

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



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### **ENABLERS Act Proposes to Expand Definition of ‘Financial Institution’; Impose BSA/AML Requirements on Professional Service Providers**

#### **Go-To Guide:**

The ENABLERS Act:

- is included in the National Defense Authorization Act for Fiscal Year 2023 that passed the House—the same legislative vehicle used to secure the enactment of the Anti-Money Laundering Act of 2020;
- proposes to expand the definition of “financial institution” under the Bank Secrecy Act to include persons who provide certain professional services that may be used to facilitate money laundering; and
- if passed, could impose bank-like anti-money laundering (**AML**) compliance obligations on law firms, investment advisers, payment processors, accounting firms, and other professional service providers that are not currently subject to these onerous obligations.

On July 14, 2022, the U.S. House of Representatives passed bipartisan legislation that, if passed by the Senate and signed into law, would expand the types of institutions required to comply with AML requirements under the Bank Secrecy Act (BSA). The [Establishing New Authorities for Business Laundering and Enabling Risks to Security \(ENABLERS\) Act](#) could impose BSA/AML obligations on so-

called “gatekeepers,” including law firms, investment advisers, payment processors, accounting firms and other professional services providers.

### **Legislative History**

The ENABLERS Act was introduced in the House Oct. 8, 2021, with Reps. Tom Malinowski (D-N.J.), Maria Elvira Salazar (R-FL), Steve Cohen (D-TN), and Joe Wilson (R-S.C.) as its sponsors. The bill was drafted in part as a response to the Pandora Papers, which revealed that certain U.S.-based professional advisors—not subject to BSA/AML due diligence requirements—may be used for money laundering purposes. *See* [Oct. 6 press release](#). This first version of the bill sought to “close loopholes” by amending the BSA to include within its scope specified categories of professional service providers and impose BSA-related due diligence requirements on these professionals.

On June 22, 2022, the House Committee on Armed Services voted to include the ENABLERS Act in the National Defense Authorization Act for Fiscal Year 2023 (NDAA). *See* [June 23 press release](#). The NDAA is a broad national defense policy bill traditionally passed by Congress every year to set annual spending and policy priorities for the U.S. Department of Defense.

On July 13, 2022, the House adopted an amendment to the ENABLERS Act sponsored by House Committee on Financial Services Chair Maxine Waters (D-CA). The amendment shifted the bill’s focus from broad categories of professions to come within the BSA’s scope to the underlying services that may be used to facilitate money laundering, and provided the Treasury Secretary authority to (i) determine the exact entities it considers as engaged in listed activities; and (ii) impose BSA/AML requirements by selecting from a list of options. On July 14, 2022, the House passed the NDAA with the amended ENABLERS Act.

The House will need to come to an agreement with the Senate on the final text of NDAA before sending to the bill to the President’s desk. The Senate Armed Services Committee (SASC) approved its version of NDAA in June without ENABLERS Act language. Earlier this month, SASC Ranking Member Roger Wicker (R-MS) and Sen. Sheldon Whitehouse (D-RI) filed an amendment to add the ENABLERS Act to the Senate bill. However, SASC Chairman Jack Reed (D-RI) filed a manager’s amendment to the Senate NDAA bill on Oct. 11, 2022, that did not include the ENABLERS Act amendment. The Senate is not expected to vote on the manager’s amendment, but instead will use it as the basis to enter into informal negotiations with the House to hammer out an agreement on NDAA that will subsequently be voted on by both chambers.

### **Extending BSA/AML Obligations to ‘Gatekeepers’**

The ENABLERS Act proposes to include within the definition of “financial institution” individuals and entities engaged in the following activities:

- the formation or registration of a legal entity or trust;
- acquisitions or dispositions of interests in a legal entity or trust;
- providing registered office or other correspondence related accommodations to a legal entity or trust;
- money or other asset managing, advising, or consulting services;
- payment processing;
- exchanging foreign currency, digital currency or digital assets; or

- sourcing, pooling, organizing or managing capital in association with the formation, operation or management of, or investment in, a legal entity or trust.

The ENABLERS Act would provide the Treasury Secretary discretion to prescribe BSA/AML compliance requirements for each newly covered person but would require that newly covered persons do at least one or more of the following:

- (i) identify and verify account holders and functional equivalents, including by establishing and maintaining written procedures that are reasonably designed to identify and verify beneficial owners of these persons;
- (ii) maintain appropriate procedures, including the collection and reporting of information as the Treasury Secretary may prescribe by regulation, to ensure compliance with the ENABLERS Act and regulations prescribed thereunder or to guard against corruption, money laundering, the financing of terrorism or other forms of illicit finance;
- (iii) establish AML programs;
- (iv) report suspicious transactions; and
- (v) establish due diligence policies, procedures, and controls as described in the BSA.

The ENABLERS Act would require the Treasury Secretary, acting through the Financial Crimes Enforcement Network (FinCEN), to promulgate regulations to define these newly covered persons and proscribe appropriate requirements no later than one year following the bill's enactment.

### **Enforcement Authority Under the ENABLERS Act**

In addition to broadening the BSA's applicability, the ENABLERS Act would provide that newly covered entities be subject to extraterritorial jurisdiction of the United States. This means, if the bill becomes law, the BSA/AML requirements could be enforced against international actors providing covered services to U.S. clients, vice versa, or both, depending on how the Treasury Secretary defined this provision's applicability in its implementing regulations. Further, the bill would require the Treasury Secretary to conduct random audits of newly covered persons: (i) beginning one year after the Treasury Secretary issued regulations identifying which persons would become subject to the BSA under the ENABLERS Act; and (ii) on an ongoing basis thereafter.

Within 180 days after the conclusion of any calendar year that is one year after the Treasury Secretary's issuance of rules identifying newly covered persons under the ENABLERS Act, the Secretary would be required to submit to the House Committee on Financial Services and the Senate Committee on Banking, Housing and Urban Affairs a report that describes the results of any random audits conducted and includes recommendations for improving the effectiveness of the requirements imposed by the ENABLERS Act.

### **Compliance Obligations and Legislative Outlook**

BSA/AML compliance program obligations currently imposed on financial institutions are onerous and costly. Current requirements include the implementation of risk-based policies and procedures to ensure compliance with BSA/AML recordkeeping and reporting requirements, customer due diligence program requirements, independent testing, and periodic training requirements. Regulators also expect that

policies, procedures, and controls be updated, as necessary, to accurately reflect the risk presented to the financial institution.

The ENABLERS Act, however, would provide FinCEN with some flexibility for determining: (i) which persons should be subject to BSA/AML requirements; and (ii) what BSA/AML requirements to apply. This, conceivably, could minimize the burden on newly covered persons, although the extent of this “relief” is yet to be determined.

The ENABLERS Act is arguably more sweeping than the AML Act of 2020, which was also passed using the same legislative vehicle—the NDAA for Fiscal Year 2020. The likelihood of its enactment is unclear. In the coming months, the Senate may pass its own version of the NDAA and agree with the House in a conference committee on the final terms of the bill.

Some commentators have suggested that a version of the ENABLERS Act likely will be enacted by Congress, with the precise language being far from final. However, there is already activity and pushback by some industry groups including the American Bar Association and large cryptocurrency exchanges. As the bill progresses, attention and input from newly affected industry groups is expected.

## Conclusion

If enacted, the ENABLERS Act would present several challenges. Among others, it would add to FinCEN’s already busy rulemaking schedule. Additionally, harmonizing BSA/AML compliance obligations with ethical duties and other professional conduct responsibilities applicable to lawyers and accountants would present a significant challenge given the unclear nature of the requirements and potential conflicts that may arise between the two.

Individuals and entities potentially impacted by the ENABLERS Act are encouraged to monitor legislative updates and may wish to consult with experienced financial regulatory counsel regarding its potential implications.

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