# THE ANTI-MONEY LAUNDERING ACT OF 2020

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## Overview

On January 1, 2021, Congress enacted a broad range of anti-money laundering ("AML") reforms within the Anti-Money Laundering Act of 2020 (the "AML Act"), as part of the National Defense Authorization Act for Fiscal Year 2021 (the "NDAA").[1] The AML Act contains the most significant reforms to U.S. AML laws since the USA PATRIOT Act of 2001.

The AML Act covers a broad range of topics, from establishing new beneficial ownership reporting requirements for many smaller companies to incentivizing whistleblowers by mandating awards for providing actionable information about Bank Secrecy Act ("BSA")/AML violations.

Many of the reforms incorporate prior proposals by lawmakers and regulators that were not previously codified, as well as integrating changes advocated by the financial industry.


## Key Provisions[2]

- **Beneficial Ownership Registry.** Creates a new, long-awaited central registry for beneficial ownership information of shell companies and other smaller, less regulated entities, which will be available to financial institutions, law enforcement, and regulators (effective within approximately one year).
  - Imposes criminal and civil penalties in connection with willful beneficial ownership reporting failures, the provision of false or fraudulent beneficial ownership information, and the unauthorized disclosure and improper use of such information.
- **Whistleblower Program.** Creates a more comprehensive whistleblower incentive program for AML violations with increased awards and protections (effective immediately—additional rulemaking authorized, but without a required time frame);
- **Subpoena Power over Foreign Banks.** Expands statutory authority of the Department of Justice ("DOJ") to subpoena documents from foreign financial institutions that maintain correspondent accounts in the United States (effective immediately);
- **New Crimes.** Makes it a crime to conceal the ownership or control of assets exchanged in monetary transactions involving senior foreign political figures, or financial institutions or jurisdictions of primary money laundering concern, and adds increased penalties for repeated violations of the BSA (effective immediately);
- **New Collateral Punishments.** Prohibits persons convicted of egregious violations of the BSA from sitting on the board of directors of any U.S. financial institution for 10 years. Provides for the claw-back of bonuses paid by financial institutions to certain employees who are subsequently convicted of BSA violations;
- **Incorporation of National Priorities into AML Exams.** Requires the Treasury Department ("Treasury") to establish National AML/Countering the Financing of Terrorism ("CFT") Priorities within six months. During regulatory exams, regulators must consider the incorporation of those priorities into a financial institution's compliance program (regulations effective six months after establishment of priorities);
- **Virtual Currencies and Antiquities.** Codifies existing regulatory guidance that the BSA covers virtual currencies (effective immediately) and expands the scope of the BSA to include antiquities dealers, advisors, and consultants (effective within approximately one year);
- **Streamlining Suspicious Activity Reporting.** Requires Treasury and DOJ, among other government and industry stakeholders, to consider how to streamline AML reporting, including Suspicious Activity Reports ("SARs") and Currency Transaction Reports, and propose regulations to Congress (within one year).

[1] The William (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA") was enacted into law on January 1, 2021, when the U.S. Congress overrode former President Trump's veto of the legislation. The NDAA contains numerous AML-related provisions. The majority of those provisions are located in Division F of the NDAA, which is the AML Act. This summary focuses on the provisions within the AML Act.

[2] This alert is not a comprehensive summary of every provision of the AML Act or the specific provisions of law discussed herein.

## Beneficial Ownership Registry

The AML Act requires shell companies, certain smaller U.S. entities, and certain foreign entities doing business in the U.S. ("Reporting Companies") to report their beneficial ownership information to the Financial Crimes Enforcement Network of the Department of the Treasury ("FinCEN").

**The new requirement effectively bans anonymous shell companies.**

## Who is Required to Register, and Who is Excluded?

**The new beneficial ownership requirements apply to shell companies and smaller entities. The intent is to capture information about shell companies rather than impose additional burdens on clearly legitimate, larger, and more established entities.**

While a Reporting Company includes a corporation, limited liability company, or similar entity that is established in, or registered to do business in, the United States, there are numerous exclusions.

**Importantly, the definition excludes entities that:**

- **Employ more than 20 full-time employees;**
- **Have more than $5 million in sales or gross receipts; *and***
- **Have an operating presence at a physical office in the United States.**

## Additional Exclusions and Comparison to CDD Rule

The definition also excludes many specific types of entities that are also excluded from the definition of "legal entity customer" in FinCEN's customer due diligence rule ("CDD Rule"),[3] including:

- U.S. publicly traded companies (*i.e.*, "issuers");
- Banks, credit unions, bank holding companies, money transmitting businesses, broker-dealers, and exchanges or clearing agencies, as defined in applicable laws;
- Registered investment companies and investment advisors;
- Insurance companies, as defined in the Investment Company Act;
- Futures commission merchants, introducing brokers, swap dealers, major swap participants, commodity pool operators, commodity trading advisors, and other registered entities, as defined in the Commodity Exchange Act;
- Registered public accounting firms;
- Designated financial market utilities; and
- Pooled investment vehicles operated or advised by the above-referenced banks, credit unions, broker-dealers, or registered investment companies and advisors.

The "Reporting Company" definition also excludes registered money transmitting businesses; U.S. public utilities; tax-exempt nonprofits and political organizations; and certain entities that are not engaged in active business, do not hold assets, have not changed ownership or transferred more than $1,000 in the past 12 months, and are not owned, directly or indirectly, by a foreign person; as well as entities that are owned or controlled by many of the foregoing, with certain exceptions.

[3] 31 C.F.R. § 1010.230.

## How is Beneficial Owner Defined?

**Beneficial owner** means, "with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise:

- exercises **substantial control** over the entity; or
- **owns or controls at least 25%** of the ownership interests of an entity."

## To Whom Will the Beneficial Ownership Registry Data be Available?

**Government agencies** engaged in national security, intelligence, or **law enforcement** in connection with a civil or criminal investigation or pursuant to a court order;

**Foreign agencies** making requests for assistance under international agreements and treaties, or trusted foreign countries without such agreements or treaties; and

**Financial institutions**, with consent of the Reporting Company, to facilitate compliance with the CDD Rule.

## *Practice Point*

*Financial institutions will need to develop procedures to effectively utilize the FinCEN registry information while maintaining adequate internal compliance processes regarding beneficial ownership information.*

## How Does the Beneficial Ownership Registry Affect Existing CDD Rule?

- The CDD Rule continues to apply to financial institutions, and financial institutions will be able to use FinCEN's registry to facilitate compliance with the CDD Rule.
- Treasury will revise the CDD Rule to bring it into conformity with provisions of the AML Act.
- Treasury is prohibited from repealing the requirement that financial institutions identify and verify beneficial owners of legal entity customers.

## When Do Beneficial Ownership Reporting Requirements Take Effect?

The Secretary of the Treasury is required to promulgate regulations by one year after enactment of the AML Act.

The beneficial ownership reporting requirements take effect on the effective date of those regulations.

## When Must Entities First Report Beneficial Ownership?

- **Existing entities:** Reporting companies formed or registered prior to the effective date of the regulations must report within two years of such effective date.
- **Newly formed entities:** Reporting companies formed after the regulations become effective must report at the time of formation.
- **Changes in beneficial ownership** must be reported to FinCEN within one year of a change to the beneficial ownership information previously reported.

### Beneficial Ownership Reporting — Potential Criminal and Civil Penalties

- Reporting companies and recipients of Beneficial Ownership Information can be subject to **civil and criminal penalties** for:
  - failing to report and falsely reporting beneficial ownership; and
  - the unauthorized disclosure or misuse of beneficial ownership information.
- **Safe harbor provision** allows correction of beneficial ownership information provided to FinCEN within 90 days of the original submission.

### Penalties for Willfully (1) Failing to Report Beneficial Ownership Information or (2) Reporting False or Fraudulent Beneficial Ownership Information

- $500/day civil penalty for every day the violation continues.
- Imprisonment of up to two years, and a fine of up to $10,000.

### Penalties for Knowing Unauthorized Disclosure or Use of Beneficial Ownership Information

- $500/day civil penalty for every day the violation continues;
- Imprisonment of up to five years, and a mandatory fine of up to $250,000; or
- If unauthorized disclosure or use of beneficial ownership information occurs in the course of other illegal activity involving more than $100,000 in a 12-month period, imprisonment of up to 10 years and a mandatory fine of up to $500,000.

### *Practice Point*

*The maximum penalties for unauthorized disclosure are more severe than maximum penalties for failing to report required information. These penalty provisions come on the heels of the widely reported "FinCEN Files," where journalists published troves of leaked confidential SAR information.*

## Whistleblower Provisions

### The AML Act Enhances AML Whistleblower Provisions

The AML Act's new whistleblower incentives are similar to those in the SEC's whistleblower program under Dodd-Frank, which has been highly effective in encouraging reporting to the SEC.

- Under the new program, a whistleblower could receive a reward of up to 30% of the government's recovery for providing original information that leads to sanctions of more than $1 million.
- This is an increase from prior BSA whistleblower provisions, which allowed for incentive payment when original information led to recovery of $50,000 or more, but the incentive reward was the lesser of up to 25% of the monies collected or $150,000.

### How Would a Whistleblower Be Eligible for an Incentive Award?

- Must provide original information that leads to monetary sanctions greater than $1 million.
- Importantly, internal reporting by the whistleblower counts. To qualify for the reward, the whistleblower can report to her employer, Treasury, or the Attorney General.
- Includes anti-retaliation protections.

**Note:** The new increased incentives will likely motivate more whistleblowers to report. For example, the SEC program has awarded $736 million to 128 individuals since 2012 and received more than 23,000 tips received in fiscal year 2020 alone.

### *Practice Point*

*Financial institutions should evaluate the effectiveness of their existing whistleblower process and ensure the process is working to document, appropriately investigate, and resolve AML-related complaints. To the extent that any financial institution does not already have a whistleblower hotline and process, it should establish them.*

# Subpoena Power

## The AML Act Expands Subpoena Power over Foreign Financial Institutions

The AML Act expands DOJ's subpoena power over "any foreign bank that maintains a correspondent account in the United States" to seek records relating to the correspondent account or any account at the foreign bank that are subject to an investigation into i) violation of criminal law, ii) violation of the BSA, iii) a civil forfeiture action, or iv) an investigation pursuant to USA PATRIOT Act Section 311.[4]

### How Does the AML Act Expand Subpoena Authority?

- Previously, the U.S. government could issue a subpoena to any foreign bank that maintains a correspondent account in the U.S., but could only subpoena records related to such correspondent account, including records maintained outside the U.S.
- The AML Act expands the U.S. government's subpoena power so that it can now subpoena records related to any account at a foreign bank that maintains a correspondent account in the United States that are the subject of a civil forfeiture action or certain investigations, *not just records related to a U.S. correspondent account*.
- Failure to comply with the subpoena exposes the financial institution to a contempt order, sanctions, and termination of correspondent relationships with U.S. financial institutions at the direction of the Attorney General or Treasury Secretary.

### *Practice Point*

*The AML Act provides that an assertion that compliance would conflict with foreign secrecy or confidentiality laws shall not be the sole basis for quashing or modifying the subpoena.*

# National AML/CFT Priorities

## The Government Must Set National AML/CFT Priorities

The Secretary of the Treasury is required to establish public priorities for AML/CFT national policy and update those priorities every four years.

- Treasury will work with state financial regulators, and national security agencies "shall establish and make public priorities for [AML] and [CFT] policy."
- The priorities must be consistent with national strategies for CFT activities, money laundering, and related forms of illicit finance.

### How Will the National AML/CFT Priorities Be Used?

- Treasury will set minimum standards for internal policies, procedures, and controls for the AML compliance programs established by financial institutions.
- The AML Act requires FinCEN to publish "threat pattern and trend information to provide meaningful information about the preparation, use and value of reports" at least twice a year.
- FinCEN must provide financial institutions and regulators with "typologies, including data that can be adapted in algorithms, if appropriate, relating to emerging money laundering and terrorist financing threat patterns and trends."

### AML Program Examination

- **Importantly**, incorporation of the defined AML priorities into a financial institution's risk-based AML compliance programs "shall be included as a measure on which a financial institution is supervised and examined for compliance with those obligations."

### *Practice Point*

*Financial institution AML compliance programs must meet these minimum standards in order to satisfy the obligations of the BSA. Financial institutions should consider trend and threat pattern analysis provided by FinCEN in their risk assessments.*

[4] Section 311 grants the Secretary of the Treasury the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, institution, class of transaction, or type of account is of "primary money laundering concern," to require U.S. financial institutions and financial agencies to take certain "special measures" against the entity of primary money laundering concern.

# Virtual Currency/Antiquities

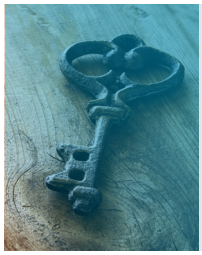

## The AML Act Applies the BSA to Virtual Currency and Antiquities Dealers

The AML Act expands and amends several definitions and provisions within the BSA to encompass "value that substitutes for currency."

The AML Act also broadens the BSA's scope to include antiquities dealers, advisors, and consultants within the definition of regulated "financial institutions."

## The AML Act Codifies Existing Virtual Currency Guidance

- FinCEN has previously issued guidance that its money-transmission regulations—which apply to the transmission of currency, funds, or "other value that substitutes for currency"—apply to "convertible virtual currencies," such as bitcoin and other cryptocurrencies.[5]
- The AML Act codifies that existing guidance and FinCEN's rules continue to be effective.



## The AML Act Tackles the Antiquities Market

Expanding the AML Act's reach to cover antiquities dealers, advisors, and consultants had been under consideration for years and is intended to address the billions of illicit dollars that are moved through "underground" art and antiques markets.

# New Criminal Violations

## The AML Act Creates New Criminal Violations for Concealing Source of Assets in Monetary Transactions

The AML Act includes new prohibitions on concealing the source of assets in monetary transactions involving individuals or entities that present heightened risk of money laundering or illicit financing activities.


## New Money Laundering Crimes related to Senior Political Figures and Jurisdictions/Entities of Primary Money Laundering Concern

- ***Senior Foreign Political Figures.*** The AML Act makes it a crime to knowingly conceal, falsify, or misrepresent a material fact concerning the ownership or control of assets in a monetary transaction if:
  - the person or entity who owns or controls the assets is a senior political figure, or any immediate family member or close associate of a senior foreign political figure; and
  - the aggregate value of the assets involved in one or more transactions is $1 million or more.
- ***Primary Money Laundering Concerns.*** The AML Act also makes it a crime to knowingly conceal, falsify, or misrepresent a material fact concerning the source of funds in a monetary transaction if:
  - the transaction involves a financial institution or jurisdiction identified as a primary money laundering concern; and
  - the transaction violates certain correspondent banking prohibitions or conditions requiring U.S. financial institutions to take "special measures" under Section 311 of the USA PATRIOT Act with respect to such concern.
- Both crimes are punishable by up to 10 years imprisonment and a $1 million fine.

[5] *See, e.g.*, FIN-2019-G001, "Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies (May 9, 2019); FIN-2013-G001, "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies" (Mar. 18, 2013)."

# AML Reporting Reviews

## The AML Act Requires Review of AML Reporting and Thresholds

Treasury, DOJ, and other federal and state regulators must formally review and propose rulemaking changes for financial institution currency transaction reporting and SAR requirements—including dollar thresholds—to reduce unnecessarily burdensome regulatory requirements and to ensure that they achieve the purposes of the BSA (proposed regulations due within one year and dollar thresholds to be considered every five years for the next ten years).


## The AML Act Requires Certain Types of Studies and Reports

**Note:** Reporting requirements have long been a subject of calls for AML reform. Industry professionals note the burden of certain reporting requirements and a perceived lack of corresponding usefulness to law enforcement. The reporting provisions in the AML Act appear to be designed to address this criticism.

The AML Act requires an array of studies and reports by Treasury, DOJ, and other government agencies related to evaluating the usefulness and efficiency of SAR and currency transaction reports ("reporting").

- **FinCEN's Pilot Program Will Expand Sharing of SAR Information**. Pilot program will temporarily (for three to five years from establishment) expand FinCEN guidance that currently permits SAR sharing only with a foreign "head office" or "controlling company" of a bank, or a foreign parent entity of a broker-dealer, futures commission merchant, or introducing broker, but not with other foreign affiliates.

  **Note:** The current prohibitions on sharing of SAR Information by financial institutions with most overseas affiliates make it more difficult to effectively respond to suspicious activity and mitigate money laundering and terrorist financing risk.

- Under the pilot program, financial institutions will not be permitted to share SAR information with affiliates in China, Russia, or any jurisdiction that "is a state sponsor of terrorism, is subject to sanctions imposed by the Federal Government, or the Secretary has determined cannot reasonably protect the security and confidentiality of such information."

- *Prohibits offshoring compliance:* Permission to share SAR information overseas does not authorize financial institutions to move their BSA-related compliance functions outside of the United States.

# Additional Penalties & Safe Harbor

## The AML Act Institutes Additional Civil and Criminal Penalties

- Repeat violators of AML laws may be subject to increased civil monetary penalties up to the greater of 3 times the profit gained or loss avoided or 2 times the maximum penalty for the violation.
- Certain individuals acting on behalf of a financial institution who are convicted of BSA violations must repay any bonus received during the calendar year during which or after the violation occurred.
- Financial institutions may require an employee to repay a bonus if it determines that the employee engaged in activities that were unethical, even if non-criminal.
- Individuals who have committed an "egregious violation" of the BSA are prohibited from sitting on the board of a U.S. financial institution for 10 years.
- These penalties became applicable immediately upon enactment of the AML Act.

## Application of Penalties

- Under the AML Act, "The term 'egregious violation' means, with respect to an individual—

  A. a criminal violation—

  i. for which the individual is convicted; and
  ii. for which the maximum term of imprisonment is more than one year; and

  B. a civil violation in which—

  i. the individual willfully committed the violation; and
  ii. the violation facilitated money laundering or the financing of terrorism."

## The AML Act Creates a Safe Harbor Relating to "Keep Open" Letters.

The AML Act also adds a safe harbor provision to hold financial institutions harmless if law enforcement asks them to keep an account or transaction open and they do so within the limits of the request.

The safe harbor does not apply to any time period before the law enforcement request is made, and financial institutions must continue reporting suspicious activity while the account remains open.

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