

## **Alert | Financial Regulatory & Compliance**



January 2021

### **The Anti-Money Laundering Act of 2020: Congress Enacts the Most Sweeping AML Legislation Since Passage of the USA PATRIOT Act**

On Jan. 1, 2021, the U.S. Senate overwhelmingly voted (81-13) to override President Trump's veto of the National Defense Authorization Act for Fiscal Year 2021,<sup>1</sup> passing into law legislation that includes – as Division F – the Anti-Money Laundering Act of 2020 (**AML Act**).<sup>2</sup>

This GT Alert provides an overview of the important themes and significant provisions of the AML Act.

#### **General Overview**

The AML Act ushers in the most significant changes to the Bank Secrecy Act of 1970, as amended (**BSA**)<sup>3</sup> and other anti-money laundering/countering terrorism financing (**AML/CFT**) laws since the USA PATRIOT Act of 2001.<sup>4</sup> The AML Act is made up of 56 sections in five titles and is 86 pages long (and will likely be significantly expanded by implementing federal regulations). The purpose of the AML Act is to:

---

<sup>1</sup> See The “William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021,” H.R. 6395 [here](#).

<sup>2</sup> *Id.*, at pages 1160-1246.

<sup>3</sup> The BSA is generally comprised of the following parts of the U.S. Code: (i) 12 U.S.C. section 1829b (“retention of records by insured depository institutions”); (ii) 12 U.S.C. Part 21 (“financial recordkeeping”, sections 1951-1959); and (iii) 31 U.S.C. subchapter II (“records and reports on monetary instruments and transactions”, sections 5311-5314, 5316-5322).

<sup>4</sup> PUBLIC LAW 107-56—Oct. 26, 2001.

- establish a uniform beneficial ownership information reporting regime that includes reporting requirements for certain U.S. corporations and limited liability companies;
- codify the risk-based approach to AML/CFT compliance;
- modernize AML/CFT systems;
- greatly expand enforcement and investigation-related authority including an expansion of the duties, powers, and functions of the U.S. Department of the Treasury's Financial Crimes Enforcement Network (**FinCEN**) and the authority of U.S. courts to subpoena foreign banks that maintain correspondent accounts with U.S. banks;<sup>5</sup> and
- align supervision and examination priorities by emphasizing coordination, cooperation, and information-sharing among financial institutions, U.S. financial regulators and foreign financial regulators.

The AML Act, and the changes to the existing BSA regime it represents, are the result of years of efforts by U.S. legislators, regulators, and the financial industry to reform the BSA legal framework and address longstanding concerns raised by the public and private sectors. The long-term effect of these comprehensive changes set by the AML Act will move the United States closer to a global regime of fighting financial crimes, as opposed to the current U.S.-centric legal framework.

### New Ultimate Beneficial Ownership Information Reporting Requirements

Today, any person can incorporate or form a U.S. company in most, if not all, states in the United States without having to disclose beneficial ownership data to the state incorporation or formation authority. Every year, thousands of such companies are incorporated or formed quickly all over the United States by entrepreneurs, family businesses, and larger businesses, the latter group often in connection with merger and acquisition opportunities or corporate reorganizations. Of course, not having to report beneficial ownership data for such entities also offers the owner a high level of confidentiality, and critics have observed that such confidentiality may be abused by money launderers, tax evaders, and other bad actors. The Financial Action Task Force on Money Laundering (**FATF**), of which the United States is a member, among others, has criticized the United States for failing to have legislation that addresses FATF standards on the collection of company beneficial ownership data.

In answer to that criticism, the AML Act imposes new ultimate beneficial ownership reporting requirements on certain U.S. state-law-organized corporations, limited liability companies, and other similar entities formed under the laws of a foreign country that register to do business in the United States (hereinafter, the **UBO Reporting Law**). Under the UBO Reporting Law, any “reporting company”<sup>6</sup> must submit, as part of the company formation or registration process, a report to FinCEN that includes specific identification information for each “beneficial owner.” FinCEN will then issue to the reporting individual or entity a unique FinCEN identifier number.

The AML Act sets forth over 20 categories of exemptions from the new UBO Reporting Law, including exemptions for the following companies:

- issuers of a class of securities registered under 15 U.S.C. § 78l, or that is generally required to file supplementary and periodic information under 15 U.S.C. § 78o(d);

<sup>5</sup> *Id.*, at 1203.

<sup>6</sup> “Reporting company” is generally defined to include corporations, limited liability companies, and other U.S. entities. It also includes foreign entities that register to do business in the United States.

- entities that are already required to disclose such beneficial ownership information publicly or to federal regulators – e.g., publicly traded companies, banks, insurance companies, registered money service businesses, broker/dealers, investment companies, and investment advisers;
- retail foreign exchange dealers;
- public accounting firms registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002; and
- pooled investment vehicles that are operated or advised by an investment adviser, a U.S. broker-dealer, or a U.S. bank.

For those entities that must register with FinCEN, the AML Act sets forth the following salient requirements:

- “Beneficial owner” is defined as an individual who directly or indirectly<sup>7</sup> exercises substantial control over the entity or owns or controls not less than 25% of the ownership interest of the reporting company.
- Existing reporting companies have two years to report.
- New reporting companies must report at the time of incorporation or formation, as applicable.
- Changes in ultimate beneficial ownership must be reported within a year.

FinCEN will be authorized to disclose such beneficial ownership information in certain circumstances to (a) a financial institution, (b) federal law enforcement, intelligence, and national security agencies, (c) state, local, and Tribal law enforcement agencies, (d) foreign law enforcement agencies (on whose behalf federal agencies must submit requests), and (e) subject to certain limitations, federal functional and other regulators. Financial institutions wishing to query the FinCEN database in connection with their Customer Due Diligence (**CDD**) obligations can do so only with the prior consent of that company. The AML Act directs FinCEN to bring its existing CDD Rule of May 11, 2016,<sup>8</sup> into conformance with the new UBO Reporting Law within a year.

Under the AML Act, any person who (a) willfully provides, or attempts to provide, false or fraudulent beneficial ownership information, or (b) willfully fails to report complete or updated beneficial ownership information, will be subject to civil and criminal penalties.

### **Broader Purpose of the BSA and Codification of the Risk-Based Approach to AML/CFT Compliance**

Another significant provision in the AML Act is the inclusion of a “declaration of purpose” to the BSA,<sup>9</sup> which essentially reinforces and codifies a risk-based approach to AML/CFT. The BSA purpose, as amended by the USA PATRIOT Act of 2001, was “to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations, or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.”<sup>10</sup> The AML Act amends the BSA purpose to include goals of preventing money laundering and the financing of terrorism by requiring financial institutions to establish risk-based programs that

<sup>7</sup> Including through any contract, arrangement, understanding, or relationship.

<sup>8</sup> *Customer Due Diligence Requirements for Financial Institutions*, 81 Fed. Reg. 29398 (May 11, 2016).

<sup>9</sup> See, revised § 5311 of Subchapter II of chapter 53 of title 31 of the United States Code [here](#).

<sup>10</sup> 31 U.S.C. § 531.

incorporate highly useful BSA-related reports in assessing risks of money laundering, terrorism finance, tax evasion, and fraud to such financial institutions.

In practical terms, the AML Act has changed the BSA to: (i) require BSA-related reports or records to be used to access risk by financial institutions subject to the BSA, and (ii) codify the requirement for financial institutions to implement reasonably designed risk-based programs to combat money laundering and the financing of terrorism.

### Modernizing the AML/CFT System

Title LXII (sections 6201 – 6216) and title LXV (sections 6502 – 6508) of the AML Act collectively are intended to modernize the AML/CFT system by embracing technology and innovation, streamlining low-value processes, and eliminating obsolete regulations and guidance. These provisions do so in several ways, including:

- **Technology Testing Rulemaking:** The U.S. Treasury must issue a rule that specifies the standards for testing the technology and internal processes that are used to comply with the BSA, such as transaction monitoring systems. The Federal Financial Institutions Examination Council will be required to update its manuals to reflect Treasury’s rule and to be consistent with relevant FinCEN and federal functional regulator guidance.
- **Changes to the Reporting of Suspicious Transactions:** In connection with suspicious activity reporting (**SAR**) requirements, FinCEN must establish streamlined (automated) processes for filing noncomplex categories of reporting. Importantly, the U.S. Treasury will also be required to review and determine whether currency transaction reports and SAR dollar thresholds, including aggregate thresholds, should be adjusted.
- **Expanded BSA Coverage:** The AML Act also seeks to modernize the AML/CFT system by recognizing previously unregulated channels that may be exploited to launder money and finance terrorism, including the antiquities trade and virtual currencies.
  - **Antiquities:** The definition of “financial institution” under the BSA was expanded to include a person engaged in the trade of antiquities, including advisors, consultants, or other persons who engage as a business in the solicitation or the sale of antiquities. Implementing regulations to be issued by the U.S. Treasury will consider, among other factors, the degree to which these regulations should focus on high-value trade in antiquities, and on the need to identify the actual purchasers of such antiquities, in addition to the agents or intermediaries acting for or on behalf of such purchasers.<sup>11</sup>
  - **Virtual Currencies:** The AML Act expands several BSA definitions to include “value that substitutes for currency,” including those pertaining to “financial agency,” “financial institution,” “money transmitting business” and “money transmitting service,” and codifies FinCEN guidance by requiring that virtual currency businesses that qualify as “money transmitting businesses” register with FinCEN.

---

<sup>11</sup> See GT Cultural Assets blog post, “Implications for Art Dealers in Anti-Money Laundering Provisions of the National Defense Authorization Act of 2021.”

## Expanded Enforcement and Investigation-Related Authority

The AML Act significantly amends BSA enforcement- and investigation-related provisions. Some of the more notable provisions requiring attention are:

- **Heightened Civil Penalties:** The AML Act will substantially increase currently available sanctions for certain BSA violations. Specifically, the BSA’s civil penalty provision set forth in 31 U.S.C. § 5321 has been amended to permit the U.S. Treasury to impose an additional fine in the case of repeat BSA violations (including violations of rules issued under the BSA) up to the greater of (a) three times the profit gained or loss avoided as a result of the violation or (b) two times the maximum applicable penalty.<sup>12</sup> No minimum or maximum duration between violations is specified.
- **Bar on Service by Individuals on Boards:** An additional amendment to the BSA’s civil penalty provision<sup>13</sup> will provide for a 10-year prohibition on serving on the board of directors of a U.S. financial institution for any individual who commits an “egregious violation” of the BSA, beginning on the date on which the conviction (or judgment) with respect to the egregious violation is entered.<sup>14</sup>
- **Heightened Criminal Penalties:** Additionally, the BSA’s criminal penalty provision set forth in 31 U.S.C. § 5322 has been amended to mandate the following additional sanctions against persons convicted of violating the BSA or a rule issued thereunder: (a) a fine in an amount equal to the profit gained by reason of the violation; and (b) if the person is an individual who was a partner, director, officer, or employee at the time of the violation, repayment to the financial institution of any bonus paid during the year in which the violation occurred or the following year.
- **Expanded Subpoena Authority for Foreign Banks with U.S. Correspondent Accounts:** Until passage of the AML Act, and pursuant to Title III of the USA PATRIOT Act of 2001, U.S. Treasury and the Department of Justice (**DOJ**) had authority to subpoena “any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside the United States relating to the deposit of funds into the foreign bank.”<sup>15</sup> The AML Act expands that authority to include “any records relating to the correspondent account or **any account** at the foreign bank, including records maintained outside the United States” (emphasis added), provided it is the subject of any one of several enumerated types of investigations or actions. Such change generally empowers DOJ to request the aid of a federal district court to compel compliance, including by holding the foreign bank in contempt, and to pursue civil penalties enforceable via seizure of funds held in the foreign bank’s correspondent account at any U.S. financial institution.
- **BSA-Specific Whistleblower Incentives and Protections:** The AML Act expands the BSA’s existing provisions for rewards for informants and protections to whistleblowers. The amendments will provide protections against retaliation against individuals who provide original information to their employer, Treasury or DOJ, relating to violations of U.S. money laundering laws. Treasury also will be permitted to award up to 30% of the total recovered monetary sanctions for BSA violations (after certain applicable exclusions), provided that the sanctions exceed \$1 million.

<sup>12</sup> For this purpose, only violations occurring after the enactment of the AML Act will be subject to the heightened sanctions.

<sup>13</sup> 31 U.S.C. § 5321.

<sup>14</sup> “Egregious violation” will be defined as a conviction with a maximum prison term of more than one year, or a “willful” civil violation that facilitated money laundering or terrorism financing.

<sup>15</sup> 31 U.S.C. § 5318(k)(3).

The AML Act also expands the duties and powers of the FinCEN director. Five new duties and powers have been added as follows:

- To promulgate regulations to implement the exam and supervision priorities of BSA/AML programs;
- To communicate regularly with the private sector, regulators, and law enforcement to explain the government's AML/CFT exam and supervision priorities;
- To give and receive feedback to and from the private sector and state bank and credit union supervisors;
- To maintain money laundering and terrorist financing experts to support federal civil and criminal investigations; and
- To maintain emerging technology experts.

### **Expanded Coordination and Information Sharing**

The AML Act will expand coordination and information-sharing among administering agencies, examining agencies, law enforcement agencies, national security agencies, the intelligence community and financial institutions. FinCEN will have a key role in such effort by managing relationships and cultivating information sharing and other forms of coordination across public and private stakeholders. FinCEN's role will include:

- Periodically soliciting feedback from BSA officers representing a cross-section of financial institutions to review SARs from such institutions and discuss trends in suspicious activity observed by FinCEN;
- Periodically disclosing to each financial institution a summary of SARs filed that proved useful to law enforcement agencies; and
- Assessing whether to institute a formal process for issuing no-action letters in response to inquiries about application of AML laws or regulations to specific conduct.

The AML Act will also codify prior interagency guidance authorizing financial institutions to share BSA compliance resources with other financial institutions. With respect to the methods to implement such information-sharing requirements, the AML Act contemplates certain mechanisms, as follows:

- FinCEN will be required to publish threat pattern and trend information to provide meaningful information about the preparation, use, and value of SARs and other reports filed by financial institutions;
- The DOJ will be required to submit to the U.S. Treasury an annual report on the use of data derived from financial institutions reporting under the BSA to be used for specified purposes that include enhancing feedback and communications with financial institutions;
- The U.S. Treasury will be required to establish a three-year pilot program that allows financial institutions to share information related to SARs, including that a SAR has been filed, with their foreign branches, subsidiaries, and affiliates;
- The BSA's principal suspicious activity reporting provision is amended to provide that information received by a financial institution from a foreign affiliate with respect to a suspicious transaction relevant to a possible violation of law or regulation will be subject to the same confidentiality requirement applicable to SARs, i.e., the statutory prohibition on notifying a person involved in a



suspicious transaction that such transaction has been reported will encompass information received by a U.S. financial institution from a foreign affiliate.

These mechanisms are aimed at facilitating cross-border sharing of SARs and suspicious transaction information within financial institutions. As a result, financial institutions will be prohibited from establishing or maintaining any operation located outside the United States for the primary purpose of BSA compliance as a result of these provisions.

## Conclusion

The AML Act substantially changes and modernizes the BSA and related AML laws and regulations. However, because many of the new statutory provisions will require rulemakings, reports, analyses, and other measures, the impact of the AML Act remains to be seen and may only be slowly realized over the next few years. Nonetheless, financial institutions should seek to prepare their stakeholders, including boards of directors, foreign affiliates, and BSA/AML compliance personnel, by informing them of these changes and how they may impact their day-to-day operations.

## Authors

This GT Alert was prepared by:

- **Carl A. Fornaris** | +1 305.579.0626 | [fornarisc@gtlaw.com](mailto:fornarisc@gtlaw.com)
- **Kyle R. Freeny** | +1 202.331.3118 | [freenyk@gtlaw.com](mailto:freenyk@gtlaw.com)
- **Marina Olman-Pal** | +1 305.579.0779 | [olmanm@gtlaw.com](mailto:olmanm@gtlaw.com)
- **Claudio J. Arruda** | +1 305.579.0874 | [arrudac@gtlaw.com](mailto:arrudac@gtlaw.com)

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.<sup>~</sup> Houston. Las Vegas. London.\* Los Angeles. Mexico City.+ Miami. Milan.\* Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.\* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¢Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*