

CLIENT ALERT

Anti-Money Laundering Act of 2020 Overhauls United States AML Framework

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AUTHORS

David Mortlock | **Britt Mosman** | **Michael J. Gottlieb** | **William J. Stellmach**
Samuel Hall | **Nikki M. Cronin**

In the most comprehensive overhaul to the U.S. anti-money laundering and countering the financing of terrorism (“AML/CFT”) regime since the USA PATRIOT Act in 2001, Congress passed the Anti-Money Laundering Act of 2020 (“AMLA” or the “Act”) into law on January 1, 2021. The AMLA amends the Bank Secrecy Act (“BSA”) ¹ to impose new obligations on FinCEN, the agency primarily responsible for maintaining and enforcing AML/CFT laws and regulations, and other related federal agencies over the coming years, as well as new reporting requirements for companies created under the laws of the United States or registered to do business in the United States.

Most of the Act’s requirements for private entities do not take immediate effect but will instead kick in after the Treasury Department promulgates implementing regulations. As a result, there is still some time to digest the new requirements and incorporate the changes into existing compliance policies and procedures. However, certain new federal powers of investigation and enforcement will go into effect immediately, as discussed below.

¹ The BSA, and its implementing regulations under the Code of Federal Regulations Chapter 10, are the civil framework for U.S. AML standards. These regulations are primarily maintained and enforced by the Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”).

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The AMLA includes many significant provisions that impact a wide range of actors. This alert provides an overview of key provisions, including:

- New beneficial-ownership reporting requirements for entities created under the laws of, or registered to do business in, the United States (with various exclusions) (Sections 6401-6403);
- Increased penalties for AML violations (Section 6309);
- New whistleblower incentives and protections (Section 6314);
- Expanded ability for the U.S. government to subpoena foreign bank records from foreign banks with U.S. correspondent bank accounts (Section 6308); and
- Increased regulatory coverage of non-traditional exchanges of value, such as cryptocurrencies and antiquities (Section 6102; 6110).

We anticipate that future alerts will address certain sections of the AMLA in more detail and will cover additional regulatory actions as regulations are promulgated by FinCEN.

Key Provisions of the AMLA

I. New Beneficial-Ownership Reporting Requirements

Title LXIV of the AMLA, titled the Corporate Transparency Act (“CTA”), is primarily aimed at preventing money laundering and other illicit activities through the use of shell companies. The CTA amends the BSA to require certain entities to report beneficial-ownership information to FinCEN and for FinCEN to maintain that information in a non-public, secure database, available only to law enforcement and federal regulators. Although FinCEN already requires covered “financial institutions” to identify and verify the identity of certain beneficial owners pursuant to its Customer Due Diligence (“CDD”) Rule,² the CTA will amend the BSA to impose new beneficial-ownership reporting requirements on “Reporting Companies” more broadly. This will significantly expand beneficial-ownership reporting requirements beyond what is currently required under the CDD Rule, despite many similarities between the two requirements. The CTA directs FinCEN to amend the existing CDD Rule to remove provisions that are now unnecessary or duplicative in light of the CTA.

² These requirements are detailed in FinCEN’s Customer Due Diligence Requirements for Financial Institutions (the “CDD Rule”) (81 Fed. Reg. 29397) (May 11, 2016), which apply only to covered financial institutions, including U.S. banks, mutual funds brokers, dealers in securities, futures commission merchants, and introducing brokers in commodities.

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a. Who Is Required to Report and What Are the Penalties for Non-Compliance?

Section 6403 defines a “Reporting Company” generally as a corporation or Limited Liability Company that is (i) created under the laws of the United States or an Indian Tribe; or (ii) a foreign entity registered to do business in the United States. Although this definition first appears to cover most companies operating in the United States, there are roughly 20 broad exclusions, including (among others):

- Publicly traded companies;
- Various types of financial institutions, such as banks, credit unions, money transmitters, registered broker-dealers, and insurance companies;
- Certain public utilities, tax-exempt nonprofit organizations, trusts, and political organizations; and
- Certain larger companies; *i.e.*, entities that:
 - Employ more than 20 full-time employees in the United States,
 - Have filed a federal tax return recording more than \$5 million in gross receipts or sales in the previous year, and
 - Have an operating presence at a physical office in the United States.

Given these exclusions, it is clear that the beneficial-owner reporting requirement are intended to target small businesses and shell companies that are deemed more likely to have opaque ownership structures and are therefore considered higher risk for money laundering.

FinCEN is authorized, in certain circumstances, to disclose the beneficial-ownership information to federal, state, and local law enforcement agencies, federal functional regulators, and Treasury Department employees (among others). Additionally, if the reporting entity consents, FinCEN is authorized to provide beneficial-ownership information to financial institutions as a means of facilitating the institution’s compliance with CDD rules. In turn, many financial institutions may need to develop processes for utilizing the new FinCEN database and ensuring that the underlying data is secure.

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b. What Are the Reporting Requirements?

Section 6403 of the Act requires Reporting Companies to provide information to FinCEN about each of their beneficial owners, including:

- Full legal name;
- Date of birth;
- Current residential or business street address; and
- Unique identifying number from an acceptable identification document or assigned by FinCEN.

There is some time before these requirements take effect. FinCEN is first required to promulgate regulations to implement the amendments to the BSA set forth in the CTA within one year of the AMLA's enactment. Any Reporting Company that has been formed or registered before the effective date of the regulations must submit its reports of information no later than two years after the effective date of the regulations prescribed pursuant to the CTA. And any Reporting Company that is formed or registered after the effective date of the forthcoming regulations must submit reports on beneficial ownership at the time of formation or registration. Reporting Companies are also subject to ongoing reporting requirements to FinCEN and will have no more than one year to make any updates following any relevant changes to their beneficial-ownership information.

Section 6403 defines the term "beneficial owner" of an entity as an individual who (directly or indirectly) through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control³ over the entity; or (ii) owns or controls 25 percent or more of the ownership interests of the entity. However, various types of individuals and entities are excluded from the definition of beneficial owner, including minor children; individuals acting as a nominee, intermediary, custodian, or agent on behalf of another individual; individuals acting solely as employees of an entity; and certain creditors (among others).

II. Enhanced AML-Related Penalties

To enhance the government's enforcement powers, the AMLA boosts existing BSA penalties and adds new ones. Under the AMLA, an entity or individual convicted of violating the BSA shall, "in addition to any other fine [], be fined in an amount that is equal to the profit gained by such person by reason of such violation[.]"⁴ Moreover, a person convicted of violating a provision of the BSA who was a partner, director, officer, or employee of a financial institution at the time the violation occurred must pay back their bonus received during the year of the violation (whether the bonus accrued before

³ The CTA does not define the term "substantial control."

⁴ See Section 6312.

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or after the violation) and “[e]gregious” violations of the BSA will now result in a ban on board membership with U.S. financial institutions for 10 years. For repeat offenders, the Treasury Secretary may also impose “if practicable” additional civil penalties of up to the greater of “3 times the profit gained or loss avoided by such person as a result of the violation; or [] 2 times the maximum penalty with respect to the violation.”⁵

With respect to the beneficial-owner reporting requirements discussed above, non-disclosure of required information carries civil monetary penalties of \$500 per day and a fine up to \$10,000 and/or imprisonment of up to two years. What is more, unauthorized disclosure of beneficial-ownership information carries civil monetary penalties of \$500 per day, and fines up to \$250,000 and/or imprisonment of up to five years.

In addition, the Act creates significant penalties for those that seek to conceal or misrepresent information provided to, or received by, financial institutions. More specifically, the Act provides up to 10 years in prison and a \$1 million fine for persons who knowingly misrepresent certain material facts from or to a financial institution in connection with certain monetary transactions.

Overall, the increased penalties suggest significantly more aggressive enforcement of AML/CFT laws moving forward. Indeed, these penalties are added to a host of existing penalties for violations of the BSA and its implementing regulations, including the imposition of civil monetary penalties, equitable remedies, and remedial undertakings, as well as criminal penalties for willful violations or for structuring transactions to avoid the reporting requirements.

III. Whistleblower Incentives and Protections

While the AMLA provides larger penalties for violations, it also provides larger incentives for whistleblowers who report violations. Prior whistleblower incentives were capped at \$150,000 for AML/CFT enforcement actions. Under the AMLA, those incentives are increased to up to 30 percent of the total amount collected by the government in monetary sanctions, if the collection is over \$1 million and results from original information voluntarily provided by the whistleblower.

The Act also provides for significant whistleblower protections from retaliation, including the ability to file a complaint with the Department of Labor, and to sue an employer for compensatory damages, reinstatement, double back-pay with interest, litigation costs, attorneys’ fees, and other expenses, if the Department of Labor does not provide a decision on a complaint within 180 days. We expect these incentives to lead to an increase in whistleblower activity and corresponding enforcement actions, given the success of similar programs (such as the whistleblower program administered by the Securities and Exchange Commission).

⁵ See Section 6309.

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IV. Expansion of Subpoena Authority

The AMLA also provides an increased number of tools for the government to find violations on its own. Under 31 U.S.C. § 5318(k), the Department of Justice (“DOJ”) previously had the authority to issue a subpoena to foreign financial institutions that maintain a correspondent bank account in the United States for “records related to such correspondent account.” The AMLA, however, expands the subpoena power provided in Section 5318 to also cover “any account at the foreign bank, including records maintained outside of the United States,” if those records are part of a broad list of enforcement actions, including criminal prosecutions or violations of the BSA. The Act also authorizes (1) the Attorney General to seek contempt sanctions if a foreign bank refuses to comply, and (2) the Attorney General or Treasury Secretary to require that U.S. financial institutions terminate their relationship with non-compliant foreign financial institutions.

V. Non-Traditional Transfers of Value—Antiquities, Cryptocurrencies, and Art

One of the goals of the AMLA is to modernize AML/CFT laws to address so-called “emerging threats.” To that end, the Act addresses certain non-traditional value transfers that have increasingly become the focus of federal regulatory agencies. For example, the Act has added antiquities dealers, advisors, and consultants to the definition of “financial institutions,” thereby subjecting such entities to BSA requirements. Perhaps more significantly, the Act also added businesses or persons engaged in the exchange of “value that substitutes for currency” to the definition of “financial institutions” and “money transmitting businesses.” This addition codifies prior FinCEN guidance that certain cryptocurrency exchanges, wallets, and other entities in the space are subject to the BSA.

Art dealers, at this time, have managed to avoid direct regulation under the BSA, but the AMLA signals that their relative freedom may be limited. The Act was passed after a series of high-profile reports involving art sales used as a means of circumventing AML and sanctions restrictions. Now, the AMLA requires several agencies to work together on a report for Congress, looking at, among other things, “the degree to which [future BSA] regulations, if any, should focus on high-value trade in works of art,” “the need to identify the actual purchasers of such works, in addition to the agents or intermediaries acting for or on behalf of such purchasers,” and “the need, if any, to identify persons who are dealers, advisors, consultants, or any other persons who engage as a business in the trade in works of art.”

VI. Pilot Program on Sharing SARs Information with Foreign Affiliates

Congress used the AMLA to instruct the Treasury Department to examine options for greater distribution of Suspicious Activity Reports (“SARs”) among a financial institution’s related entities. The Act requires the Treasury Department to create a three-year pilot program (with an option to extend for two years) allowing financial institutions to share SARs information “with the institution’s foreign branches, subsidiaries, and affiliates for the purpose of combating illicit finance risks,” so long as those foreign entities are not located in certain high-risk countries.

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VII. New Priorities, Research, and Positions for AML/CFT Regulators

The Act also directs relevant agencies to invest significant time and resources into expanding and focusing AML/CFT enforcement. The AMLA requires the Treasury Department, with help from the DOJ, national security agencies, and other state and federal regulators, to report to Congress with new AML/CFT priorities within 180 days of the AMLA's passage, and to update those priorities every four years. FinCEN must then promulgate new regulations consistent with those priorities within 180 days of submitting the report to Congress and financial institutions, in turn, will be expected to include these priorities in their compliance processes and policies moving forward.

The AMLA also tasks the Treasury Department, in conjunction with other relevant agencies, with a formal review of all existing BSA regulations and with making "appropriate changes" based on that review. Although Congress did not put a specific timeline on those changes, it did require a report to Congress within one year of the AMLA's passage "that contains all findings and determinations[.]" Relatedly, Congress called on various agencies in the Executive Branch to review existing requirements and to explore means of modernizing AML/CFT enforcement, including:

- A review of current Currency Transaction Reports ("CTRs") guidelines,
- A review of dollar thresholds for SARs,
- A review of the reporting burdens on non-profit organizations,
- A review of no-action letters in enforcement actions,
- The establishment of a subcommittee on innovation, along with innovation officers, and
- The convening of a tech symposium.

Each of these tasks will be accompanied by a formal report to Congress.

Congress has also directed FinCEN to spearhead a number of programs to promote public and private collaboration. As an example, the Treasury Secretary must convene private and public stakeholders "to examine strategies to increase cooperation between the public and private sectors for purposes of countering illicit finance." Congress also formally requested within the AMLA the establishment of a "FinCEN Exchange," a program first piloted in 2017, designed to facilitate information sharing between financial institutions, law enforcement agencies, national security agencies, and FinCEN and mandated that FinCEN report to Congress on the usefulness of the exchange and to suggest improvements.

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Finally, to ensure that these ambitious enforcement and modernization goals are realized, Congress provided for new resources to assist in AML/CFT administration and enforcement. To that end, several new programs and roles were mandated within the Treasury Department, each designed to add expertise or increase the Department's exposure to relevant actors in the AML/CFT space. These positions and programs include a Treasury Financial Attaché Program, Foreign Financial Intelligence Unit Liaisons, BSA "Innovation Officers," and "Information Security Officers," among others. The Act also requires AML training for federal bank examiners.

VIII. Conclusion

Overall, the AMLA represents a significant focus on AML/CFT compliance and enforcement in the immediate future and the coming years. Although new reporting requirements will likely not be triggered for another three years for existing companies, new penalties, new incentives for whistleblowers to come forward, and increased information sharing between public and private entities will quickly change the enforcement landscape. What is more, the AMLA signals significant additional regulatory changes that will be considered over the next year that could fundamentally change the AML/CFT regulatory regime. As those changes unfold, we will provide additional alerts.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

David Mortlock

202 303 1136

dmortlock@willkie.com

Britt Mosman

202 303 1057

bmosman@willkie.com

Michael J. Gottlieb

202 303 1442

mgottlieb@willkie.com

William J. Stellmach

202 303 1130

wstellmach@willkie.com

Samuel Hall

202 303 1443

shall@willkie.com

Nikki M. Cronin

202 303 1203

ncronin@willkie.com

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