

Consumer Finance Litigation



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Regulators Take Another Stab at Taking a Bite Out of Crime

In January 2021, after the override of President Trump's veto, Congress passed the National Defense Authorization Act ("NDAA"). The NDAA includes the Anti-Money Laundering Act of 2020 (the "Act"), which contains significant changes to the Bank Secrecy Act ("BSA"), along with changes relating to anti-money laundering ("AML"), counter-terrorism financing ("CTF"), and protections to the U.S. financial system against foreign interference.

Among the key reforms in the Act are the following:

- (1) substantial revision of the definition of "financial institution" to recognize innovations in financial technology;
- (2) establishment of new beneficial ownership reporting; and
- (3) requiring the U.S. Treasury to increase transparency and update the AML/CFT legal framework.

The Act makes clear that innovation is coming to BSA/AML compliance. Although the Treasury Department may not complete its administrative and legislative findings and promulgate implementing regulations until 2022, we expect that the implementation of the Act will emphasize the need for businesses, particularly in the FinTech sector, to adopt effective transaction monitoring processes. The development of the beneficial ownership database, which is accessible to a financial institution (with the customer's consent) for purposes of complying with customer due diligence requirements, should create efficiencies in the BSA/AML process by helping financial institutions analyze suspicious transactions.

DEFINITION OF "FINANCIAL INSTITUTION"

The Act amends the BSA's definition of "financial institution" to include any business engaged in the transmission of currency, funds, or "value that substitutes for currency."¹ This amendment reflects the Act's focus on FinTech and reinforces the position that the BSA possibly applies to cryptocurrency. The Act also requires the Treasury Department to establish a Subcommittee on Innovation and Technology, which will provide guidance to federal and state financial regulators in order to "encourage and support technological innovation in the areas" of AML and CFT and reduce obstacles that exist in current regulation. The U.S. Government Accountability Office Director must also conduct a study on the use of virtual currencies to facilitate drug trafficking and human trafficking on online markets.

BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS

The Act also includes the Corporate Transparency Act, which is intended to discourage the use of shell corporations to disguise and move illegal funds. In furtherance of this goal, the Corporate Transparency Act requires each business that meets the definition of a "reporting company" to disclose to the Financial Crimes Enforcement Network ("FinCEN") certain information regarding the real person that owns and controls the entity and to update that disclosure upon a change. For each such beneficial owner, the "reporting company" is required to provide the following information: (1) full legal name; (2) date of birth; (3) current residential or business address; and (4) unique identifying number. FinCEN will then maintain a non-public national registry of beneficial ownership information.

1. These additions supplement the prior definition of financial institution, which included banks, thrifts, credit unions, and any other insured depository institutions, branches, and agencies of foreign banks, broker-dealers of securities, and money services businesses, including money transmitters, issuers of checks, money orders or "similar instruments," and foreign exchange dealers, among others. 31 U.S.C § 5312.

The Act also adds antiquities dealers, advisors, and consultants to the BSA's definition of "financial institution."

The term “reporting company” is generally defined to include entities created under the laws of the United States or Indian Tribe and foreign entities registered to do business in the United States. One significant exclusion from this definition relates to entities that: (1) employ more than 20 full-time employees; (2) file a federal tax return of more than five million dollars; and (3) maintain a physical office in the United States. Other notable exclusions from this definition are publicly traded companies, certain nonprofits, government entities, and certain financial institutions (such as banks, credit unions, and bank holding companies).

Many of the details regarding beneficial ownership reporting will be determined through future regulations, which we expect to be promulgated throughout 2021 and potentially into 2022. Additionally, there is an extended compliance period and existing entities do not have to report beneficial ownership until two years after the effective date of the regulations promulgated under this law (and must update beneficial ownership information within one year of the change). Entities formed after the promulgation of the regulations, however, must report beneficial ownership information at the time of formation.

U.S. TREASURY PRIORITIES

The Secretary of the Treasury will establish national AML priorities, which are to be updated at least every four years. Financial institutions are then required to incorporate the AML priorities into their compliance programs (and can pool resources for AML/BSA compliance through collaborative arrangements).

The Treasury Department will also lead a review of existing BSA regulations and guidance and update them as necessary. Further, on an annual basis, beginning in January 2022, the Secretary of Treasury is required to submit to Congress a report of the Treasury Department’s findings, including administrative and legislative recommendations.

The Act also increases penalties for non-compliance with AML/BSA obligations and increases whistleblower incentives and protections.

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Blank Rome LLP has a comprehensive regulatory compliance team focused on consumer financial services that regularly assists clients in the development of internal policies and procedures needed to minimize non-compliance risk exposure. For questions regarding consumer finance regulatory compliance issues, please contact the team members below.

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