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The Dawn of a New Day: Expansive Law Signals Heightened AML Enforcement

On January 1, 2021, the Senate voted to override the former president's veto and to enact the National Defense Authorization Act for Fiscal Year 2021 (the "NDAA")[1]. Incorporated into the NDAA, the Anti-Money Laundering Act ("AMLA") sets into motion the most comprehensive reform to the Bank Secrecy Act ("BSA") in nearly two decades. The new landscape will feature:

- Heightened enforcement capabilities for the U.S. Departments of Treasury and Justice to investigate and prosecute money laundering crimes;
- New corporate transparency requirements for entities to disclose the identity of their beneficial owners; and
- Greater incentives for whistleblowers to report potential money laundering violations.

This client alert summarizes the key reforms to the BSA promulgated under the AMLA.

EXTENDING THE REACH OF THE BSA AND ITS ENFORCEMENT

The AMLA significantly broadens who is covered under the BSA. Specifically, the new law extends the BSA more explicitly to cryptocurrency businesses by amending the definition of "financial institutions" and "money transmitting businesses" to include businesses engaged in the exchange or transmission of "value that substitutes for currency."[2] The AMLA also expands the BSA to cover antique dealers.[3]

The AMLA enhances penalties for repeat violations of the BSA. It establishes new criminal and civil penalties in cases involving misrepresentation of material facts from or to a financial institution in transactions involving assets of a politically exposed person ("PEP") or a member of his/her family.[4] The AMLA also imposes criminal and civil penalties for failure to make certain disclosures regarding transactions involving financial institutions and entities that have been identified as a "primary money laundering concern," *i.e.,* a financial institution or jurisdiction with lax money laundering laws.[5]

At the same time, the federal government will be equipped with better resources and enforcement tools to pursue money laundering investigations. The new law encourages the reporting of potential misconduct by making whistleblower awards compulsory, rather than discretionary, and increases maximum awards for reporting BSA violations from $150,000 to up to 30 percent of the moneys collected

1. The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395 (Conference Report Dec. 2, 2020), 116th Cong. (2020) § 6403 ("2021 NDAA"), available here.
2. AMLA, § 6102(d).
3. AMLA, § 6102(d); AMLA, § 6110(a)(1) (31 U.S.C. § 5312(a)(2)(Y) as amended).
4. AMLA, § 6313 (adding 31 U.S.C. § 5335(b)).
5. AMLA, § 6313 (adding 31 U.S.C. § 5335(c)).

for monetary sanctions more than one million dollars.[6] A separate provision of the NDAA permits the government to pay a whistleblower for information that leads to the *initiation* of a civil or criminal forfeiture case involving the laundered assets of a PEP.[7] The AMLA also increases staffing at the Financial Crimes Enforcement Network ("FinCEN") and the U.S. Department of Treasury to combat money laundering and terrorist financing.

The AMLA further expands the Department of Justice's ("DOJ") authority to investigate conduct abroad by obtaining records in the custody of foreign financial institutions that maintain correspondent bank accounts in the United States. Previously, DOJ could issue subpoenas to "request records relating to such correspondent account."[8] Under the new law, DOJ will have the ability to pursue "any records relating to the correspondent account or *any account at the foreign bank,* including records maintained outside of the United States" in connection with investigations into BSA violations.[9]

Following enactment of the AMLA, companies and financial institutions should expect to see greater scrutiny of corporate AML compliance programs and more frequent enforcement activity from the U.S. Departments of Treasury and Justice. They should therefore review the sufficiency of their AML compliance programs. Companies should also ensure they have the policies, mechanisms, and/or staffing in place to facilitate employees' (and, in some cases, third parties') anonymous or confidential reporting of allegations of suspected misconduct as a response to the new whistleblower incentives.

UNMASKING CORPORATE ENTITIES' BENEFICIAL OWNERS

The Corporate Transparency Act of the AMLA addresses what has been criticized as a "glaring hole"[10] in, and a "significant vulnerability"[11] to, U.S. AML and counterterrorism enforcement efforts. It requires companies (*e.g.,* corporations, limited liability companies, and partnerships) covered by the new law to report identifying information regarding their beneficial ownership to FinCEN. "Beneficial ownership" is a broadly defined term that refers to the individual(s) who directly or indirectly owns or exercises control over a legal entity. Prior to passage of this act, bad actors engaging in financial crimes may have been able to evade detection by conducting transactions through corporate structures. Disclosing beneficial ownership information at the time of company formation or after changes in entity ownership is intended, at least in part, to prevent illicit actors from misusing shell or front companies. Once implemented, the new law will also restrict beneficial owners from taking corporate cover in states, such as Delaware, Wyoming, and Nevada, that historically have permitted the formation of anonymously held companies.

Under the Corporate Transparency Act, certain companies will be required to disclose and to keep current the name, date of birth, address, and unique identifying number from an "acceptable identification document" for each beneficial owner.[12] The reported identifying information will be maintained by FinCEN in a registry, which will be available to law enforcement.[13]

The new law principally targets small businesses as it exempts existing companies operating in the United States that employ more than 20 full-time employees in the United States and generate more than five million dollars in gross revenue.[14] The law also exempts certain banks, bank holding companies, and credit unions; money transmitting businesses registered with FinCEN; and certain insurance companies.[15] Under the Corporate Transparency Act, violators who willfully provide false information to FinCEN face fines of up to $10,000 and/or imprisonment of up to two years.[16]

The new reporting requirements dovetail with FinCEN's 2018 Customer Due Diligence Rule ("CDD Rule"), requiring covered financial institutions to identify and verify the identities of beneficial owners of legal entity customers at

6. AMLA, § 6314 (adding 31 U.S.C. § 5323(b)(1)).
7. NDAA, § 9703(b).
8. 31 U.S.C. § 5318(k)(3)(A).
9. AMLA, § 6308 (31 U.S.C. § 5318(k)(3)(A)(i) as amended).
10. Former Treasury Secretary Mnuchin's testimony before the Senate Finance Committee Hearing on the former president's Fiscal Year 2021 Budget (February 12, 2020).
11. U.S. National Strategy for Combating Terrorist and Other Illicit Financing at 12.
12. AMLA, § 6403 (adding 31 U.S.C. § 5336(b)(2)(A)).
13. AMLA, § 6403 (adding 31 U.S.C. § 5336).
14. AMLA, § 6403 (adding 31 U.S.C. § 5336(a)(11)).
15. Id.
16. AMLA, § 6403 (adding 31 U.S.C. § 5336(h)(3)(A)).

the time of account opening and defined points thereafter.[17] While FinCEN's beneficial ownership registry is confidential, financial institutions that obtain customer consent will be permitted to access the registry to verify account opening information. Accordingly, once the registry is established, financial institutions will be able to more easily satisfy their verification and identification obligations under the CDD Rule by confirming beneficial ownership with FinCEN.[18]

The disclosure requirements under the Corporate Transparency Act will go into effect upon the promulgation of implementing regulations by FinCEN and the U.S. Department of Treasury, no later than January 1, 2022.[19] To prepare for compliance with the new law, companies formed or registered to do business in the United States should consider the following steps:

- Assess the scope and obligation of "reporting companies" to report identifying information to FinCEN.
- Develop procedures and dedicate staff to aggregating, maintaining, and reporting of beneficial owner's identifying information. Businesses with complex entity structures and/or many beneficial owners will need more resources to compile the necessary identifying information.
- Monitor FinCEN's rulemaking process to implement regulations pursuant to the Corporate Transparency Act for guidance on terms undefined in the Corporate Transparency Act, such as "substantial control."
- Track pending revisions to FinCEN's CDD Rule, which are intended to reduce duplication of efforts and burdens on financial institutions and legal entity customers in light of the Corporate Transparency Act.

CONCLUSION

Financial institutions and companies formed or doing business in the United States should review and assess the sufficiency of their compliance programs to greet this new AML landscape. Those that dedicate the necessary resources to conducting such a review, including soliciting the input of legal counsel, will find themselves well-prepared for the coming expansion of the BSA.

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17. 31 C.F.R. § 1010.230.
18. AMLA, § 6403 (adding 31 U.S.C. § 5336(c)(2)(B)(iii)).
19. AMLA, § 6403(b)(5).