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Congress Makes Sweeping Changes to Money Laundering Enforcement

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On New Year's Day 2021, Congress passed—over President Trump's veto—a defense appropriations law containing the Anti-Money Laundering Act of 2020 ("AML Act") and the Corporate Transparency Act, as part of a sweeping new set of anti-money laundering reforms that create important new beneficial ownership disclosure obligations for a wide range of small companies, and contain both good and bad news for financial institutions.

The law was the culmination of a decade of advocacy from various lawmakers, law enforcement agencies, and interest groups seeking to reduce the use of U.S. jurisdictions to form anonymous shell companies to facilitate money laundering, tax evasion, violations of sanctions and export control laws, and terrorist financing. It reflects a growing trend within Western economies, particularly in the EU, to require enhanced transparency in corporate ownership, following controversies such as the [Panama Papers](#), [Paradise Papers](#), and (more recently) "[FinCEN Files](#)" reports by the International Consortium of Investigative Journalists.

Required disclosure of beneficial owners

The most notable feature of the new Corporate Transparency Act is a requirement that—subject to certain exemptions—all corporations and limited liability companies formed under U.S. state or tribal laws or registered to do business in the United States, and everyone forming such entities, must disclose and regularly update information on the entities' beneficial owners to the Treasury Department's [Financial Crimes Enforcement Network](#) (FinCEN). Specifically, those subject to statute would have to disclose the owners' full legal names, dates of birth, address, and identification number (e.g., driver's license) or FinCEN-issued number. Each violation, whether by providing false information or failing to provide true information, can result in up to two years of imprisonment.

"Beneficial owner" is defined as any natural person who directly or indirectly (1) exercises "substantial control" over the entity; or (2) owns or controls at least 25% of the ownership interest of the entity. It cannot include a minor child, a nominee or custodian, an individual acting merely as an employee of the entity, an individual with mere inheritance rights to the entity, or a creditor (with certain exceptions).

The new reporting requirement would apply mainly to small companies, such as new start-ups. The law exempts various categories of companies, including:

- Issuers of securities that are registered under Section 12, or that are required to file information under Section 15(d), of the Securities Exchange Act;
- Federal-, tribal-, or state-owned companies;
- Banks, credit unions, and bank holding companies;
- Brokers, dealers, exchanges, and other entities registered under the Securities Exchange Act;
- Investment companies and advisers registered under the Investment Company Act or the Investment Advisers Act;
- Pooled investment vehicles managed by exempted brokers, dealers, investment advisers, or certain other entities;
- Various entities registered or regulated under the Commodity Exchange Act;
- Insurance companies;
- Public accounting firms;
- Public utilities and financial market utilities; and
- Tax-exempt 501(c) non-profits or 527(a) political organizations.

It also exempts any company that has over 20 full-time U.S.-based employees, files U.S. tax returns showing over \$5 million in gross receipts, and operates from a physical office in the United States. In addition, the law exempts any entities owned or controlled by any of the above categories of companies.

Separately, a company is exempted if it has existed for over one year without a change in ownership and has no active business, no foreign ownership, and no assets, and has not sent or received funds over \$1,000 within the past year. However, a subsidiary of or other entity controlled by such a company would not be exempt.

The new law also prohibits the issuance of bearer shares by corporations or LLCs. Such instruments have been widely criticized as facilitating money laundering and other illicit activity.

The [Congressional Budget Office has estimated](#) that a prior version of the statute could result in as many as 30 million new beneficial ownership filings each year. It would have particular effect in states such as Delaware, Nevada, and Wyoming, which have historically allowed for creation of anonymously-held companies with relatively little effort.

Support—and possible relief—for financial institutions

The law also allows for FinCEN to share disclosed information with financial institutions upon their request and with the customer's consent. This could greatly assist financial institutions' efforts to find, verify, and report beneficial ownership of their entity clients. FinCEN's [Customer Due Diligence rule](#) (CDD), enacted in 2016, had imposed that requirement, creating challenges for bank compliance officers trying to confirm ownership information provided by new clients.

At the same time, the law provides for the possible streamlining (though not the elimination) of the CDD rule. The new 31 U.S.C. § 5336(d) requires the Treasury Secretary to revise the rule within the next year in order to "reduce any burdens on financial institutions that are, in light of the enactment of this Act and the amendments made by this Act, unnecessary or duplicative."

New BSA whistleblower program and increased BSA sanctions

As welcome as the potential CDD revisions may be, a more ominous development for banks, credit unions, and other regulated parties is the creation of an enhanced Bank Secrecy Act (BSA) whistleblower program. Modeled on the SEC's program created by the Dodd-Frank statute, the program will allow the Treasury department to pay whistleblowers up to 30% of any recovery obtained in BSA enforcement proceedings resulting from information the whistleblowers provide to Treasury or DOJ. The SEC's program has led to a flood of insider tips and a [number of major enforcement actions](#) by that agency—and corresponding bounty payments—over the past decade, and one can expect that the Treasury program may have the same effect.

The AML Act also increases the potential sanctions for BSA violations. Repeat BSA violators can be subject to an additional civil penalty of up to three times the profit gained or loss avoided through the violation, or two times the maximum penalty for the violation. Employees, officers, and directors of financial institutions who are individually convicted of violations can be ordered to repay any bonus paid during the fiscal year in which the violation occurred or the following year.

Separately, the AML Act authorizes the Treasury Department to hire additional FinCEN staff, including to enforce the BSA. It also creates a number of other FinCEN programs and positions to address privacy, international coordination, government information-sharing, and analysis of additional BSA and anti-money laundering reforms. Further details of the new requirements remain to be implemented in forthcoming Treasury regulations.

Expanded subpoena authority over foreign banks

Pre-existing law permitted the Treasury and Justice Departments to subpoena foreign banks with correspondent accounts in the United States, and demand production of records related to those correspondent accounts. The AML Act expands that authority to cover records relating to "any account" of the foreign bank, including records maintained outside the United States. Although the foreign bank can ask a U.S. court to quash such a subpoena, it cannot do so only on the basis that a foreign bank secrecy law prevents disclosure.

Managing the new risks and requirements

All U.S.-organized corporations and LLCs, non-U.S. entities registered to do business in the United States, and anyone who has created or intends to create such entities in the future, should be aware of the new law and evaluate whether they or any companies they own or control are subject to the disclosure requirements. If so, they should review those requirements and their responses to them carefully, lest either inaction or inaccuracies lead to a criminal investigation or worse.

In particular, any small (sub-20 employee) company that is not owned or controlled by a larger parent company should be on notice that it is likely required to file a disclosure with FinCEN. Start-ups in particular should pay attention.

Financial institutions and other entities subject to BSA requirements should monitor these developments for potential changes in Customer Due Diligence requirements, but should also prepare for increased oversight, management of whistleblower risk, and higher enforcement stakes, and should consider updating and upgrading their BSA/Anti-Money Laundering compliance programs accordingly.

Buchalter's White Collar & Investigations practice group has extensive experience advising companies from various industries on compliance with anti-money laundering laws and regulations, and managing related government investigations. For more information on this topic, please contact one of the following attorneys.



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