Schulte Roth & Zabel

# Alert

## Passage of Anti-Money Laundering Act of 2020 Includes Comprehensive BSA/AML Reform Measures

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On Dec. 31, 2020, as part of the National Defense Authorization Act ("NDAA"), Congress enacted the Anti-Money Laundering Act of 2020 ("AML Act") and the Corporate Transparency Act (collectively, the "Act") reflecting some of the most significant reforms to the Bank Secrecy Act ("BSA") and federal anti-money laundering ("AML") laws since the USA PATRIOT Act of 2001.

The Act addresses several AML issues that have been the subject of prior legislative attempts to reform various aspects of the BSA that have been of particular concern to the regulated financial industry. These include, among others, the need for new corporate transparency requirements designed to limit the use of shell companies to shield illicit financial schemes, the difficulties surrounding the issue of financial institutions de-risking (or avoiding) higher-risk customers or accounts, such as charities, money services businesses and non-governmental organizations, and the need for more feedback from the Financial Crimes Enforcement Network of the U.S. Department of the Treasury ("FinCEN" and "Treasury," respectively) and other law enforcement to improve the effectiveness of the AML compliance efforts adopted by financial institutions. The Act further memorializes certain aspects of existing FinCEN guidance relating to AML programs, including the adoption of a risk-based approach and certain FinCEN guidance related to virtual currencies. The Act also significantly expands the role and authority of FinCEN to be responsible for improved industry coordination and information sharing, both between the public and private sectors and globally with international partners. The following are a few of the key elements of the Act:

### 1. Expansion of the BSA's Purpose and Coverage

The Act expands the BSA's existing purpose from requiring reports and records where they have a high degree of usefulness to law enforcement, regulators and national security authorities to encompass the: (i) prevention of money laundering and terrorism financing through financial institutions establishing reasonably designed risk-based programs; (ii) facilitation of tracking money sourced through criminal activity or intended to support criminal or terrorist activity; (iii) assessment of risks to financial institutions, products or services in order to protect the U.S. financial system from criminal abuse and to safeguard national security; and (iv) establishment of information-sharing frameworks to be used among financial institutions, law enforcement and regulatory authorities to combat money laundering and terrorism financing.[1]

[1] *See* AML Act § 6101(a).

*Virtual Currencies.* The Act codifies existing FinCEN guidance related to virtual currencies by expanding and modifying several definitions and provisions within the BSA to encompass "value that substitutes for currency."[2] In doing so, the Act explicitly requires virtual currency businesses that qualify as money transmitters to register with FinCEN and establishes reporting and recordkeeping requirements for transactions involving certain types of virtual currencies.[3]

*Antiquities.* The Act expands the BSA's definition of "financial institution" to include "a person engaged in the trade of antiquities, including an advisor, consultant or any other person who engages as a business in the solicitation or the sale of antiquities, subject to regulations prescribed by the Secretary [of the Treasury]"[4] and requires Treasury, within a year of enactment of the NDAA, to propose AML rules specifically for dealers in antiquities.

### 2. Minimum Standards for AML/CFT Programs

The Act codifies the risk-based approach adopted by FinCEN and the federal functional regulators for financial institutions' AML programs and also requires financial institution to establish specific counter-terrorist financing ("CFT") programs to combat terrorism financing.[5] The Act requires Treasury to set minimum AML and CFT program standards by taking into account several factors, including that AML and CFT programs should be "reasonably designed to assure and monitor compliance with the requirements of the [BSA]" and "risk-based, including ensuring that more attention and resources of financial institutions should be directed toward higher-risk customers and activities, consistent with the risk profile of a financial institution, rather than toward lower risk customers."[6] The minimum standards must also take into account the issue of "de-risking" and provide for the extension of financial services to the underbanked, which includes the facilitation of global remittances and the prevention of criminal persons from abusing financial services networks.

Further, the Act requires federal examiners tasked with ensuring BSA compliance to attend annual trainings related to AML and CFT activities concerning: (i) potential risk profiles and warning signs during examinations; (ii) financial crime patterns and trends; (iii) the importance of AML and CFT programs for the safeguarding of national security; and (iv) de-risking.[7]

### 3. AML Strategic Initiatives

Within 180 days following the effective date of the NDAA, Treasury is required to establish AML and CFT priorities, which must be consistent with national security strategy. Financial institutions must then incorporate the priorities into their AML and CFT programs, and FinCEN will have 180 days following the

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[2] AML Act § 6102 (amending 31 USC §§ 5312 and 5330(d)).

[3] This aligns with FinCEN's recent notice of proposed rulemaking, Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 Fed. Reg. 83840 (Dec. 23, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-23/pdf/2020-28437.pdf. SRZ's client alert on the proposed rule is available here.

[4] AML Act § 6110 (amending 31 USC § 5312(a)(2)).

[5] The federal functional regulators are the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Securities and Exchange Commission and the Commodity Futures Trading Commission.

[6] *See* AML Act § 6101(b) (amending 31 USC § 5318(h)).

[7] *See* AML Act § 6307.

establishment of the AML and CFT priorities to promulgate regulations to carry them out.[8] The priorities are to be reviewed and updated every four years.

The Act also requires FinCEN to publish "threat pattern and trend information to provide meaningful information about the preparation, use and value of reports" at least twice a year. Along with the publication, FinCEN is required to provide financial institutions and regulators with "typologies, including data that can be adapted in algorithms, if appropriate, relating to emerging money laundering and terrorist financing threat patterns and trends."[9]

### 4. Certain Companies Must Report Beneficial Ownership Information Directly to FinCEN, Which Will Maintain a Confidential Registry

Under the Corporate Transparency Act, "reporting companies" must report to FinCEN identifying information for any individual who owns or controls, directly or indirectly, 25% or more of the company's ownership interests, as well as any individual who exercises "substantial control" over the company.[10]

A "reporting company" is defined to mean a corporation, limited liability company or other similar entity that is — (i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe; and (iii) not a company that falls within any of the 24 provided excluded company-types.[11] Among these exclusions, which track, in certain respects the exemptions to FinCEN's customer identification program and customer due diligence rules, are: publicly traded companies; bank holding companies; BSA-regulated financial institutions (e.g., banks, broker-dealers and money transmitting businesses); registered investment advisers and pooled investment vehicles operated or advised by a registered investment adviser; and companies that have (a) physical operating office within the United States, (b) more than 20 full-time employees based in the United States, and (c) reported more than $5 million in gross receipts or sales in the aggregate to the Internal Revenue Service in the previous year. Foreign-based pooled investment vehicles that are operated or advised by a registered investment adviser are required to "file with FinCEN a written certification that provides identification information of an individual that exercises substantial control over the pooled investment vehicle."[12] The Act does not define "substantial control" or provide examples of individuals that exercise substantial control.

An existing reporting company must disclose beneficial ownership information to FinCEN within two years of the effective date of the Act's implementing regulations by submitting a report to FinCEN. A newly formed reporting company must disclose beneficial ownership information to FinCEN at the time

[8] *See* AML Act § 6101(b). This is consistent with the proposals raised in FinCEN's most recent advanced notice of proposed rulemaking soliciting comment on enhancing the effectiveness of AML programs. FinCEN, ANPRM, Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58023 (Sept. 17, 2020), available here.

[9] *See* AML Act § 6206.

[10] *See* Corporate Transparency Act § 6403 (adding 31 USC § 5336). Reportable information includes name, date of birth, address and unique identifying number, e.g., driver's license or passport numbers, of each defined beneficial owner.

[11] *Id.*

[12] *Id.*

of incorporation. All entities must update their beneficial ownership information within a year of any change in beneficial ownership. FinCEN will maintain the resulting beneficial ownership registry.

Although the beneficial ownership registry will not be publicly available, FinCEN will be authorized to share information in certain circumstances, and subject to certain limitations, with (1) a financial institution, (b) federal law enforcement, intelligence and national security agencies; (c) state, local and Tribal law enforcement authorities; (d) foreign law enforcement authorities; and (e) federal functional and other regulators. FinCEN also may share a consenting reporting company's beneficial ownership information with other financial institutions for customer due diligence-related purposes. FinCEN shall issue a FinCEN identifier to each reporting company upon such company's request, evidencing that beneficial ownership information has indeed been reported to FinCEN.

The Act would also make the willful failure to report beneficial ownership information or the willful reporting of false or fraudulent beneficial ownership information a violation of law that can potentially result in civil and criminal penalties, including imprisonment.

The beneficial ownership reporting requirement does not take immediate effect and requires Treasury, shortly after the enactment of the NDAA, to promulgate implementing regulations and then also revise the existing FinCEN customer due diligence rule (31 C.F.R. § 1010.230) to account for these new beneficial ownership reporting requirements.

### 5. New Violations for Concealing Source of Assets in Monetary Transactions

*Senior Foreign Political Figures.* The Act specifically prohibits a person from knowingly concealing, falsifying or misrepresenting, or attempting to conceal, falsify or misrepresent, from or to a financial institution, a material fact concerning the *ownership or control of assets* involved in a monetary transaction if "(1) the person or entity who owns or controls the assets is a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure" and "(2) the aggregate value of the assets involved in 1 or more monetary transactions is not less than $1,000,000."[13]

*Section 311 Actions.* The Act also prohibits the knowing concealment, falsification, or misrepresentation of a material fact concerning the *source of funds* in a monetary transaction that "(1) involves an entity found to be a primary money laundering concern under section 5318A or the regulations promulgated under this title; and (2) violates the prohibitions or conditions prescribed under section 5318A(b)(5) or the regulations promulgated under this title."[14]

A violation of these provisions is punishable by up to ten years' imprisonment and up to $1 million in penalties (or both), and subject to criminal and civil forfeiture of assets.[15] Since a registered investment adviser or fund is not a financial institution under the Act, these new violations would not necessarily

[13] *See* AML Act § 6313(b)(1).

[14] *See* AML Act § 6313(b)(2). Section 311 of the USA Patriot Act of 2001, which added 31 USC § 5318A to the BSA, authorizes Treasury, upon finding that reasonable grounds exist to conclude that a foreign jurisdiction, institution, class of transaction or type of account is of "primary money laundering concern," to require domestic financial institutions and financial agencies to take certain "special measures" against the entity designated of primary money laundering concern. 31 USC § 5318A(b)(5) provides that Treasury may prohibit, or impose conditions upon, the opening or maintaining in the United States of a correspondent account or payable-through account for or on behalf of a foreign banking institution, if such correspondent account or payable-through account involves any jurisdiction or entity identified as being of primary money laundering concern.

[15] *See* AML Act § 6313.

directly affect the representations made by persons to a registered investment adviser or private investment fund; however, investment advisers and funds should take these increased penalties into account in formulating their AML programs.

### 6. Increased Whistleblower Rewards

Under a new whistleblower program, which revises the BSA's existing whistleblower provision, whistleblowers who voluntarily provide original information to their employer, the Secretary of the Treasury or the Attorney General, as applicable, that leads to a successful BSA/AML-related enforcement action could receive up to 30% of monetary penalties recovered from an entity where the tip led to penalties over $1 million.[16] This reflects a significant increase from the current reward threshold of the lower of $150,000 or 25% of the penalty. The term "original information" is defined to mean "information that (A) is derived from the independent knowledge or analysis of the whistleblower; (B) is not known to the Secretary [of the Treasury] or the Attorney General from any other source, . . . and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a government report, hearing, audit, or investigation, or from the news media."[17] A whistleblower who faces retaliation for lawfully reporting a BSA/AML-related violation can file a complaint with the Secretary of Labor and, if no decision issues in 180 days, can file an action in a federal district court.

The NDAA also added a Kleptocracy Asset Recovery Rewards Act to encourage the rewarding of individuals who provide information leading to the seizure, recovery or repatriation of stolen assets in an account at a U.S. financial institution.[18]

### 7. Federal Agencies Must Consider how to Streamline AML Reporting

The Act requires Treasury to: (i) evaluate its currency transaction reporting ("CTR") and suspicious activity report ("SAR") reporting requirements, including the reporting thresholds; (ii) within one year of the enactment of the NDAA, propose to Congress regulations that reflect its findings by reducing unnecessarily burdensome requirements and adjusting reporting thresholds; and (iii) at least once every five years for the next ten years, reevaluate reporting thresholds and propose rulemakings, if appropriate.[19]

SAR filings must be "guided by the [BSA] compliance program" of a financial, "including the risk assessment processes" that should take into consideration the strategic AML priorities issued by Treasury.[20]

Under the Act, Treasury must also establish (i) streamlined and automated processes to allow for the filing of "noncomplex categories of reports" and (ii) corresponding standards meant to ensure that any such streamlined reports would relate to transactions concerning potential violations of law.[21]

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[16] AML Act § 6314 (amending 31 USC § 5323).

[17] AML Act § 6314.

[18] NDAA § 9701 *et seq*.

[19] *See* AML Act §§ 6204 and 6205.

[20] AML Act § 6202 (amending 31 USC § 5318(g)).

[21] *See* AML Act § 6202. On Dec. 17, 2020, the Office of the Comptroller of the Currency (OCC) invited comment on a notice of proposed rulemaking to modify requirements for certain entities to file SARs, which would, in effect, make it possible for the OCC to grant relief to those

**8. Ability to Share SARs with Foreign Branches, Subsidiaries and Affiliates**

Currently, under FinCEN guidance and regulations, SAR sharing is only permissible with a foreign "head office" or "controlling company" of a bank, securities broker-dealer, futures commission merchant or introducing broker in commodities. Within a year of the NDAA's enactment, Treasury must establish a pilot program for participating financial institutions to share SARs and SAR information with their foreign branches, subsidiaries and affiliates — except those in certain jurisdictions, including China , Russia and sanctioned jurisdictions — for the purpose of combating illicit finance schemes.[22] In addition, the Act prohibits the offshoring of BSA-related compliance functions that result from SAR sharing.[23]

**9. Procedures for "Keep-Open" Accounts and Directives**

Further, to effectuate the BSA's broader purpose, the Act adds a new safe harbor that would shield a financial institution from liability with respect to keeping open any customer account or customer transaction by written request of a federal law enforcement agency so long as that enforcement agency provides advance notice to FinCEN of the intent to submit such written request to the financial institution.[24] Any "keep open" request shall include a termination date after which the request shall no longer apply.

**10. Broader Subpoena Reach**

The Act expands the authority of Treasury and the Department of Justice to issue a subpoena to a 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 that are the subject of: (i) a violation of U.S. criminal law; (ii) a violation of the BSA; (iii) a civil forfeiture action; or (iii) an investigation pursuant to Section 311 of the USA PATRIOT Act of 2001.[25] The Act provides that conflict with a foreign jurisdiction's confidentiality laws may not be the only basis for quashing or modifying the subpoena.

**11. Treasury to Enhance Funding and Staffing on Domestic and International Levels**

*Domestic.* The Act also requires FinCEN to employ and maintain on staff money laundering and terrorist financing investigation financial experts, as well as emerging technology experts,[26] and Treasury would have special hiring authority to appoint candidates directly to positions related to terrorism and financial intelligence within FinCEN's competitive services.[27] Moreover, FinCEN must appoint an Innovation Officer tasked with, among other directives, providing technical assistance or guidance on the implementation of new technologies and exploring opportunities for public-private partnerships.[28] To

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national banks or federal savings associations that develop innovative solutions intended to meet BSA requirements more efficiently and effectively. *See* https://www.occ.gov/news-issuances/federal-register/2020/nr-occ-2020-174a.pdf.

[22] *See* AML Act § 6212(a).

[23] *Id.*

[24] *See* AML Act § 6306.

[25] *See* AML Act § 6308 (*emphasis added*).

[26] *See* AML Act § 6101(c).

[27] *See* AML Act § 6105.

[28] *See* AML Act § 6208.

enable FinCEN to carry out its expanded role, the Act provides it with $136 million for 2021, $60 million for 2022 and $35 million for each of years 2023 through 2026.[29]

*International.* FinCEN specifically, and Treasury, generally, will expand their abilities to coordinate with foreign law enforcement authorities. FinCEN will appoint at least six foreign financial intelligence unit liaisons at U.S. embassies to, among other directives, establish relationships and promote engagement with their foreign counterparts. U.S. embassies abroad will also see a Treasury Attachés program created.[30] Treasury will be required to work with international organizations including the Financial Action Task Force, International Monetary Fund, and Organization for Economic Cooperation and Development to promote global AML frameworks. Finally, for the next four years, Treasury will receive $60 million per year earmarked for providing technical assistance abroad to promote compliance with international standards and best practices for establishing AML and CFT programs.[31]

### 12. Focus on Improving Communications Between Federal Regulators and the Private Sector

The Act makes FinCEN responsible for periodically engaging BSA officers at financial institutions to review previously filed SARs and discuss trends in suspicious activity. FinCEN would also be tasked with disseminating any relevant feedback to the appropriate federal and state regulatory bodies, as well as providing written reports to financial institutions regarding specific SARs that proved to be useful in investigations.[32] The Act further requires FinCEN's Office of Domestic Liaison to be established to act as liaison between financial institutions and their regulatory and supervisory counterparts with respect to information-sharing matters concerning the BSA. Among other duties, the Office of Domestic Liaison is tasked with performing outreach to BSA officers at financial institutions, including non-bank financial institutions, and with gathering feedback regarding BSA/AML examinations.[33]

Two new subcommittees will be created in the BSA Advisory Group ("BSAAG").[34] *First*, the Subcommittee on Innovation and Technology will consider ways to (i) encourage and support technological innovation in the areas of AML and CFT and (ii) reduce existing obstacles to innovation.[35] *Second*, the Subcommittee on Information Security and Confidentiality will consider "the information security and confidentiality implications of regulations, guidance, information-sharing programs and the examination for compliance with and enforcement of" the BSA.[36] Both BSAAG subcommittees will

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[29] *See* AML Act § 6509.

[30] The Act defines "foreign financial intelligence unit" as "any foreign agency or authority, including a foreign financial intelligence unit that is a member of the Egmont Group of Financial Intelligence Units, that is empowered under foreign law as a jurisdiction's national center for — (i) receipt and analysis of suspicious transaction reports and other information relevant to money laundering, associated predicate offenses, and the financing of terrorism; and (ii) the dissemination of the results of the analysis described in clause (i)." AML Act § 6109.

[31] *See* AML Act § 6111.

[32] *See* AML Act § 6203.

[33] *See* AML Act § 6107.

[34] The BSAAG is comprised of representatives from federal regulatory and law enforcement agencies, financial institutions and trade groups with members subject to the requirements of the BSA, that functions as the means by which Treasury receives advice on the operations of the BSA.

[35] *See* AML Act § 6207.

[36] *See* AML Act § 6302.

statutorily terminate in five years following passage of the Act, subject to renewal by the Secretary of the Treasury.

The Act also statutorily formalizes the FinCEN Exchange program, which was launched on Dec. 4, 2017 and facilitates increased voluntary public-private information-sharing among law enforcement, national security agencies, and financial institutions. to exchange information on priority threats.[37]

### 13. Possible "No-Action Letter" Process for FinCEN

The Act requires FinCEN to conduct a review to consider establishing a process for the issuance of no-action letters in response to inquiries concerning the application of the BSA or any other AML or CFT law to specific conduct, including requests for confirmation as to whether FinCEN intends to take a specific enforcement action against a person. The review will be based on an analysis of three factors: (i) a timeline for the process used to reach a final determination by FinCEN in response to a request for a no-action letter; (ii) whether improvements in current processes are necessary; and (iii) whether a formal no-action letter process would help to mitigate or accentuate illicit finance risks.[38]

### 14. Government Reports and Assessments to Evaluate AML Requirements

The Act calls for a number of reports and assessments by FinCEN to evaluate the effectiveness of the efforts of the regulated community in combating money laundering and terrorist financing. For example, the Government Accountability Office will be required to conduct an analysis and report to Congress on de-risking, which analyzes the drivers of de-risking and identifies options for financial institutions that serve high-risk categories of clients. Treasury, in turn, will also be required to undertake a formal review of the adverse consequences of de-risking by financial institutions, and develop a strategy to reduce de-risking and its adverse consequences. Other reports address trade-based money laundering, deferred prosecutions and non-prosecution agreements relating to BSA violations, human trafficking, the use of virtual currencies and money laundering in the Peoples Republic of China and Russia.

### 15. Increased Penalties

As amended by the Act, in addition to any other fine imposed under 31 USC § 5322, the BSA would permit fines "equal to the profit gained by such person by reason" of the violation to be imposed.[39] Repeat violators of the BSA could be subject to an additional civil penalty of either (i) three times the profit gained or loss avoided or (ii) twice the otherwise-applicable maximum penalty for the violation.[40] Persons who violate the BSA who are directors or employees of financial institutions could also owe amounts equal to bonuses paid out in the year in which the violation occurred or the following year. And those individuals determined to have committed "egregious" violations would be barred from serving on the board of directors of a U.S. financial institution for ten years from the date of conviction or judgment.[41]

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[37] *See* AML Act § 6103.

[38] *See* AML Act § 6305.

[39] *See* AML Act § 6312.

[40] *See* AML Act § 6309 (amending 31 USC § 5321).

[41] *See* AML Act §§ 6309, 6310 and 6312.

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