BSA/AML Reform in the 2021 NDAA
Seven Things To Know

On January 1, 2021, the Senate voted to override President Trump's veto of the National Defense Authorization Act (the "NDAA" or "Act"), which includes over 200 pages of significant reforms to the Bank Secrecy Act ("BSA") and other anti-money laundering ("AML") laws that have been working their way through Congress for several years. The Senate's vote follows the House's override on December 28, 2020, and the Act is now law. The Act puts in place the most comprehensive set of BSA/AML reforms since the USA PATRIOT Act of 2001.

Updated: *This alert has been updated since it was first published on December 11, 2020, to reflect the Senate and House votes to override President Trump's veto.*

1 The Act will require certain U.S. companies to provide FinCEN with information about their beneficial owners.

The Act will require certain U.S. companies and companies doing business in the U.S. ("reporting companies") to disclose to the Financial Crimes Enforcement Network ("FinCEN") information about their beneficial ownership, including the name, date of birth, address, and unique identifying numbers (e.g., driver's license or passport numbers) of their beneficial owners. Newly formed companies will be required to report such information at the time of incorporation. Reporting companies that subsequently experience a change in beneficial ownership will be required to provide FinCEN with updated information within a year. FinCEN will maintain a registry of the beneficial ownership information collected.

Under the Act, a "beneficial owner" is defined as any person who (i) owns a 25% equity stake or (ii) exercises substantial control over the entity. The Act does not define what constitutes "substantial control," and it is unclear whether the definition will be interpreted to align with the "control" prong of FinCEN's current Beneficial Ownership Rule, which provides that a beneficial owner includes "a single individual with significant responsibility to control, manage, or direct a legal entity customer."

The Act exempts a range of companies from the reporting requirements, including public companies, as well as companies that: (i) have more than 20 full-time employees, (ii) report more than $5 million in yearly revenue to the Internal Revenue Service, *and* (iii) have an operating presence at a physical office within the United States. These exemptions reflect one of the primary purposes of the Act, which is increased transparency into the beneficial owners of shell companies and investment conduits.

The beneficial ownership information that FinCEN collects in its registry will not be publicly available, although the Act authorizes FinCEN to share beneficial ownership information with federal law enforcement, and with state, local, and tribal law enforcement agencies if the enforcement agency obtains court approval. The Act also allows FinCEN to share beneficial ownership information with financial institutions for customer due diligence purposes, but only with the reporting company's consent.

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2 The Act creates a new whistleblower program and establishes a private right of action for whistleblowers who have experienced retaliation.

To incentivize reporting of BSA/AML violations, the Act sets forth a new whistleblower program that provides for awards to whistleblowers whose tips lead to monetary penalties that exceed $1 million. In these circumstances, whistleblowers can receive up to 30% of the monetary penalties assessed against the company. The amount of the award depends on a variety of factors, including the significance of the information, the degree of assistance provided, and the interest of the government in deterring BSA violations by providing such rewards. The Act expands the current whistleblower incentive law under the BSA, which provides for rewards of $150,000 or 25% of the penalty, whichever is lower.

The Act also creates a private right of action for whistleblowers who suffer retaliation for disclosing BSA violations. Specifically, a whistleblower can file a complaint with the Occupational Safety and Health Administration ("OSHA") and, if OSHA does not issue a decision within 180 days, the whistleblower can file a claim in federal district court.

3 The Act significantly increases penalties for BSA/AML violations for both companies and individuals.

For repeat BSA/AML violations, the Act allows for an additional civil penalty of either (i) three times the profit gained or loss avoided (if practicable to calculate) or (ii) two times the otherwise applicable maximum penalty for the violation. The Act also adds to the BSA a provision allowing for fines "equal to the profit gained by such person by reason" of the violation, and also, for financial institution directors and employees, bonuses paid out the year in which the violation occurred or the following year. In addition, persons determined to have engaged in "egregious" violations of the BSA/AML laws may be barred from serving on the board of directors of a U.S. financial institution for ten years from the date of the conviction or judgment reflecting the relevant determination. Finally, the Justice Department will, for the next five years, be required to submit reports to Congress on the use of non-prosecution and deferred prosecution agreements in the course of BSA/AML matters.

4 The Act requires Treasury to evaluate how it might streamline SAR and CTR requirements and processes.

Several provisions of the Act require Treasury, the Justice Department, and other agencies to consider the usefulness of, and opportunities to streamline, AML reporting requirements. Among other things, the Act requires Treasury to undertake a formal review of currency transaction reporting ("CTR") and suspicious activity reporting ("SAR") requirements and current reporting thresholds. Within one year of the enactment of the NDAA, Treasury must propose regulations to Congress that would reduce any unnecessarily burdensome requirements and adjust thresholds in line with its findings. Treasury must also reevaluate the reporting thresholds used in its regulations at least once every five years, for the next ten years. This formal review and recommendation process suggests forthcoming enhancements to, and modernization of, both the CTR and SAR regimes.

5 The Act underscores the importance of law enforcement focus on international AML issues.

The Act reinforces the importance of working with foreign law enforcement authorities to safeguard the financial system as part of FinCEN's mission. To that end, the Act requires (i) a Treasury Attachés program to be established at U.S. embassies abroad; (ii) FinCEN to appoint Foreign Financial Intelligence Unit Liaisons at U.S. embassies to facilitate engagement with their foreign counterparts; and (iii) Treasury 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. The Act also appropriates $60 million per year between 2020 and 2024 to Treasury to provide technical assistance to foreign countries to promote compliance with international standards and best practices for establishing effective AML and counter-terrorist financing ("CTF") programs.

6 The Act expands the ability of financial institutions to share SARs with foreign affiliates.

The Act requires the Secretary of Treasury and FinCEN to create a pilot program that allows a financial institution to share SARs and SAR information with the financial institution's foreign branches, subsidiaries, and affiliates. Currently, pursuant to interagency guidance, financial institutions may only disclose SARs to a foreign affiliate that is a "head office" or "controlling company," which can serve as an obstacle to enterprise-wide compliance at global banks. However, the Act prohibits participants in the pilot program from sharing SARs with branches, subsidiaries, and affiliates in China, Russia, and certain other jurisdictions.

7 The Act makes a number of other changes that significantly modify the U.S. BSA/AML regime.

The section of the Act devoted to AML spans over 200 pages and incorporates many other provisions that significantly change the BSA/AML landscape in the United States, including:

- expanding the BSA's applicability to antiquities dealers (but not art dealers);
- amending various definitions that appear intended to capture virtual currencies and other non-traditional cash substitutes;
- broadening the ability to subpoena the records of foreign banks that maintain correspondent accounts in the United States;
- creating a "FinCEN Exchange" to facilitate voluntary public-private information sharing among law enforcement, national security agencies, and financial institutions;
- considering a potential no-action letter process for FinCEN; and
- requiring a number of potentially significant studies, including studies related to (i) artificial intelligence, blockchain, and other emerging technologies; (ii) beneficial ownership reporting requirements; (iii) trade-based money laundering; and (iv) money laundering by the People's Republic of China.

Importantly, the Act also contains provisions that bear on the recent "effectiveness" advance notice of proposed rulemaking promulgated by FinCEN, described in our prior client alert. These include provisions that emphasize risk-based approaches to AML program requirements and that would require Treasury to periodically publish on national AML and CTF priorities.

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