New "Beneficial Owner" Requirements Under the Corporate Transparency Act

In December 2020, Congress passed the National Defense Authorization Act for Fiscal Year 2021 ("Defense Act"),[1] which includes significant reforms to the United States' monitoring system for financial crimes. Although President Donald Trump vetoed the Defense Act, the Senate voted to override the President's veto on January 1, 2021.

As part of the Defense Act, the Anti-Money Laundering Act of 2020—and the Corporate Transparency Act included therein—imposes new requirements for the reporting of beneficial ownership information to the Financial Crimes Enforcement Network ("FinCEN"). The Corporate Transparency Act also authorizes FinCEN to share beneficial ownership information with domestic and foreign law enforcement authorities in certain circumstances, and it directs FinCEN to issue regulations to implement the new beneficial ownership reporting requirements within one year of the statute's enactment.

These requirements represent a significant change to the laws regarding corporate formation in the United States. While beneficial owners may still remain anonymous from private parties, their identities now must be disclosed to U.S. law enforcement authorities. As a result, the U.S. activities of "shell" entities in the United States as part of schemes to engage in criminal activity will be greatly reduced.

In addition to these new reporting requirements, the Anti-Money Laundering Act includes several notable amendments to the Bank Secrecy Act to enhance whistleblower protections, incentives, and provide stronger regulation of virtual currency and virtual currency exchanges. These amendments also seek to facilitate greater international collaboration in anti-money laundering efforts.

A summary of major provisions of the Corporate Transparency Act and other sections of the Anti-Money Laundering Act follows below.

I. The Corporate Transparency Act Imposes New Beneficial Ownership Reporting Requirements on Certain "Reporting Companies"

Once the Corporate Transparency Act imposes new requirements on certain companies to report information about their "beneficial owners"[2] to FinCEN. "Reporting companies," which include corporations, limited liability companies, and similar U.S. entities, as well as foreign companies that are registered to do business in the U.S., must identify each of their beneficial owners by disclosing the

[1] The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395 (Conference Report Dec. 2, 2020), 116th Cong. (2020) ("Conf. Report"), relevant excerpts attached herewith.

[2] Except for certain exceptions (*see* Conf. Report at 2956:10 – 2957:8), a "beneficial owner" is generally "an individual, who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—exercises substantial control over the entity" or who "owns or controls not less than 25 percent of the ownership interests of the entity" (*id.* at 2955:24 – 2956:9).

beneficial owner's: (i) full legal name; (ii) date of birth; (iii) current residential or business address; and (iv) unique identifying number from an acceptable identification document or FinCEN identifier.[3]

A variety of companies are, however, exempt from the reporting requirements, including, among other types of companies: publicly traded companies; wholly owned subsidiaries of publicly traded companies; as well as companies that employ more than 20 employees on a full-time basis in the U.S., have an operating presence at a physical location in the U.S., and have filed income tax returns in the U.S. demonstrating more than $5 million in gross receipts or sales.[4]

To comply with the new requirements. a reporting company that exists before the effective date of any regulations prescribed under the Anti-Money Laundering Act must register with FinCEN within two years of the effective date of the prescribed regulations,[5] while a reporting company formed after such date must register with FinCEN at the time of formation.[6]

Beneficial ownership information will be kept in a newly-established nonpublic database maintained by FinCEN.[7]

II. FinCEN is Authorized to Disclose Beneficial Ownership Information in Certain Circumstances

The Corporate Transparency Act provides that the database of beneficial ownership information is to be "highly useful" to national security, intelligence, and law enforcement agencies, as well as federal regulators.[8] While the database will be nonpublic, FinCEN may disclose beneficial ownership information in certain circumstances to:

- A federal agency engaged in national security, intelligence, or law enforcement activity "for use in furtherance of such activity";
- A state, local, or tribal law enforcement agency if the law enforcement agency obtains court authorization "to seek the information in a criminal or civil investigation"; or
- A federal agency "on behalf of a foreign law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation)" under an international treaty, agreement, or official request issued in response to a request for assistance in an investigation or prosecution by such foreign country for limited use in the "authorized investigation or national security or intelligence activity."[9]

FinCEN may also disclose beneficial ownership information to financial institutions subject to customer due diligence requirements with the consent of the reporting company, and to federal regulatory

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[3] *See id.* at 2958:21 – 2959:10; 2974:1 – 17.
[4] *Id.* at 2958:21 – 2968:20.
[5] *Id.* at 2969:20 – 2970:5.
[6] *Id.* at 2953:9 – 2970:5.
[7] *Id.* at 2953:9 – 21.
[8] *See id.* at 2954: 7–11.
[9] *See id.* at 2980:14 – 2982:9.

agencies, subject to certain requirements, such as compliance with security and confidentiality protocols to be set by the Treasury Department.[10]

Unauthorized knowing disclosure or unauthorized knowing use of beneficial ownership information is punishable by civil and criminal penalties. Such violations are subject to: (i) a civil penalty of up to $500 per day for each day that the violation continues or has not been remedied; and (ii) a fine of up to $250,000, imprisonment up to five years, or both; or, if the violation occurred while violating another U.S. law or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, a fine of up to $100,000, imprisonment up to 10 years, or both.[11]

III. Penalties for Reporting Violations

Violations of the Corporate Transparency Act's reporting requirements are also subject to civil and criminal penalties.

Willfully providing or attempting to provide false or fraudulent beneficial ownership information to FinCEN, or willfully failing to report complete or updated beneficial ownership information, is punishable by: (i) a civil penalty of up to $500 per day for each day that the violation continues or has not been remedied; and (ii) a fine of up to $10,000, imprisonment up to two years, or both.[12]

IV. Changes to the Bank Secrecy Act

The Anti-Money Laundering Act provides enhanced incentives and protections for whistleblowers who provide information leading to successful enforcement actions for violations of the Bank Secrecy Act.[13]

Under the new law, whistleblowers are entitled to greater compensation for reporting Bank Secrecy Act violations. Previously, whistleblowers were eligible to receive rewards of $150,000 or 25% of the fine, penalty, or forfeiture collected, whichever is lower.[14] The Anti-Money Laundering Act provides that a whistleblower may receive up to 30% of the total monetary sanction imposed for tips that lead to a successful enforcement action by DOJ or the Treasury Department with penalties exceeding $1 million.[15]

Whistleblowers will also be entitled to greater protections under the Anti-Money Laundering Act, which creates a private right of action for those who are retaliated against for disclosing Bank Secrecy Act violations. Under the new law, whistleblowers who experience retaliation will be able to file a complaint

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[10] *See id.* at 2982:10 – 2987:18.

[11] *Id.* at 3000:1 – 16. A safe harbor is available for individuals who have reason to believe that any report they submitted contains inaccurate information, voluntarily and promptly withdraw the report, and submit a corrected report within 90 days. *See id.* at 3000:17 – 3001:11.

[12] *Id.* at 2999:16 – 25.

[13] Violations of the Bank Secrecy Act include failure to comply with program, recordkeeping, and reporting requirements for financial agencies, financial institutions, and nonfinancial trades or businesses. *See* 31 U.S.C. §§ 5312 – 5318A.

[14] *See* 31 U.S.C. § 5323.

[15] *See* Conf. Report at 2932:18 – 2934:2; 2936:3 – 2936:18.

with the Secretary of Labor, and if a final decision is not issued within 180 days, the whistleblower may bring an action in a U.S. district court.[16]

In addition, repeat violators of the Bank Secrecy Act will face higher penalties. Specifically, repeat violators will face additional civil penalties of three times the profit gained or loss avoided as a result of the violation, or two times the maximum penalty with respect to the violation.[17] Furthermore, individuals who commit "egregious violations"[18] will be barred from serving on the board of directors of a U.S. financial institution for 10 years from the date of judgment or conviction.[19]

The Anti-Money Laundering Act also enhances FinCEN's statutory authority to regulate virtual currency and virtual currency exchanges by expanding the statutory definitions of "financial agency," "financial institution," "money transmitting business" and "money transmitting service" to include "value that substitutes for currency."

V. Increased Information Flow With Foreign Authorities and Institutions

The Anti-Money Laundering Act establishes enhanced measures for sharing information with foreign authorities and institutions. For example:

- The Anti-Money Laundering Act provides for the "FinCEN Exchange," a voluntary public-private information sharing partnership among law enforcement agencies, national security agencies, financial institutions, and FinCEN.[20] However, financial institution are prohibited from using information acquired through the FinCEN Exchange for any purpose other than for "identifying the reporting on activities that may involve the financing of terrorism, money laundering, proliferation financing, or other financial crimes."[21]

- The Anti-Money Laundering Act directs FinCEN to issue regulations to implement a three-year pilot program through which a financial institution may share Suspicious Activity Reports ("SARs") with its foreign branches, subsidiaries, and affiliates "for the purpose of combating illicit finance risks."[22]

- The Anti-Money Laundering Act creates the "Treasury Financial Attaché Program" and provides for "FinCEN Foreign Financial Intelligence Unit Liaisons" located outside the U.S. to facilitate

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[16] *See id.* at 2942:22 – 2943:13.

[17] *See id.* at 2926:10 – 22.

[18] An "egregious violation" means: (i) a criminal conviction that carries a maximum term of imprisonment of more than one year; or (ii) a civil violation that the individual willfully committed or that facilitated money laundering or the financing of terrorism. *Id.* at 2926:10 – 22.

[19] *See id.* at 2926:23 – 2927:6.

[20] *See id.* at 2814:10 – 2815:5.

[21] *See id.* at 2817:6 – 12.

[22] *See id.* at 2876:1 – 2879:10. However, a financial institution may not share SARs with its branches, subsidiaries, or affiliates located in China; Russia; or a jurisdiction that is a state sponsor of terrorism or subject to U.S. sanctions, or that the Treasury Department has determined "cannot reasonably protect the security and confidentiality of such information." *See id.* at 2879:13 – 2880:7.

anti-money laundering efforts and countering terrorism financing with foreign authorities, law enforcement agencies, and financial industries.[23]

- The Anti-Money Laundering Act establishes "FinCEN Domestic Liaisons" to coordinate with federal regulators and perform outreach to Bank Secrecy Act officers at financial institutions.[24]

In addition, the Anti-Money Laundering Act expands the ability of DOJ and the Treasury Department to obtain foreign bank records under 31 U.S.C. § 5318(k). The new law authorizes DOJ and the Treasury Department to issue a subpoena to "any foreign bank that maintains a correspondent account in the United States and request any records relating to the correspondent account or any account at the foreign bank, including records maintained outside of the United States" that are the subject of a federal criminal investigation, investigation of a violation of the Anti-Money Laundering Act, civil forfeiture action, or investigation pursuant to the Treasury Department's authority to take "special measures" pursuant to 31 U.S.C. § 5318A.[25]

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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[23] *See id.* at 2820:6 – 2822:15.
[24] *See id.* at 2822:16 – 2829:8.
[25] *See id.* at 2912:19 – 2914:5. Previously under 31 U.S.C. § 5318(k), DOJ and the Treasury Department could only issue a summons or subpoena "to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank."