US Enacts Historic Legislation To Strengthen Anti-Money Laundering and Counterterrorist Financing Legal Framework

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01/07/21

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On January 1, 2021, the United States Congress overrode the president's veto to enact the 2021 National Defense Authorization Act (the NDAA), which, aside from allocating the annual defense budget, includes the Anti-Money Laundering Act of 2020 (AMLA), the Corporate Transparency Act (CTA), the Combating Russian Money Laundering Act (CRMLA) and the Kleptocracy Asset Recovery Rewards Act (KARRA). These statutes contain sweeping provisions intended to modernize the anti-money laundering (AML) and counterterrorist financing (CTF) laws in the U.S. to address new and emerging threats; improve coordination and information sharing among regulators, law enforcement and financial institutions; and encourage technological innovation to more effectively counter money laundering and terrorism financing.

Most notably, these statutes collectively (i) impose new beneficial ownership reporting requirements on companies formed or registered in the United States; (ii) expand the jurisdictional reach of the Treasury and Justice Departments to obtain records from foreign banks with U.S. correspondent accounts; (iii) establish more robust whistleblower programs to fight money laundering and corruption; (iv) include virtual currencies within the framework of the Bank Secrecy Act (BSA); (v) create a pilot program under which U.S. financial institutions can share suspicious activity reports (SARs) with foreign affiliates; (vi) direct a review aimed toward streamlining existing requirements for currency transaction reports (CTRs) and SARs; (vii) amend the BSA to add dealers in antiquities to the definition of "financial institution" and enhance penalties for BSA violations; and (viii) outline steps to address potential Russian and Chinese money laundering risks.

New Beneficial Ownership Reporting Requirements

The CTA imposes new beneficial ownership reporting requirements on U.S. companies to improve transparency regarding corporate structures and discourage the use of shell corporations to disguise and move illicit funds. Specifically, each "reporting company" — generally, domestic entities created under the laws of a state or Indian tribe and foreign companies registered to do business in the United States, with certain exceptions — must submit a report to the Financial Crimes Enforcement Network (FinCEN) disclosing information regarding its beneficial owners, such as full legal name, date of birth, residential or business street address, and a unique identifying number (*e.g.*, U.S. passport or driver's license number) or FinCEN identifier.[1] FinCEN must promulgate regulations implementing this reporting requirement within one year of the NDAA's enactment. These regulations will complement FinCEN's beneficial ownership rule requiring covered financial institutions[2] to identify and verify the beneficial owners of their legal entity customers, which became effective in May 2018 (the May 2018 Rule).

Reporting companies formed or registered prior to the effective date of the implementing regulations must submit to FinCEN such a report in a timely manner, and in no case more than two years after the regulations' effective date. Reporting companies formed or registered after the effective date must submit such a report at the time of formation or registration, and all reporting companies must report to FinCEN within one year any changes to information previously reported.[3]

[1] The term "FinCEN identifier" means the unique identifying number assigned by FinCEN to a person pursuant to this provision.

[2] Covered financial institutions include banks, securities brokers or dealers, mutual funds, futures commission merchants and introducing brokers in commodities.

[3] The CTA also bans bearer shares issued by companies formed under the laws of a state or Indian tribe.

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As similarly defined in the May 2018 Rule, a "beneficial owner" under the CTA is defined as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns or controls 25% or more of the ownership interest of the entity or exercises substantial control over the entity.[4] The CTA does not define "substantial control," which raises questions as to who, other than those individuals who satisfy the 25% ownership threshold, might be considered a beneficial owner for purposes of this requirement. FinCEN may clarify this term when it announces implementing regulations, and may interpret it as equivalent to the "control" prong of the beneficial owner definition adopted in the May 2018 Rule, which explicitly includes "an executive officer or senior manager" such as "a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer." The number of individuals with "substantial control" that a reporting company will have to disclose under the new legislation, however, is not clear; the May 2018 Rule requires covered financial institutions to identify and verify only one individual who satisfies the "control" prong for each legal entity customer.

The CTA excludes several types of entities from its broad definition of "reporting company," presumably because beneficial ownership information for these entities is generally available from other credible sources. The entities exempted under this provision are similar to those exempted from the May 2018 Rule, such as certain issuers of securities registered with the Securities and Exchange Commission.[5] Unlike the May 2018 Rule, however, the CTA carves out exemptions for entities that are relatively unlikely to be shell companies, such as companies that employ more than 20 employees on a full-time basis in the United States, filed U.S. federal income tax returns in the previous year showing more than $5 million in aggregate gross receipts or sales, and maintain an operating presence at a physical office within the United States. An entity that was exempt, but that no longer meets the exemption criteria, must report to FinCEN each beneficial owner as soon as the entity no longer qualifies for exemption.

Although FinCEN must generally keep confidential the information that reporting companies submit pursuant to these requirements, federal law enforcement agencies may access the information in furtherance of national security, intelligence or law enforcement activity. The Treasury Department also may access the information for purposes of tax administration, and state, local and tribal law enforcement agencies may access the information with a subpoena issued by a court of competent jurisdiction. In addition, the information may be shared with foreign countries, under certain circumstances, and with federal functional regulators or other appropriate regulators upon request and subject to certain conditions. Notably, the information may be disclosed to a financial institution, with the consent of the reporting company, to facilitate the financial institution's compliance with customer due diligence requirements under "applicable law." As this provision is not limited to compliance with the BSA, FinCEN's implementing regulations may permit the disclosure of beneficial ownership information to a financial institution for purposes of compliance with U.S. economic sanctions or other applicable laws. To what extent financial institutions will be allowed to rely on information obtained from FinCEN to satisfy their own due diligence obligations remains to be seen.

The CTA imposes civil and criminal penalties for willfully failing to report complete or updated beneficial ownership information to FinCEN or willfully providing, or attempting to provide, false or fraudulent beneficial ownership information. The unauthorized disclosure or use of such information is prohibited. For reporting violations, the law authorizes civil fines of up to $500 per day that a violation continues or has not been remedied, as well as a criminal fine of up to $10,000 and/or up to two years' imprisonment. In contrast, the unauthorized disclosure of beneficial ownership information is subject to the same civil penalty, but with fines of up to $250,000 and/or imprisonment of up to five years, and potentially higher penalties under certain circumstances. Persons who submit incorrect information but voluntarily provide corrected information within 90 days could be entitled to the benefit of a safe harbor provision.

Expansion of Jurisdiction To Obtain Records From Foreign Banks With U.S. Correspondent Accounts

The AMLA grants additional authority to the Treasury Department and the Justice Department to issue a subpoena to any foreign bank that maintains a correspondent account in the United States. Previously, the Treasury and Justice Departments

[4] The beneficial owner definition excludes: (i) a minor child, if the information of the parent or guardian of the minor child is reported; (ii) an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual; (iii) an individual acting solely as an employee of the entity and whose control over or economic benefits from such entity is derived solely from the employment status of the individual; (iv) an individual whose only interest in an entity is through a right of inheritance; and (v) a creditor of an entity, unless the creditor otherwise meets the definition of beneficial owner.

[5] Other entities exempted include banks, bank holding companies, savings and loan holding companies, and federal or state credit unions; certain investment companies, investment advisers and insurance companies; registered public accounting firms; certain public utilities; certain entities registered with the Commodities Futures Trading Commission; and entities owned or controlled by each of the foregoing. A "reporting company" similarly does not include registered money transmitting businesses, certain pooled investment vehicles or tax exempt 501(c)(3) organizations.

had the power to issue a subpoena to any foreign bank that maintains a U.S. correspondent account for "records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank." The new authority under the AMLA extends to "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 an investigation of a violation of federal criminal laws or of a civil forfeiture action. This change reflects a considerable expansion of the U.S. government's authority to obtain records held abroad by foreign banks, as the authority is no longer limited to records of the correspondent account itself or the deposit of funds into the foreign bank.

As before, covered financial institutions, including U.S. banks, are required to terminate correspondent relationships with foreign banks within 10 business days after receipt of written notice from the Treasury Department or the Justice Department that the foreign bank has failed to comply with such a subpoena or failed to prevail in judicial proceedings challenging it. The AMLA expressly provides that potential conflicts with foreign secrecy or confidentiality laws shall not be the sole basis for quashing or modifying the subpoena. Foreign banks may face added challenges of complying with conflicting obligations under local law and U.S. law — on the one hand, local bank secrecy and data privacy laws limiting a bank's ability to provide records to U.S. authorities, and on the other hand, potentially severe consequences from U.S. authorities for noncompliance with a subpoena.

The AMLA imposes civil penalties of $50,000 for each day that a foreign bank fails to comply with such a subpoena and authorizes the Treasury Department and the Justice Department to seek an order from a U.S. district court to compel compliance. Also, the new law prohibits foreign banks from notifying any person named in such a subpoena about the existence or contents of the subpoena. Violating this disclosure prohibition can subject a foreign bank to civil penalties equivalent to twice the amount of the suspected criminal proceeds sent through its correspondent account or, if no such proceeds can be identified, not more than $250,000. Any funds held in the correspondent account of a foreign bank maintained in the United States with a covered financial institution may be seized to satisfy civil penalties.

Enhanced Whistleblower Programs To Fight Money Laundering and Corruption

The AMLA replaces the existing "rewards for informants" provision of the BSA with a more robust whistleblower program to incentivize individuals to report violations of money laundering laws. Under the new program, subject to regulations prescribed by the secretary of the Treasury, a whistleblower is entitled to a reward of up to 30% of any penalty over $1 million if his or her "original information" results in a successful "covered judicial or administrative action"[6] or "related action."[7] For example, an eligible whistleblower may provide original information regarding a financial institution's violations of recordkeeping or reporting requirements. For the information to be considered "original," it must be derived from the independent knowledge or analysis of the whistleblower and cannot be known to the secretary or the attorney general from any other source. The AMLA's whistleblower protection is limited to lawful acts, and therefore a whistleblower must comply with prohibitions against the unauthorized disclosure of SARs. The statute sets out a number of factors that the Treasury secretary should consider in determining the reward amount, but leaves the ultimate decision to the secretary's discretion. The reward amounts contemplated by the new whistleblower program far exceed the previous $150,000 cap set by the current "rewards for informants" provision.

The AMLA's whistleblower program contains important limitations. Similar to the existing rewards statute, the new program denies awards to any whistleblower who is, or was at the time the whistleblower acquired the original information, a member, officer or employee of (i) an appropriate regulatory or banking agency; (ii) the Treasury Department or the Justice Department; or (iii) a law enforcement agency; and who was acting in the normal course of the whistleblower's job duties. Additionally, a whistleblower who was convicted of wrongdoing in connection with the reported conduct or who fails to submit information to the Treasury secretary or attorney general as required by law cannot receive any award. Of note, the new whistleblower program does not require a minimum award; the Treasury secretary has unlimited discretion to set award amounts below 30% of a penalty or to make no award at all.

The AMLA provides whistleblowers who suffer retaliation with a private right of action, subject to substantially similar parameters as the BSA's existing whistleblower protections. The anti-retaliation provision protects whistleblowers from retaliation for disclosing information regarding conduct that the whistleblower reasonably believes violated any law, rule or regulation of the Treasury Department (and not just the

[6] "Covered judicial or administrative action" means any judicial or administrative action brought by the secretary of the Treasury or the attorney general under the BSA that results in monetary sanctions exceeding $1 million. Monetary sanctions include penalties, disgorgement and interest, ordered to be paid, but do not include forfeiture, restitution or any victim compensation payment.

[7] In this context, the term "related action" means any judicial or administrative action brought by an appropriate federal authority, a state attorney general in connection with a criminal investigation, or an appropriate state regulatory authority, that is based on the original information provided by a whistleblower that led to the successful enforcement of the action by the secretary or the attorney general.

BSA, which defines the scope of the awards provision). A whistleblower need not qualify for an award in order to seek protection under the anti-retaliation provision, although employees of banks insured under the Federal Deposit Insurance Act and of credit unions insured under the Federal Credit Union Act are barred from suing their employers for retaliation. In addition, employees of entities not regulated under those two statutes must file a retaliation complaint with the Department of Labor; only if that department does not act within 180 days, and there is no showing that such a delay is due to the bad faith of the claimant, can the whistleblower then sue in federal district court.

Additionally, the KARRA establishes a pilot program to support government efforts to fight foreign corruption and recover the proceeds of such corruption. The Treasury secretary, with the concurrence of the secretary of State and the attorney general, will administer the rewards program. Under the program, an individual is eligible for an award if he or she furnishes information leading to the restraining, seizure, forfeiture or repatriation of stolen assets in an account at a U.S. financial institution that come within the U.S. or within possession or control of a U.S. person. Additionally, if the Treasury secretary determines that the identity of the reward recipient or a member of the recipient's immediate family must be protected, the secretary must provide such protection. This program will terminate three years after the NDAA's enactment.

Inclusion of Virtual Currencies Within the BSA Framework

The AMLA seeks to ensure that the AML/CTF legal regime applies to current and future payment systems by expanding the definition of financial institution and money transmitting business to include businesses involved in the exchange or transmission of "value that substitutes for currency." This broad term would capture virtual currencies and other emerging payment methods. Although this amendment does not reflect a change in FinCEN's existing position that companies that engage in the transmission, administration, issuance and exchange of virtual currencies are subject to the BSA's requirements, it may help reduce any remaining doubts about the BSA's application to virtual currencies, and provides a framework for regulating future payment methods.

Also, the AMLA directs the Government Accountability Office to study the role of various payment systems and methods, including virtual currencies in online marketplaces, in the facilitation of human trafficking and drug trafficking. The study must address how online marketplaces, including the dark web, may be used to facilitate these illicit activities; how virtual currencies and peer-to-peer mobile payment services may be used to facilitate financing them; how illicit funds that have been transmitted through virtual currencies are repatriated into the formal U.S. banking system through money laundering or other means; how virtual currencies and their underlying technology can be used to detect and deter illicit activities; and the extent to which immutability and traceability of virtual currencies can contribute to the tracking and prosecution of illicit funding. The study must be completed within one year of the NDAA's enactment.

U.S. regulators and prosecutors continue to give significant attention to the virtual currency industry. For example, FinCEN recently proposed two separate rules that, if adopted, would considerably increase the AML/CTF requirements of money transmitters, including those that deal in virtual currencies. (See our November 2020 client alert "FinCEN and Federal Reserve Propose to Significantly Lower Threshold for International Funds Transfers Under Recordkeeping and Travel Rules" for further details.)

Establishment of a Pilot Program for Sharing SARs Across International Borders

Under existing SAR confidentiality rules, financial institutions are generally permitted to share SARs with their head office or controlling company, but may do so with an affiliate only to the extent that the affiliate is itself subject to SAR reporting requirements. These rules effectively prohibit U.S. financial institutions from sharing SARs with foreign offices since the latter are not subject to the BSA's SAR regulation.

The AMLA requires the secretary of the Treasury to establish, within one year of the NDAA's enactment, a pilot program to allow financial institutions subject to the BSA to share SARs with foreign branches, subsidiaries and affiliates[8] for the purpose of combatting illicit finance risks. The secretary must also consider rules to hold a foreign affiliate of a U.S. financial institution liable for the unauthorized disclosure of information related to SARs.

The pilot program will not extend to branches, subsidiaries and affiliates located in (i) China, (ii) Russia, (iii) a jurisdiction that is a state sponsor of terrorism, (iv) a jurisdiction that is subject to sanctions imposed by the U.S. government or (v) a jurisdiction that the secretary of the Treasury has determined cannot reasonably protect the security and confidentiality of such information. The secretary is authorized, however, to make exceptions, on a case-by-case basis, for a financial institution located in China or Russia.

[8] The term "affiliate" means "an entity that controls, is controlled by, or is under common control with another entity."

US Enacts Historic Legislation To Strengthen Anti-Money Laundering and Counterterrorist Financing Legal Framework

The pilot program is intended to remain in place for three years, but can be extended by two years if the secretary certifies that the extension serves the national security interest of the United States and submits to Congress a detailed legislative proposal providing for a long-term extension of activities under the pilot program.

Efforts To Streamline Existing Requirements for CTRs and SARs

The AMLA requires the secretary of the Treasury, in consultation with other government agencies, to conduct a broad review of reporting requirements relating to CTRs and SARs, including the processes for submitting such reports to FinCEN. The secretary must propose "changes to those reports to reduce any unnecessarily burdensome requirements," while ensuring that the information still fulfills its intended purpose.

The review shall assess, among other things, whether different thresholds should apply to different categories of activities; the categories and characteristics of reports that are the most and least helpful to law enforcement; whether the process for the electronic submission of reports could be improved for both financial institutions and law enforcement agencies; the appropriate manner in which to ensure the security and confidentiality of personal information; how to improve the cross-referencing of individuals or entities operating at multiple financial institutions and across international borders; and whether there are ways to improve CTR aggregation for entities with common ownership. Relatedly, the AMLA also requires a review exclusively focused on the applicable thresholds that trigger CTR and SAR reporting obligations.

The secretary of the Treasury has one year from the NDAA's enactment to submit reports on the Treasury Department's studies to Congress and to propose rulemakings to implement the findings and determinations of the reports. These studies may lead to additional, future substantive regulation or legislation regarding CTR and SAR reporting requirements.

Application of the BSA to Dealers in Antiquities and Enhanced Penalties for BSA Violations

The AMLA amends the BSA to add the following to the definition of "financial institution": "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." The Treasury secretary must issue proposed rules to implement this amendment no later than 360 days after the NDAA's enactment. Before doing so, the secretary, acting through FinCEN's director, must consider, among other issues, which persons should be subject to the rulemaking, by size, type of business, and domestic or international geographical locations; and the degree to which the regulations should focus on high-value trade in antiquities and identifying the actual purchasers of such antiquities (in addition to the agents or intermediaries acting on behalf of such purchasers). This amendment to the BSA will take effect on the effective date of Treasury's final rule implementing it.[9] Note that there are certain categories of financial institutions under the BSA that FinCEN has not included within its regulations.

Moreover, the AMLA increases penalties for BSA violations. For example, any person "convicted" of violating the BSA must be fined in an amount that is equal to the profit gained by such person as a result of such violation, "as determined by the court." If the person was a partner, director, officer or employee of a financial institution at the time of the violation, the person must repay to the financial institution any bonus received during the calendar year during or after which the violation occurred. Also, individuals who have committed an "egregious violation"[10] of the BSA are now prohibited from sitting on boards of U.S. financial institutions for 10 years. Additionally, the AMLA provides the Treasury secretary the option to impose enhanced penalties on repeat BSA violators of up to the greater of three times the profit gained or loss avoided by such person as a result of the violation or two times the maximum statutory penalty associated with the violation. For purposes of determining whether a person has committed a previous violation, the determination includes only violations occurring after the NDAA's enactment.

Money Laundering Risks Related to Russia and China

The CRMLA requires the secretary of the Treasury to submit a report to Congress, within one year of the NDAA's enactment, identifying any additional regulations, statutory changes, enhanced due diligence and reporting requirements necessary to better address money laundering linked to Russia. The CRMLA additionally authorizes the secretary to take certain actions upon determining that one or more foreign financial institutions or one

[9] Relatedly, the AMLA also requires the secretary of the Treasury to perform a study of how trade in artwork facilitates money laundering and the financing of terrorism and to report its findings within a year of the NDAA's enactment. This study will inform any future determination of whether dealers in artwork should be subject to the BSA.

[10] The term "egregious violation" means a criminal violation for which the individual is convicted and for which the maximum term of imprisonment is more than one year, or a civil violation in which the individual willfully committed the violation and the violation facilitated money laundering or the financing of terrorism.

US Enacts Historic Legislation To Strengthen Anti-Money Laundering and Counterterrorist Financing Legal Framework

or more class of transactions or account types involving a foreign jurisdiction represents a primary money laundering concern in relation to Russian illicit finance. One option is for the secretary to exercise the authority already available under Section 311 of the USA PATRIOT Act.[11] Another option, which the secretary previously did not have, is to prohibit or impose conditions upon "certain transmittals of funds (to be defined by the Secretary)" by any U.S. financial institution, if such transmittal of funds involves a financial institution, class of transaction or type of account determined to be of a primary money laundering concern.

The AMLA similarly requires the secretary of the Treasury to provide a report to Congress on the extent and effect of illicit finance risk relating to China and Chinese firms, including financial institutions.

[11] Section 311 grants the secretary of the Treasury the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, financial institution, class of transactions or type of account is of "primary money laundering concern," to require U.S. financial institutions to take certain "special measures" to address the primary money laundering concern. The following special measures can be imposed individually, jointly, in any combination and in any sequence: (i) recordkeeping and reporting of certain transactions; (ii) collection of information relating to beneficial ownership; (iii) collection of information relating to certain payable-through accounts; (iv) collection of information relating to certain correspondent accounts; and (v) prohibition or conditions on the opening or maintaining of correspondent or payable-through accounts. Notably, to date Section 311 has not been employed to impose special measures on Russia, a Russian financial institution, or classes of transactions or account types involving Russia.

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