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Sweeping Anti-Money Laundering Legislation Requires Registration with FinCEN

Overview

On December 11, 2020, the Senate passed the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”). The NDAA was previously passed by the House of Representatives and includes the Anti-Money Laundering Act of 2020 (“AMLA”)—a sweeping reform designed to modernize and strengthen the United States financial crime monitoring system. Most central to the AMLA is the creation of a central registry to track the beneficial owners of business entities registered in the United States. In addition to the registry, the AMLA seeks to expand the Bank Secrecy Act (“BSA”) and Patriot Act regimes, by directing the Financial Crimes Enforcement Network (“FinCEN”) to consider digital currency related risks as part of a national AML process. The legislation would also expand BSA coverage over art and antiquities dealers. The legislation further includes provisions to enhance international cooperation with foreign financial crime agencies, while also enhancing protections for whistleblowers. While enactment of the AMLA is likely, implementation will take time, as the Treasury Department and FinCEN engage in the rulemaking process.

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Creation of a Nonpublic, Beneficial Ownership Database

Perhaps the most central piece of the AMLA is the creation of a secure registry to track the beneficial ownership of legal entities. The AMLA requires a Reporting Company—defined as corporations, LLCs, and other businesses that are registered under the law of a state, or are formed under the law of a foreign country but are registered in the United States to conduct business—to disclose to FinCEN the names and identifying information of all beneficial owners.¹ The AMLA defines a beneficial owner as “an individual, who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—exercises substantial control” or who “owns or controls not less than 25 percent of the ownership interests of the entity.”² Although the AMLA does not define “substantial control,” it is likely the functional definition will reflect FinCEN’s customer due diligence rules, which define control as an individual “with significant responsibility to control, manage, or direct a legal entity customer, including an executive officer or senior manager.”³ FinCEN will likely provide further clarity during the regulatory process.

A Reporting Company existing prior to the effective date of any regulations prescribed under the AMLA must register with FinCEN within two years, while a Reporting Company formed after the effective date must register with FinCEN at the time of formation.⁴ A Reporting Company may satisfy registration requirements by providing FinCEN with the beneficial owner’s name, address, date of birth, and a driver’s license or other readily available government-issued identification.⁵ Certain entities will be exempt from the reporting requirements, including businesses already subject to reporting obligations with other agencies, such as publicly traded companies that file relevant stockholder information with the Securities and Exchange Commission (“SEC”).⁶ Also exempt from reporting requirements are entities that employ more than 20 employees on a full-time basis in the United States, have an operating presence at a physical location in the United States, and have filed income tax returns in the United States demonstrating more than \$5 million in gross receipts or sales.⁷ The \$5 million requirement may include the receipts or sales of other entities owned by the entity, or other entities through which the entity operates.

The AMLA sets forth penalties for violations of the reporting requirements, including civil penalties of not more than \$500 for each day that a violation continues or has not been remedied.⁸ Criminal penalties include a fine of not more than \$10,000, imprisonment for not more than two years, or both.⁹

The AMLA will allow access to the registry to state and federal law enforcement who are either directly engaged in the authorized investigation of financial criminal activities or who have received authorization from the Secretary of the Treasury and have undergone appropriate training as set forth by the Secretary.¹⁰ FinCEN may also disclose registry

information to financial institutions subject to customer due diligence requirements, provided the Reporting Company consents.¹¹ Unauthorized access or use of registry information is punishable by a \$250,000 fine, imprisonment of five years, or both.¹²

Expanded Definition of “Money Transmitter”: Reporting Requirements for Digital Currencies

Although businesses engaged in the transfer of funds, known as “money transmitters,” are already required to register with FinCEN, the AMLA expands the definition of money transmitters to capture a larger scope of businesses who transfer anything of value. Specifically, the legislation amends the definition of “money transmitters” to include businesses that transfer “currency, funds, or value that substitutes for currency,” and allows the Secretary of the Treasury to pass such regulations to further define “value that substitutes for currency.”¹³ This expanded definition is likely to capture businesses engaged in the exchange of digital currencies, online payment service providers, gaming companies with in-game currencies, and e-commerce companies that may offer gift cards and other items of value.

Art and Antiques Markets

The AMLA will also require the Secretary of the Treasury to issue proposed rules in connection with high-value trades of art and antiquities, conduct studies concerning how such trades impact financing of terrorism and crime, and set certain value thresholds that may trigger registration requirements with FinCEN.¹⁴ Although the AMLA is silent on the exact compliance framework concerning art and antiquities sales and trades, it is evident that Congress understands the high-risk nature of the market for money laundering.

International Cooperation

The AMLA highlights the importance of law enforcement focus on international anti-money laundering efforts by

- Formalizing the U.S. Treasury’s Financial Attaché Program, which helps foreign governments meet the legislative and regulatory standards set by the Financial Action Task Force (“FATF”), the international policymaking body created by the G-7 to counter money laundering and terrorist financing;
- Creating foreign financial intelligence unit liaisons to establish relationships with their foreign counterparts for the purpose of engagement on anti-money laundering and counter-terrorist financing regulatory frameworks; and
- Appropriating \$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 programs.

Whistleblower Protections

The AMLA expands whistleblower protections and requires the Treasury to pay an award of up to 30 percent of monetary sanctions collected as a result of a judicial or administrative action brought under the BSA in which the sanctions are more than \$1 million.

The AMLA prohibits a wide range of retaliatory acts, including directly or indirectly discharging, demoting, suspending, threatening, blacklisting, harassing, or in any other manner discriminating against a whistleblower in the terms and conditions of employment due to the employee's protected whistleblowing. The whistleblower provisions of the AMLA create a private right of action for whistleblowers who have suffered retaliation for disclosing potential BSA violations. In bringing a retaliation action, protected conduct includes internal whistleblowing, not just reporting a potential BSA violation to a regulatory agency. A whistleblower seeking to bring such an action also does not need to meet the AMLA requirements for award eligibility. Recovery from a retaliation claim can include reinstatement, double back pay with interest, and uncapped compensatory damages as well as other remedies that the court finds to be appropriate.

Current Status and Implementation

U.S. President Donald Trump vetoed the \$740 billion NDAA on December 23, 2020. Given that the NDAA passed with a veto-proof majority, most commentaries agree that enactment is likely.

How the AMLA will be implemented, however, will likely be established in regulations enacted over many months. Such implementation will likely fall to FinCEN—a primary AML regulator for financial institutions—which has “undertaken recent initiatives to collectively re-examine the BSA regulatory framework and the broader national AML regime.”¹⁵

Conclusion

We will continue to monitor regulations implemented as a result of the AMLA. If you have any questions, please consult your Ropes & Gray advisor.

1. National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 6403 (2020).
2. *Id.*
3. *See* 31 C.F.R. § 1010.230 (2016).
4. National Defense Authorization Act for Fiscal Year 2021, § 6403.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at § 6102.
14. *Id.* at § 6110.
15. Press Release, FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs (Sept. 16, 2020), available at <https://www.fincen.gov/news/news-releases/fincen-seeks-comments-enhancing-effectiveness-anti-money-laundering-programs>