relationships more often involves a gross failure of due diligence, if not bank complicity").

29. *Id*. at 3.

30. *See* Matthew Goldberg, *Private Banking: Here's How It Works*, BANKRATE (Oct. 8, 2020) https://www.bankrate.com/banking/what-is-private-banking/ [https://perma.cc/EB3K-XYKT] (providing a general analysis on the benefits and drawbacks to private banking).

31. *Id*.

32. ASSESSMENT, *supra* note 28 at 17.

33. *Id*.

Report ("CTR").[34] A CTR is part of a bank's AML responsibilities and may also be filed if a customer is "deliberately avoiding the $10,000 threshold," an act referred to as "structuring."[35]

Furthermore, although most people working in compliance jobs fully comply with reporting standards of filing Suspicious Activity Reports ("SARs"), the minority that does not, sometimes working for these private banking firms, gives bad actors a head start in laundering illicit funds.[36] SARs filings are "intended to alert the appropriate authorities that the transaction in question should be reviewed and investigated, in addition to their own internal compliance review efforts."[37] Dirty money may be "blended" with clean funds in an attempt to disguise the dirty money, potentially through transactions for a front company posing as a legitimate business.[38]

The second step is the "layering" of the dirty funds to complicate any detection efforts by law enforcement to discover the dirty money.[39] Layering may occur through either physical or monetary transactions.[40] In physical transactions, one would purchase physical assets, such as cars or artwork, with the dirty money and later resell those assets or convert the money into monetary instruments.[41] The focus on this activity is increasing the level of complexity of the laundering activity and making the paper trail harder to track.

Casinos are notoriously susceptible to layering, primarily through criminals exchanging cash obtained illegally for casino chips which are then cashed out and misrepresented as gambling winnings.[42] Structuring, the act of using multiple deposits below a reporting threshold to go undetected, has been utilized for gambling winnings fraud as well.[43] In one instance, several individuals purchased chips below a reporting

34. 31 C.F.R. § 1010.311 (2011).

35. Adam Hayes, *Currency Transaction Report*, INVESTOPEDIA (July 29, 2021), https://www.investopedia.com/terms/c/ctr.asp [https://perma.cc/RXT8-M7DE].

36. *See* Kelly, *supra* note 3 (describing how SARs notify authorities of potential wrongdoing).

37. *See id*. (explaining how financial institution conduct internal investigations in addition to notifying enforcement agencies after the filing of a SAR).

38. *See* United States v. Weisberg, No. 08-CR-347, 2011 WL 4345100, at *2 (E.D.N.Y. Sept. 15, 2011) (depicting a case where a defendant had allegedly mixed $1.6 million of "dirty" money in an account with $30 million of "clean" money).

39. *Three Stages*, *supra* note 25.

40. *Id.*

41. *Id*.

42. ASSESSMENT, *supra* note 28 at 52.

43. *Id*.

threshold over twelve months, ending with a single person cashing out $1.1 million, requiring only one CTR being filed during the cash out.[44]
The third and final step is the integration of the funds that were laundered back into the economy under the appearance of normal business proceeds.[45] Integration comes in many forms: it may involve money laundering participants setting up accounts with foreign banks complicit in money laundering, selling property purchased with laundered funds, or lending dirty funds to their own front companies through the form of fraudulent loans.[46] Institutions with existing AML program requirements include mutual funds, precious jewel dealing, and banks.[47]

B. Money Laundering Legislation

In 1970, Congress passed the Banking Secrecy Act ("BSA") to combat money laundering by providing a new source of ample information accessible by domestic and international law enforcement.[48] The BSA imposes recordkeeping and reporting obligations pursuant to uniform regulatory standards to deter the financing of terrorism, criminal organizations, and tax evasion.[49] One of these requirements is the mandatory filing of a Form 8300 for the payment or receipt of a cash transaction over $10,000.[50] Another BSA requirement is the filing of a Report of Foreign Bank and Financial Accounts for any individual who has a foreign bank account, mutual fund, or other foreign financial accounts.[51]
In the aftermath of September 11, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act").[52] This act

44. *Id*.
45. *Id*.
46. *Id*.; *see also* United States v. Prevezon Holdings, Ltd., 251 F. Supp. 3d 684, 688-689 (S.D.N.Y. 2017) (showing a money laundering case with an element of proof involving money laundering with a foreign bank).
47. ASSESSMENT, *supra* note 28 at 71-72.
48. Bank Secrecy Act of 1970, 31 U.S.C. § 5311; *Bank Secrecy Act*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/bank-secrecy-act [https://perma.cc/9P6A-GRYB] (last visited Jan. 20, 2022) (explaining the purpose of the BSA).
49. 31 U.S.C. § 5311.
50. ASSESSMENT, *supra* note 28 at 69.
51. *Id*.
52. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act"), Pub. L. No. 107-56, 2001 U.S.C.C.A.N. (115 Stat.) 272 (2001); *see also USA PATRIOT Act*, FIN. CRIMES ENF'T

required financial institutions to develop and implement AML programs that financial institutions are required to follow.[53] Additionally, the act expanded the legislative reach of the BSA to include underground banking institutions as financial institutions for anti-money laundering purposes.[54]

Recently, in January of 2020, Congress passed the Anti-Money Laundering Act of 2020.[55] The AML Act requires institutions to file BSA reports and records to deter money laundering, the financial support of terrorist organizations, and protect the safety of the United States and its financial systems.[56] In a June 2020 statement, FinCEN clarified that banks (as defined by the BSA) would not be required to comply with the AML Act until its effective date, at the start of 2021.[57]

As part of a growing crackdown on international financial crimes, the AML Act prohibits knowingly concealing a material fact concerning ownership or the source of funds in a financial transaction if the person is a foreign political figure or if any of these transactions are for over $1 million.[58] In addition, federal examiners who review compliance are ordered to attend training on risk factors, trends in financial crime, and learn why fighting money laundering is necessary for law enforcement and national security agencies.[59]

III. CRITICISMS OF CURRENT SYSTEM

Although the AML Act seemingly represents a massive overhaul of Money Laundering regulation, it still has significant shortcomings. The various programs and enhancements the act has codified will fail in execution if the loopholes are too pervasive.[60]

NETWORK, https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act [https://perma.cc/FF2N-DT7G] (last visited Jan. 22, 2022) (providing a general overview of the PATRIOT Act).

53. 31 U.S.C. § 5352.

54. PATRIOT Act § 359.

55. Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, Div. F, 134 Stat 3388.

56. 31 U.S.C. § 5311.

57. Press Release, Fin. Crimes Enf't Network, Interagency Statement on the Issuance of the Anti-Money Laundering/Countering the Financing of Terrorism National Priorities, (June 30, 2020), https://www.fincen.gov/sites/default/files/shared/Statement%20for%20Banks%20(June%2030%2C%202021).pdf [https://perma.cc/QG7U-7SLH].

58. 31 U.S.C. § 5335.

59. 31 U.S.C. § 5334(a).

60. *See* Stephen M. Kohn, *Congress Must Protect Anti-Money Laundering Whistleblowers*, NAT'L L. REV (Jan. 26, 2021),

Whistleblowers are essential to detecting money laundering as their internal positions within institutions often provide them with information about and access to transactions which might demonstrate money laundering. These crimes depend on secrecy, and whistleblowers are insiders who can discover these crimes and serve as primary witnesses in these prosecutions.[61] Although whistleblowing introduces robust awards for whistleblowers, the AML Act's overhaul to the existing SEC whistleblower program removed the minimum reward amount while simultaneously capping whistleblowers to 30 percent of all monetary sanctions.[62] By removing the minimum threshold of rewards whistleblowers can recover, there will be a lack of uniformity and consistency in recovery amounts and might not adequately compensate whistleblowers for the importance of their contributions.[63]

Furthermore, although the act proposes whistleblower protections from retaliatory actions such as firings, these protections are unavailable to employees at Federal Deposit Insurance Corporation ("FDIC") insured institutions, which could exempt protections to the most significant sources of whistleblowers.[64] The anti-retaliation law passed in the new AML Act contains an explicit exemption for employees at insured credit unions and FDIC-insured institutions.[65] Since every national and state bank is required by law to have FDIC coverage, [66] all

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https://www.natlawreview.com/article/congress-must-protect-anti-money-laundering-whistleblowers [https://perma.cc/TYV2-RUJS] [hereinafter *Whistleblowers*] ("[t]he [AML Act's] numerous problems will result in a chilling effect on whistleblowers, especially when otherwise fully valid whistleblowers who have lost their jobs and careers are denied rewards due to loopholes in the law").

61. *See id*. (explaining the role of whistleblowers as key witnesses in money laundering enforcements and addressing Congress' changes to whistleblower rewards and protections).

62. *Id*.

63. *See id*. (describing how language in the AML Act contains language that is "identical" to the 1943 False Claims Act, one which did not work in practice due to whistleblowers being disincentivized to file cases and led to the loss of billions of dollars).

64. *See* Stephen M. Kohn, *Big Banks Get a Big Break on Pending Whistleblower Law*, THE HILL (Dec. 7, 2021, 8:30 AM) https://thehill.com/blogs/congress-blog/politics/528995-big-banks-get-a-big-break-on-pending-whistleblower-law [https://perma.cc/PJ3B-HCTL] [hereinafter *Big Break*] (reporting on institutions that are FDIC insured being exempt in the new whistleblower law within the 2021 NDAA).

65. *See Whistleblowers*, *supra* note 60 (explaining how "a 'carve out' contained in the AML law excludes all employees at FDIC insured institutions and credit unions from these protections").

66. Lucas Downey, *Insured Financial Institution*, INVESTOPEDIA (Mar. 22, 2021), https://www.investopedia.com/terms/i/insured-financial-institution.asp [https://perma.cc/77LE-CEHJ] (describing how FDIC insurance works and what institutions have it).

bank employees for these banks are therefore unprotected from retaliatory firings and are thus disincentivized to hold fraudsters accountable.[67]

In addition to what is outlined in the AML Act, the United States Department of the Treasury ("USDT") may deny a meaningful reward to any whistleblower.[68] Under the Dodd-Frank Act Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), whistleblowers that provided information that led to successful prosecutions received awards from ten to thirty percent of the recovery.[69] However, this minimum reward amount has been removed, meaning the USDT has final authority in setting a settlement reward as low as a penny for a sanction obtained of any size.[70]

Another hurdle for whistleblowers is the absence of rewards for criminal cases, as those sanctions are under the "victims' compensation" and thus are outside of the realm of whistleblower law.[71] Civil enforcements and criminal enforcements both require whistleblowers for effective prosecutions, so excluding whistleblower rewards to criminal prosecutions will only make these types of enforcements harder, leading to a lack of success in practical execution of criminal enforcement.

Additionally, the Merit Systems Protection Board ("MSPB") poses a secondary challenge to successfully implementing the AML Act. As of September 9, 2021, the MSPB has not voted on a single whistleblower case since 2017 due to the lack of a quorum.[72] The connection to money laundering prevention becomes apparent when the purpose of the MSPB is disclosed; they are tasked with hearing federal employee appeals, including retaliatory firings.[73] So what happens when there's been over a four-year gap in any activity for an appellate board?[74]

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67. *See Big Break*, *supra* note 64 (criticizing how "[n]o other modern whistleblower law denies a majority of potential whistleblowers the ability to protect themselves from retaliation. . . ").

68. *Id*.

69. *Id*.

70. *Id*.

71. *Whistleblowers*, *supra* note 60.

72. *Id*.; *see generally* Nicole Ogrysko, *Lack of Quorum Hits 3-year Mark at MSPB, with No Clear End in Sight*, FED. NEWS NETWORK (Jan. 24, 2020), https://federalnewsnetwork.com/workforce/2020/01/lack-of-quorum-hits-3-year-mark-at-mspb-with-no-clear-end-in-sight/ [https://perma.cc/VHR5-QRX3] (illustrating the lack of activity in the MSPB and the issues with its inaction).

73. Ogrysko, *supra* note 72.

74. *Big Break*, *supra* note 64.

The cases pile up; as of December 2019, 2,529 pending appeals were awaiting a decision.[75]

IV. CHALLENGES IN REGULATING MONEY LAUNDERING AND MITIGATING ITS RISK

Policing money laundering is far different from regulating other crimes and is described by the FBI as a "massive and evolving challenge that requires collaboration on every level."[76] As evidenced by the Dodd-Frank Act, anti-money laundering efforts depend on whistleblowers to enforce the AML Act.[77]

A. Enforcement Challenges for United States Attorneys

Securing a criminal conviction for money laundering requires a jury to be convinced beyond a reasonable doubt of each element.[78] To conceptualize the daunting task a U.S. attorney faces in convicting defendants accused of money laundering, this Note will explore the appellant brief of *United States v. Gudipati*, an August 2021 Fifth Circuit case which upheld the convictions of five defendants for four different forms of money laundering.[79] In *Gudipati*, six people were convicted of a complex, "two-year multi-million dollar black market peso exchange money-laundering scheme" where money from illicit American drug sales were laundered through businesses in Laredo, Texas, before being returned to Mexican drug dealers.[80] The scheme concealed the source of proceeds by making them appear as legitimate transactions when the drug dealing organization was actually using dollars from illicit drug sales and

75. Ogrysko, *supra* note 72.

76. *White-Collar Crime*, *supra* note 13.

77. *See Whistleblowers*, *supra* note 60 ("Since Dodd-Frank became law, whistleblowing under the Commodity Exchange Act exploded, uncovering billions in corrupt oil trading violations, price fixing, foreign exchange manipulation, and other frauds impacting numerous consumer products").

78. United States v. Gudipati, No. 19-40524, 2021 WL 3744908 1, 2 (5th Cir. Aug. 24, 2021).

79. *Id*. at 1.

80. *See* Press Release, U.S. Dep't of Just., Six Convicted for Roles in Multi-Million Dollar Black Market Peso Exchange Money-Laundering Scheme (Feb. 12, 2019), https://www.justice.gov/opa/pr/six-convicted-roles-multi-million-dollar-black-market-peso-exchange-money-laundering-scheme [https://perma.cc/UE8B-4UDS] (describing how various Laredo stores, specifically "the owners of El Reino International . . . accepted loose bulk-cash" after being told of its drug dealing origins and subsequently neglected filing federally mandated Form 8300s which are required after receiving over $10,000 in cash).

selling them to a Mexican importer, functioning as a "drug broker," in return for pesos.[81]

In proving that a conspiracy to commit money laundering existed, the government had to prove "(1) that there was an agreement between two or more persons to commit money laundering and (2) that the defendant joined the agreement knowing its purpose and with the intent to further the illegal purpose."[82] These elements outline two significant issues with prosecuting money laundering; a prosecutor must prove that the defendant joined the conspiracy knowing that the purpose was to commit money laundering and had the specific intent to further that organization's nefarious objectives.[83] So logically, if a requisite element of a successful prosecution is a need for a specific intent, a successful defense can be raised by proving that the burden has not been met through an absence of specific intent or that insufficient evidence was brought forth in its prosecution.[84]

Obtaining a guilty verdict for concealment of money laundering requires the government to prove that the financial transactions "had the purpose, not merely the effect, of 'making it more difficult for the government to trace and demonstrate the nature of the funds.'"[85] This element carves out an additional defense, allowing defendants to claim that their financial transactions were not primarily intended to make it harder for the government to track and find the purpose of the funds. Additionally, for "avoidance money laundering," the government must prove "that the defendant was aware of certain reporting requirements and knew the transaction was designed to avoid those requirements."[86] This charge may be successfully defended by the defendant claiming that they did not intentionally avoid reporting requirements, providing an additional hurdle of proving the purpose of the transactions.[87]

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81. Gudipati, 2021 WL 3744908, at *1.

82. *Id*. at *2.

83. *See Money Laundering Basics*, GOLDMAN & ASSOCS., https://www.criminallawyer-chicago.com/money-laundering-basics.html [https://perma.cc/WX7Z-G2F2] (last visited Sept. 19, 2021) (explaining money laundering background and defenses).

84. *Id*.

85. Gudipati, 2021 WL 3744908, at *2 (quoting United States v. Valdez, 726 F.3d 684, 690 (5th Cir. 2013)).

86. *Id*.

87. *See id*., (stating that to prove avoidance money laundering, "the government must prove that the defendant was aware of certain reporting requirements and knew the transaction was designed to avoid those requirements") (quoting United States v. Bronzino, 598 F.3d 276, 281 (6th Cir. 2010)).

Finally, for a jury to find the defendant guilty of "substantive money laundering," the government must prove that the defendant "actually conducted or attempted to conduct a financial transaction with proceeds of a specified unlawful activity with knowledge that its purpose was to conceal the source of the proceeds or avoid transaction reporting requirements."[88] Again, the burden of a money laundering prosecution relies on the government proving its case by proving the defendant performed or attempted to perform a transaction with unlawful proceeds under the guise of not triggering reporting requirements, such as compelling the financial institution to file a SAR.[89]

Throughout each of these statutory crimes, the difficulty in proving that a defendant, who may not even testify, committed all these specific intent crimes makes it even more necessary that whistleblowers testify and provide insight into the crimes that may have taken place.[90] Although this is not a comprehensive list of money laundering crimes, each of these instructions requires a specific intent, essentially requiring the jury to have some level of insight into the reasons the defendant acted the way they did.[91]

The aggregate number of white-collar criminal cases prosecuted has sharply trended downwards since 2011.[92] The total amount of prosecutions has steadily decreased since 2001 besides a short period of growth between 2006-2011.[93] However, some observers believe this drop is related to which party resides in the Oval Office. Professor Brandon Garrett of Duke Law theorized that this drop has a political correlation to President Trump's election, stating that "[i]f you look at the past 18 to 20 months, there is no comparison to the Obama years."[94] Garrett further suggests that the decrease in arrests is an enforcement

88. *Id*.

89. *Id*.

90. *See Whistleblowers*, *supra* note 60 (asserting that "[m]oney laundering needs secrecy to succeed . . . [and] whistleblowers are perfectly situated to detect these crimes and provide the key evidence for successful prosecution").

91. Gudipati, 2021 WL 3744908, at *2.

92. *See* Stephen Gandel, *White-Collar Crime Prosecutions Hit Lowest Level in 33 Years*, CBS NEWS (Sept. 26, 2019), https://www.cbsnews.com/news/white-collar-crime-prosecutions-have-hit-lowest-level-in-33-years/ [https://perma.cc/489H-A5PD] (reporting on the decreasing level of White-Collar Arrests, decreasing from 10,162 prosecutions in 2011 to 5,425 in 2019).

93. *White-Collar Crime*, *supra* note 13.

94. *See* Gandel, *supra* note 92 (quoting Duke University Law Professor Brandon Garrett who believes the drop in prosecutions and lowering in fines against corporations is a partisan issue and correlated with President Donald Trump's election).

issue when remarking "there may be some serious corporate crime going on that is just not being punished."[95]

However, this change in white-collar prosecutions may actually stem from an earlier incident, the 2002 prosecution of Arthur Anderson LLP ("Arthur Anderson"), in the aftermath of the Enron scandal.[96] As a corporation convicted of obstruction of justice, Arthur Andersen lost its accounting license and went out of business, putting tens of thousands of employees out of work.[97] The case had "collateral consequences" on employees, shareholders, and others incidentally related to Arthur Andersen.[98] ProPublica reporter Jesse Eisinger described that the collapse of the accounting firm "ushered in an era of prosecutorial timidity . . . . [Arthur] Andersen had to die so that all other big corporations might live."[99]

Another contributing factor to declining white-collar prosecutions is bank consolidation.[100] While acknowledging a series of mergers and deregulation within the banking industry, former Attorney General Eric Holder admitted that indictments against major consolidated banks, many of which are publicly traded, would "have a negative impact on the national economy, perhaps even the world economy."[101]

For instance, when HSBC was being investigated in 2012 for money laundering, the British Chancellor of the Exchequer urged U.S. authorities not to criminally indict HSBC, warning of "very serious implications for financial and economic stability."[102] Shortly after that statement, HSBC entered into a DPA arranged by the DOJ, agreeing to pay a $1.9 billion fine, submit to five-year probationary period, and accept blame for a "blatant failure" to implement anti-money laundering controls. [103] This mistake is evidenced in part by the bank severely understaffing the compliance office within Mexico which allowed

95. *Id*.

96. *See* Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 24, 2017), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail [https://perma.cc/ANU7-TFNV] (describing how Arthur Anderson's demise after its conviction led to federal prosecutors becoming more tentative to initiate white-collar criminal prosecutions).

97. *Id*.

98. *Id*.

99. *Id*.

100. *See id*. (describing bank consolidation's effect on white-collar crime prosecutions).

101. *Id*.

102. *Id*.

103. Treanor & Rushe, *supra* note 6.

pervasive amounts of money laundering to occur.[104] Former Attorney General Assistant Lanny Breuer described how Mexican drug traffickers would deposit hundreds of thousands of dollars every day in HSBC accounts and that the total amount of money laundered was $881 million between 2006 and 2010.[105] Even while on probation from their DPA, HSBC continued to provide services to shell companies, alleged criminals, and drug cartels.[106] Ultimately, the criminal immunity of those working for HSBC may have emboldened the banking corporation to continue functioning in the same irresponsible manner that initially landed the London incorporated bank holding company in trouble.[107]

B. How Financial Institutions Can Mitigate Risks

Banks and other financial institutions have a fiduciary duty to their consumers to ensure the integrity of the financial marketplace and report the discovery of suspicious activity within their transactions.[108] Regulations are getting more immersive, so staying up to date will boost a financial institution's reputation and avoid invasive investigations from regulatory agencies or any subsequent sanctions.[109]

One example of these regulations is Know Your Client ("KYC"), "a set of standards used within the investment and financial services industry to verify customers, their risk profiles, and financial profile."[110] Enacted as part of the PATRIOT Act, the statutory basis for KYC dictates that the "Secretary of the Treasury shall prescribe regulations setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with

104. *Id*.

105. *Id*.

106. Woodman, *supra* note 4.

107. *See* Leopold, *supra* note 1 (describing how "banks such as JPMorgan Chase, HSBC, Standard Chartered, Deutsche Bank, and Bank of New York Mellon continued to move money for suspected criminals [after being fined or prosecuted for misconduct]").

108. *See* Leopold, *supra* note 1 (stating that "banks must file suspicious activity reports when they spot transactions that bear the hallmarks of money laundering or other financial misconduct . . . ").

109. *See* Jackie Wheeler, *AML and Payments: Building a Successful Compliance Program*, PAYPERS (Sept. 1, 2021, 8:15 AM), https://thepaypers.com/thought-leader-insights/aml-and-payments-building-a-successful-compliance-program--1251283 [https://perma.cc/W9QX-VELM] (explaining how banks can take effective compliance measures).

110. James Chen, *Know Your Client (KYC)*, INVESTOPEDIA (Apr. 17, 2021), https://www.investopedia.com/terms/k/knowyourclient.asp [https://perma.cc/D8GN-DJ7G] (describing what "Know Your Client" is and how it works).

the opening of an account at a financial institution."[111] In addition, FinCEN requires financial institutions to verify customers and beneficial owners that possess a 25% or greater ownership, and this threshold is lowered for higher risk entities that have additional security measures imposed.[112] Financial institutions must understand the type of account and the purpose of the customer relationship to develop a risk profile that is important when discovering suspicious activity.[113] Documents that satisfy KYC requirements are a birth certificate, driver's license, or other government-issued ID.[114] Some jurisdictions require two forms of identification, but all require a valid address and a document confirming that address.[115] Additionally, many cryptocurrency exchanges have implemented KYC protocols to verify customers dealing in the decentralized currencies.[116]

Employee training is also integral to deterring money laundering and violations of the reporting requirements.[117] Training should concern the details of compliance regulations and educate employees that they are essential in preventing the commission of money laundering and the harmful effects of failing to file SARs and suspicious transactions to supervisors.[118] Furthermore, hiring a compliance officer who can effectively train employees in AML programs will assist in maintaining compliance with federal requirements.[119]

When these requirements are overlooked or not appropriately prioritized, massive fines may be levied against culpable financial institutions.[120] In the case of Citigroup, poor risk management, data governance, and internal controls led to a $400 million civil penalty assessed by the Office of the Comptroller of the Currency ("OCC") in

111. 31 U.S.C. § 5318(l)(1).
112. Chen, *supra* note 110.
113. *Id*.
114. *Id*.
115. *Id*.
116. *Id*.
117. Wheeler, *supra* note 109.
118. *Id*.
119. Wheeler, *supra* note 109.
120. *See* Pete Schroeder, *Citigroup Fined $400 Million By Regulators, Agrees to Fix 'Longstanding Deficiencies'*, REUTERS (Oct. 7, 2020, 11:16 PM), https://www.reuters.com/article/usa-citigroup-enforcement/citigroup-fined-400-million-by-regulators-agrees-to-fix-longstanding-deficiencies-idUSKBN26T0BL [https://perma.cc/6FH7-7D3N] (detailing how Citigroup was fined $400 million for failing to meet required compliance standards for a bank of their size).

October 2020.[121] According to the OCC's consent order, "[Citigroup] failed to implement and maintain an enterprise-wide risk management and compliance risk management program, internal controls, or a data governance program commensurate with the Bank's size, complexity, and risk profile."[122] Ultimately, clearer instructions and regular training for financial institution employees can deter wrongdoing and help protect financial institution executives from liability while also avoiding any prosecutions or hefty fines from lapses in compliance.[123]

The elite and secluded space of private banking is particularly vulnerable to money laundering.[124] This industry promotes a "[c]ulture of confidentiality [through] the use of secrecy jurisdictions or shell companies."[125] Also, "lax internal controls" and "[p]rivate bankers [acting] as client advocates" prejudice these bankers in favor of their clients at the expense of promoting financial compliance.[126] Furthermore, these banks facilitate the formation of "offshore entities" for their clients.[127] Each of these conditions puts private bankers in a nebulous position where they have the knowledge and ability to prevent the nefarious usage of overseas entities and shell companies before it occurs, but this would counter the ingrained culture of confidentiality and facilitating deposits in overseas tax havens.[128]

To mitigate money laundering risks in private banking, these banks can establish risk assessments that factor in the source of their customers' wealth, the anticipated activity of the account, purpose of the

121. *See* Press Release, Off. Comptroller Currency, OCC Assesses $400 Million Civil Money Penalty Against Citibank, (Oct. 7, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-132.html [https://perma.cc/6JU2-XKAY] (stating how the OCC fined Citigroup $400 million due to unsound and unsafe business practices and its failure to establish effective risk management and internal controls).

122. *Id*.

123. Schroeder, *supra* note 120.

124. *See* FED. FIN. INSTS. EXAMINATION COUNCIL, *Private Banking – Overview*, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL 273, 274 (2015), https://bsaaml.ffiec.gov/docs/manual/09_RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/20.pdf [https://perma.cc/7PDQ-JASK] (describing the private banking industry's particular susceptibility to money laundering).

125. *Id* at 274.

126. *Id*.

127. *Id*. at 273.

128. *See* Joris Luyendijk, *Former Private Banker: 'Making Money is the Easy Part*, GUARDIAN (Sept. 19, 2013) https://www.theguardian.com/commentisfree/2013/sep/19/private-banker-investment [https://perma.cc/P895-V7WF] (depicting an anonymous account of private banking as one inundated with "office politics," hyper competitive coworkers, and clients with lots of money [but not necessarily financial savviness]).

account, public information about the customer that can be reasonably obtained, and whether the geographic location of the account poses greater risks and susceptibilities to money laundering.[129] Customer due diligence based on these factors can help combat money laundering as well, allowing banks to "establish the identity of their private banking clients and, as appropriate, the beneficial owners of accounts."[130] Learning a customer's identity is particularly important in private banking, as this will hold the owner responsible in the case of wrongdoing and discourage any money laundering activity that may be easily traced back to that accountholder by the private banker assigned to the culpable account.

V. CONCLUSION AND RECOMMENDATION

For the AML Act to serve its desired purpose in combatting the use of financial institutions as vehicles for criminal enterprises to access their illicitly obtained funds, the loopholes prohibitive to combatting money laundering need to be closed. The AML Act created two loopholes by: (1) abolishing the minimum reward to whistleblowers and (2) exempting employees at FDIC-insured institutions from retaliatory discharge protection as a whistleblower. As long as both of these loopholes persist, other meaningful changes in the AML Act will be ineffective.

Whistleblowers are integral to the criminal prosecution of orchestraters of complex and convoluted money laundering crimes.[131] It makes sense that financial rewards upon successful prosecutions can provide sufficient motivation to testify. However, the absence of protection from retaliatory firings for whistleblowers working for FDIC insured institutions poses a major threat, as this includes bank workers. Additionally, under the Dodd-Frank Act, whistleblowers were entitled to between 10 and 30 percent of sanctions obtained.[132] With that minimum being removed and the 30 percent remaining in place,[133] it means that even when a whistleblower can provide exemplary testimony and help

129. *Id*. at 274-275.

130. *Id*. at 275.

131. *See supra* part III (describing the repercussions of the AML Act's removal of whistleblower protections).

132. *Whistleblowers*, *supra* note 60.

133. *Id.*

obtain government sanctions, they are not legally entitled to any sort of significant compensation.

Furthermore, the consolidation of multiple banks has discouraged federal prosecutions against larger banks for fears of adverse economic effects. It is not enough to testify that "banks are not too big to jail" while simultaneously overruling the criminal charging of a bank accused of widespread wrongdoing.[134] This consolidation of power has placed pressure on federal prosecutors to reach DPAs with large banks that protect culpable executives from jail time, even if they failed to put in place or comply with statutorily required compliance standards.

Essentially, prosecuting with stronger AML enforcement and imposing jail time will assist in the combatting of money laundering through United States financial institutions. However, it is not enough to simply enact legislation that imposes harsher penalties, crimes, and individual accountability on culpable banks and bankers. Prosecutors should prioritize proceeding with criminal indictments without any fear of economic repercussions associated with indicting employees of consolidated banks.

In conclusion, if the worrying trend of the DOJ absolving banks or mitigating their wrongdoings continues, banks will only continue to act with impunity, which will in turn lead to the degradation of our banking system. To restore the integrity of our financial system, enforcement agencies and legislators need to address the issues of current legislation and the execution of it. Money laundering in and of itself is not a violent crime, but it is one that enables violent and ruthless organizations while also harming innocent parties associated with the wrongdoer(s). It is important that the DOJ treat this crime with the appropriate severity warranted, and not to allow those complicit and enabling its commission to avoid facing the consequences of their actions.

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134. *See* Rosenberg, *supra* note 8 (discussing how former U.S. Attorney General Eric Holder and other senior Justice Department leadership declined to criminally charge HSBC and how Holder has testified before congress that "banks are not too big to jail).

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