EVERY MOVE YOU MAKE ("I'LL BE WATCHING YOU")

THE ANTI-MONEY LAUNDERING ACT OF 2020

The Anti-Money Laundering Act of 2020, which was enacted as part of the National Defense Authorization Act for Fiscal Year 2020 ('NDAA') on December 11, 2020, introduced what may be the most substantial reforms to the United States' regulatory framework for financial crimes since the USA PATRIOT Act of 2001.

Five (5) key highlights, discussed in further detail below, include:

1. **Mandatory rule re-writing, review, and amendments related to critical financial crimes compliance requirements, indicating a more formalized risk-based standard for compliance.These standards include:**

    - Process for Testing BSA/AML Technology.Treasury must put forth standards by which technology used to comply with BSA requirements is tested and reviewed.

    - Review of Suspicious Activity Reporting ('SAR')/Cash Transaction Reporting ('CTR') Requirements and Thresholds. Treasury will be required to formally review SAR and CTR reporting requirements, including filing continuing SARs and streamlining narratives for certain types of customers.

2. **Updating the Bank Secrecy Act (the 'BSA') definition of 'Financial Institution' to align further with the Financial Crimes Enforcement Network ('FinCEN') regulations. Thereby include entities providing services relating to a value that 'substitutes for currency' – a category that includes stored value and virtual currencies.**

    - Expansion of BSA provisions into 'non-traditional' transfers of value (cryptocurrency). 'Financial Institution' now includes any business (or person) who "engages in as a business the transmission of currency, funds, or value that substitutes for currency."

    - Honorable mention, Antiquities:anyone engaged in the trade and/or dealing of antiques is now considered a 'Financial Institution' – this includes advisors and consultants in the sales of antiques.

3. **Mandating the U.S. Treasury establishes National AML and CFT Priorities.**

    - Treasury must now establish a subcommittee on Innovation and Technology within the Bank Secrecy Act Advisory Group. It must also appoint an Innovation Officer, whose role will be to collaborate with state and federal agencies and elements of the private sector to address new technologies supporting compliance with the BSA and other financial crimes requirements.

4. **New regulations include a Corporate Transparency Act establishing a new Beneficial Ownership registry and reporting requirements designed to combat financial crimes committed through the use of shell companies.**

   - Perhaps most importantly, certain U.S. entities and foreign entities doing business in the U.S. ("Reporting Companies") will have to report beneficial ownership information to FinCEN to capture information about shell companies. This information will include:(i) legal name; (ii) date of birth; (iii) current business or residential address; (iv) the Unique Identifying Number ('UIN') relating to any one of a list of approved identifying documents (e.g., driver's license, passport)[1].

   - The information required of Reporting Companies is similar to the requirements contained in FinCEN's 2018 'CDD Rule.' Still, a notable difference is that the latter applies to "Financial Institutions" versus 'Reporting Companies.'

     - 'Reporting Company' includes foreign entities registered to do business in the U.S. and any entity created under U.S. law (or the law of an Indian Tribe) with certain exceptions.

       - Because the new regulations intend to shed more light on shell companies, certain types of entities are excluded from the definition, such as publicly-traded companies, certain types of 'Financial Institutions' (e.g., banks, broker-dealers, insurance companies and commodities and futures dealers) and other entities meeting certain thresholds (e.g., filed a tax return in the U.S. with gross receipts and sales over five million dollars and have more than 20 employees).

     - A 'Beneficial Owner' is defined similarly to the CDD Rule and includes any person or entity who (either directly or indirectly) has substantial control over an entity or owns/controls more than 25 percent of an entity's ownership interest(s).

       - The definition excludes certain custodians or agents or acting only as an employee.

       - The definition also excludes creditors, unless the creditor exercises substantial control or owns/controls more than 25 percent of an entity's ownership interest.

       - Substantial Control' is not currently defined and will be provided at a later date by FinCEN.

   - Compliance with the Corporate Transparency Act will be required for:

     - Existing entities two years after the effective date of the regulations that will be subsequently implemented as a result of this law (which will probably be at least 18 months from the date of this article); and

     - Bew entities, which are formed after the effective date of the above regulations, will be required to report when the entities are formed.

   - FinCEN will now operate a non-public registry of beneficial ownership information, accessible by Financial Institutions only after they obtain a customer's permission to do so.

5. **Enhancing penalties for BSA/AML violations.**

   - Executive Bonus Claw-Back

     - Directors, officers and partners of Financial Institutions who are convicted of BSA violations will now have to repay any bonuses received during the year in which they committed the violation.

   - Damage Escalation for AML Recidivists

     - Treasury now has the power to impose additional civil monetary penalties for repeat offenders, which could include 2x the maximum penalty for a violation or 3x the profit gained/losses avoided from the violation.

1. "Reporting Company" is defined as any corporation, LLC and similar U.S. entity, plus any foreign business registered to do business in the U.S.. There are upwards of 20 exemptions from this definition, and not all are discussed in this brief.

CONCLUSION

Our view is that this legislation is a direct signal that banks and other similar financial institutions should be using responsible innovation to meet applicable financial crimes compliance obligations, balanced with robust risk management and testing components. For example, the OCC's recent Interpretive Letter 1174 discusses the use of independent node verification networks ('INVNs' or 'Blockchains') or stablecoins[2].

This letter is an extension of the OCCs recent recognition that banking entities should make responsible use of emerging technologies to perform traditional banking services (e.g., payments), with appropriately tailored controls to address the unique risks presented by cryptocurrency, including those related to liquidity management and BSA/AML and OFAC programs. We also view these new laws as a continued codification of a risk-based approach to financial crimes compliance. SARs will now be required to be informed by a bank's BSA compliance program, including risk assessments, to-be-established national priorities for AML program

In addition, this expansive regulation designed to both modernize the BSA and address gaps in the nation's financial crimes framework (especially those on aggregated beneficial ownership information) will require Reporting Companies to assess impacts to their existing BSA/AML programs, namely: (i) identifying gaps in their customer data, especially relating to beneficial ownership information; (ii)formalizing a plan to obtain missing data; and (iii) developing a process for reporting to FinCEN's registry, as needed, within applicable timeframes. The industry can likely expect to see increased AML-related enforcement due to expanded whistleblower provisions and expanded authority of the DOJ to seek documents from foreign banks (e.g., for correspondent accounts).

For further information, or to learn about our Financial Crimes capabilities, including advisory and managed service support, please contact:

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2. https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2a.pdf

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