

The Anti-Money Laundering Act of 2020: 5 Key Takeaways

Expanded compliance obligations will have far-reaching implications for regulated financial institutions and most companies operating in the US.

On January 1, 2021, Congress overrode President Trump's veto and enacted the National Defense Authorization Act for Fiscal Year 2021, an omnibus bill that includes the Anti-Money Laundering Act of 2020 (the Act). The Act represents a significant development in US anti-money laundering laws.

This *Client Alert* highlights five key takeaways from the Act.

1. The Act requires certain United States companies to disclose their beneficial owners to the government.

Under the Act, many US companies — including corporations, limited liability companies, and foreign companies registered to do business in the United States — are for the first time required to disclose to the government their beneficial owners. Specifically, US companies must submit such information to the Department of Treasury's Financial Crimes Enforcement Network (FinCEN), which will be responsible for creating and maintaining a database to house information on beneficial ownership. The Act defines beneficial owners to include any individual who exercises "substantial control" over the company or owns or controls not less than 25% of the entity's ownership interests.

For each beneficial owner, the Act directs companies to report the full legal name, date of birth, current residential or business address, and a unique identifying number from an identification document or a FinCEN identifier. The Act excludes several types of entities from this requirement, including:

- Companies with more than 20 employees, more than US\$5 million in gross receipts or sales, and a physical office in the US
- Registered securities issuers
- Governmental entities
- Banks
- Credit unions
- Investment companies
- Insurance companies
- Public accounting firms
- Public utilities
- Pooled investment vehicles

- 501(c) organizations
- Political organizations
- Trusts

Many of these exempted entities already are subject to disclosure requirements under the Bank Secrecy Act (BSA), or are deemed by FinCEN not to represent significant money laundering risks.

The Act imposes civil penalties of up to US\$500 per day and criminal penalties of up to US\$10,000 and two years in prison for submitting incomplete, outdated, false, or fraudulent beneficial ownership information to FinCEN.

2. Pursuant to the Act, FinCEN will administer a non-public national database of US companies' beneficial owners.

FinCEN will collect and maintain US companies' reported beneficial owner information in a secure database. Information in this national registry will not be publicly available. FinCEN can, however, make this information directly available to US government authorities that perform national security, intelligence, and law enforcement activities, as well as to trusted foreign law enforcement agencies upon request.

3. The Act creates a new whistleblower program.

The Act also creates a new whistleblower program similar to those utilized by the Securities and Exchange Commission and the Commodity Futures Trading Commission. Section 6314 of the Act authorizes awards up to 30% of monetary sanctions imposed in successful judicial or administrative actions exceeding US\$1 million to whistleblowers who provide original information of violations of the BSA to employers, the Secretary of the Treasury, or the Attorney General. As noted above, pursuant to the Act, such violations now include submitting incomplete, outdated, false, or fraudulent beneficial information to FinCEN. Other typical violations of the BSA include failing to maintain an effective anti-money laundering program, failing to register as a money transmitting business, or failing to file required Suspicious Activity Reports (SARs) or Currency Transaction Reports (CTRs). In determining the amount of an award, the Secretary of the Treasury will take into account the significance of the information and the degree of assistance provided by the whistleblower. The Act also prohibits retaliation against whistleblowers.

4. The Act authorizes subpoenas to foreign banks that maintain correspondent accounts in the United States.

Section 6308 of the Act expands the authority of the Secretary of the Treasury and the Attorney General, previously granted by Section 5318(k) of the PATRIOT Act, to issue subpoenas to any foreign bank that maintains a correspondent account in the United States, including for records outside of the United States. Significantly, the Act grants those authorities power to request not only the foreign banks' records relating to the US-based correspondent account, as the PATRIOT Act allowed, but also records relating to "any account at the foreign bank." This represents an important expansion of the government's authority to issue subpoenas to foreign banks.

The Act also builds on the PATRIOT Act by providing that "[a]n assertion that compliance with a subpoena ... would conflict with a provision of foreign secrecy or confidentiality law shall not be a sole basis for quashing or modifying the subpoena." Foreign banks facing PATRIOT Act subpoenas have sometimes challenged the authority of the United States to compel production of records when compliance would violate foreign law. For example, in a 2019 case before the US Court of Appeals for the

District of Columbia Circuit involving an investigation into North Korea's financing of its nuclear weapons program, a Chinese bank claimed that the subpoena at issue exceeded the authority of the Attorney General under the PATRIOT Act. The bank noted among other arguments that compliance with a subpoena would violate Chinese banking secrecy laws. (The court ultimately upheld the subpoena.)¹ The Act clarifies that these comity arguments could not form the "sole basis" for a court to quash such a subpoena.

Additionally, similar to the rules prohibiting banks, governmental authorities, and related parties from disclosing SARs submitted to FinCEN pursuant to the Bank Secrecy Act, Section 6308 of the Act prohibits employees and agents of a foreign bank from notifying any account holders about the existence or contents of the subpoena. Violations of this provision are subject to civil penalties in an amount equal to "(I) double the amount of the suspected criminal proceeds sent through the correspondent account of the foreign bank in the related investigation; or (II) if no such proceeds can be identified, not more than \$250,000."

Under the Act, a foreign bank that fails to comply with such a subpoena may be subject to a civil penalty up to US\$50,000 per day. A financial institution that fails to terminate a relationship with a foreign bank not in compliance with a subpoena faces a daily fine of US\$25,000, up from the US\$10,000 allowed by the PATRIOT Act.

5. The Act modernizes anti-money laundering authorities, strengthens the relationship between law enforcement and national security agencies, and commits new resources to combatting money laundering.

Several provisions of the Act serve to update the existing anti-money laundering regime in order to help safeguard the financial system from developing threats and account for emerging technologies and payment methods, such as virtual currencies. For example, although the government has taken the position that the existing anti-money laundering framework covered cryptocurrency transactions, the Act expressly includes financial institutions and businesses engaged in the exchange or transmission of "value that substitutes for currency" — such as cryptocurrencies — within the scope of regulated entities.

The Act also amends existing money-laundering laws to strengthen the relationships among law enforcement and national security agencies and to incorporate "countering the financing of terrorism." For example, Section 6104 directs the Secretary of the Treasury to maintain anti-money laundering and countering the financing of terrorism efforts through a personnel rotation program involving the Department of Justice, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, and other agencies. Additionally, Section 6103 establishes FinCEN Exchange, a voluntary public-private information-sharing partnership among law enforcement agencies, national security agencies, financial institutions, and FinCEN.

Relatedly, the Act commits significant new resources to enforcing anti-money laundering laws, including by expanding the number of US government personnel dedicated to preventing money laundering and terrorism finance. The new personnel programs include:

- The creation of the Treasury Financial Attaché Program
- The creation of the Office of Domestic Liaison within FinCEN
- The appointment of six Foreign Financial Intelligence Unit Liaisons
- The creation of the Subcommittee on Information Security and Confidentiality within the Bank Secrecy Act Advisory Group

- The appointment of a Bank Secrecy Act Information Security Officer within each Federal functional regulator, FinCEN, and the Internal Revenue Service

Conclusion

The Anti-Money Laundering Act of 2020 represents a significant expansion of US anti-money laundering compliance obligations that impacts not only regulated financial institutions, but most companies operating in the US. In particular, the beneficial owner disclosure requirements involve the creation of an entirely new regulatory regime, which likely will require future FinCEN rulemaking and guidance to fully implement. Collectively, the new whistleblower program, additional enforcement resources and tools, and increased information sharing among government and private entities will likely lead to increased enforcement of the BSA and related laws against both companies and financial institutions. Latham will provide updates on relevant developments and is available to assist clients in assessing the impact of the Act on their businesses and compliance obligations.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

[Alice S. Fisher](#)

alice.fisher@lw.com
+1.202.637.2232
Washington, D.C.

[Douglas N. Greenburg](#)

douglas.greenburg@lw.com
+1.202.637.1093
Washington, D.C.

[Benjamin A. Naftalis](#)

benjamin.naftalis@lw.com
+1.212.906.1713
New York

[Eric S. Volkman](#)

eric.volkman@lw.com
+1.202.637.2237
Washington, D.C.

[Douglas K. Yatter](#)

douglas.yatter@lw.com
+1.212.906.1211
New York

[Allison Hugi](#)

allison.hugi@lw.com
+1.202.637.1088
Washington, D.C.

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Endnotes

¹ See *In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019).