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# The Anti-Money Laundering Act of 2020

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On January 1, 2021, the National Defense Authorization Act for Fiscal Year 2021 became law after the Senate joined the House in overriding a presidential veto.[1] Included within the legislation is the Anti-Money Laundering Act of 2020 ("the Act"), which introduces dozens of reforms to the Bank Secrecy Act ("BSA") and the broader anti-money laundering ("AML") regime and—unrelatedly—also provides authority to the U.S. Securities and Exchange Commission to seek disgorgement in federal court. Among the AML reforms, the Act establishes a new national beneficial ownership reporting requirement, increases BSA penalties and strengthens enforcement, enhances whistleblower incentives and protections, and encourages greater international information sharing and coordination. As passage of the Act marks the most significant update to the country's AML laws since the 2001 USA PATRIOT Act, we write to summarize the Act's key provisions.

## KEY CHANGES TO THE BSA/AML REGIME

### Beneficial Ownership

One of the most widely-anticipated provisions in the Act is the new national beneficial ownership reporting requirement. The Act requires what it terms "reporting companies" to report information on their beneficial owners to the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") for use in a beneficial ownership registry. The requirement's stated purpose is "to combat the abuse of anonymous companies, which can be used to facilitate money laundering, the financing of terrorism, proliferation finance, tax evasion, human and drug trafficking, sanctions evasion, and other financial crimes." This new requirement will bring the U.S. into compliance with international AML standards, while shifting the burden of beneficial ownership reporting from financial institutions to the reporting companies themselves.

The Act defines "reporting companies" broadly as any company registered in a U.S. state or foreign companies that are registered to do business in the United States. Importantly, however, to further the Act's goal of targeting companies with limited or no operations, or "shell" companies, the Act includes broad exemptions to the "reporting companies" definition. For example, financial institutions, publicly traded companies, nonprofits and government entities are all exempt. Also exempt are companies that employ more than 20 people, have gross receipts in excess of $5 million *and* have a physical operating presence in the United States.

"Beneficial owners" are defined as individuals who (i) exercise "substantial control" over an entity *or* (ii) own or control at least 25% of the ownership interests in an entity. The Act does not define "substantial control". Companies must report the names, dates of birth, addresses and unique identifying numbers for relevant individuals. FinCEN is required to maintain this information for at least five years after

the reporting company terminates, and the Act imposes penalties for failing to report, fraudulently reporting or improperly sharing this information.

The Act provides that the information reporting companies are required to submit to FinCEN is to be stored in a non-public beneficial ownership registry and may only be accessed upon a request from (i) a U.S. agency acting in a law enforcement capacity, (ii) a Federal agency on behalf of a foreign law enforcement authority under certain circumstances, (iii) a financial institution subject to customer due diligence requirements with the consent of the reporting company or (iv) other Federal regulators, as determined by the U.S. Secretary of the Treasury.

Among other things, permitting access to this information will provide financial institutions with a means to verify information on reporting companies to increase the effectiveness of their AML programs and will promote increased information sharing between U.S. and foreign enforcement authorities in international money laundering investigations. We anticipate that these provisions of the Act will also help strengthen the cross-border investigative efforts of FinCEN's recently established Global Investigations Division.

#### Modernizing the BSA

The Act includes a number of provisions to modernize the BSA to address recent developments in technology and enforcement. Among these, the Act expands the scope of businesses that are considered to engage in the transfer of monetary funds. While previously "money transmitting businesses" were only those businesses that transferred "funds", such businesses now include all businesses that transfer "currency, funds, or value that substitutes for currency". The Act further grants the Treasury Secretary the authority to define "value that substitutes for currency" through future regulations. This expanded definition is particularly notable for businesses involved in digital currencies, virtual currencies in internet games, electronic gift cards and other non-traditional cash substitutes.

The Act also establishes the FinCEN Exchange to facilitate a voluntary public-private information sharing partnership among financial institutions, FinCEN and law enforcement and national security agencies to combat money laundering by promoting technical advances in reporting. One goal of the Exchange is to enhance understanding between financial institutions and regulators regarding the development of risk-based AML compliance programs. In addition, the Act creates the Subcommittee on Information Security and Confidentiality within the Bank Secrecy Act Advisory Group to advise the Treasury Secretary regarding information security and sharing related to BSA enforcement, and the Subcommittee on Innovation and Technology to advise the Secretary on how to most effectively encourage and support technological innovation in the AML enforcement regime.

#### Increased BSA Penalties

The Act increases penalties for serious BSA violations by corporations and individuals. In particular, the Act establishes enhanced civil penalties for repeat violators that may be up to the greater of three times the profit gained or loss avoided as a result of the repeat violation, if calculable, or twice the maximum penalty otherwise permitted with respect to that violation. Additionally, individuals found to have committed "egregious" violations of the BSA or other AML laws now face a prohibition on serving on the board of directors of a U.S. financial institution.

In addition, the Act imposes maximum penalties of 10 years of imprisonment and a $1 million fine for senior foreign political figures, their immediate family members and close associates who knowingly conceal, falsify or misrepresent material facts concerning the ownership or control of assets involved in a monetary transaction. Any person that knowingly conceals, falsifies or misrepresents a material fact concerning the source of funds in a monetary transaction that involves an entity found to be a primary money laundering concern would also be subject to the same penalties.

#### Subpoenas to Foreign Financial Institutions

The Act contains an important provision related to subpoenas to foreign banks that maintain correspondent accounts in the United States. Previously, the U.S. Department of Justice and Treasury Department could issue subpoenas pursuant to 31 U.S.C. § 5318 to any foreign bank with a correspondent account in the United States for records related to that

correspondent account, including records maintained abroad. The Act broadens that authority to permit both agencies to issue subpoenas to such banks for records related to the correspondent account *or* any other account of the foreign bank (again, including records maintained abroad), and to do so provided only that the records sought are the subject of a U.S. criminal investigation, civil forfeiture action or other investigation related to the Act. Potential penalties for non-compliance range from contempt sanctions to the termination of correspondent relationships between the foreign bank and covered U.S. financial institutions.

The Act marks a significant expansion of the ability of U.S. law enforcement authorities to obtain foreign bank records unrelated to correspondent accounts, and to obtain such records more quickly than through more cumbersome processes such as mutual legal assistance treaty requests. Given comity concerns and the potential impact on international cooperation, however, we anticipate prosecutors will continue to be required to obtain approval from the Justice Department's Office of International Affairs before issuing such subpoenas, and that prosecutors in most cases will still be required to pursue treaty requests before being permitted to resort to compulsory process. How these subpoenas are used in practice, and the outcome of any legal challenges that their use may draw, will be important areas to watch.

#### Whistleblower Incentives & Protections

The Act updates the whistleblower provisions of the BSA by incentivizing whistleblower tips and further penalizing retaliation. Most significantly, the Act mandates that whistleblowers who provide tips that lead to successful enforcement actions "shall" receive an award of up to 30% of the assessed monetary penalties when the tip leads to a penalty in excess of $1 million. The Act also heightens protections for whistleblowers by prohibiting employer retaliation and permitting whistleblowers who have experienced retaliation to file a complaint with the U.S. Department of Labor; if no decision is issued within 180 days, the Act provides that the whistleblower may pursue an action in U.S. district court.

#### Review of AML Reporting Requirements

The Act requires the Treasury Department, in consultation with the Justice Department and other agencies and stakeholders, to conduct a formal review of the AML reporting process, with the goal of assessing the reporting thresholds and streamlining the reporting processes for Currency Transaction Reports ("CTR") and Suspicious Activity Reports ("SAR"). In light of the current inefficiencies of the CTR and SAR filing processes, this provision will be of particular interest to financial institutions, which we anticipate will be actively engaged in the review.

#### International AML Coordination

Several provisions of the Act aim to increase international cooperation and coordination in AML matters. For example, the Act creates a Treasury Attaché Program to aid foreign countries in complying with Financial Action Task Force requirements. The Act also establishes FinCEN Foreign Financial Intelligence Unit Liaisons to perform outreach regarding AML issues with foreign financial institutions and commercial actors and maintain relationships with foreign regulatory authorities, law enforcement agencies and other foreign authorities. In addition, the Act requires the Treasury Secretary within one year to issue rules to create a pilot program to permit financial institutions to share data from SARs with their foreign branches, affiliates and subsidiaries (except those in China, Russia and certain other jurisdictions) in order to combat illicit finance risks.

### SEC DISGORGEMENT

Significantly—and unrelated to anti-money laundering—the Act contains a provision amending the Securities Exchange Act of 1934 to give the SEC express statutory authority to seek disgorgement in civil enforcement actions in federal court and to extend the statute of limitations to bring such actions from five to 10 years for any scienter-based violation of the securities laws, including those under the Securities Act of 1933 and the Investment Advisers Act of 1940. These provisions come as a response to the limitations imposed by the U.S. Supreme Court's 2017 decision in *Kokesh v. SEC*, 137 S. Ct. 1635, which had held that disgorgement was a penalty subject to the same five-year statute of limitations period as other civil monetary penalties commonly applied by the SEC. The Act provides that the new

statute of limitations rule will apply not just prospectively but to any action or proceeding that was pending as of the date of enactment.

Courts will ultimately have to determine how to apply this new limitations period to pending cases, particularly in light of the Supreme Court's holding in *Liu v. SEC*, 140 S. Ct. 1936 (2020), that disgorgement should be limited in accordance with "equitable principles". Notably, the Act does not expressly do away with the equitable limitations imposed by *Liu*, so courts may be hesitant to interpret these provisions in such a manner. Application of the new limitations period to pending cases also raises potential constitutional questions related to retroactive imposition of penalties. While the full impact of these new disgorgement rules will depend on future court interpretation, they have the potential to significantly increase the SEC's ability to pursue illegally gained profits on behalf of investors.

## CONCLUSION

The Anti-Money Laundering Act of 2020 is the first major update to the BSA/AML regime in nearly 20 years. The Act includes new beneficial ownership reporting requirements, increased mechanisms for coordination between domestic and international law enforcement, and a number of provisions that could lead to greater AML enforcement, including significantly expanded whistleblower incentives and protections. Financial institution clients in particular will need to carefully evaluate the impact of the new law and eventual implementing regulations on their AML programs. We will monitor regulatory and enforcement developments on the AML and SEC disgorgement fronts and provide further updates in the year ahead.



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[1] National Defense Authorization Act for Fiscal Year 2021, United States Congress, enacted on January 1, 2021, *available at* https://www.congress.gov/bill/116th-congress/house-bill/6395/text.