# The Anti-Money Laundering Act of 2020 – Key Takeaways

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# Overview

- **The Anti-Money Laundering Act of 2020** was enacted as part of the National Defense Authorization Act for Fiscal Year 2020 (**the NDAA**) and includes the most substantial changes to U.S. anti-money laundering law (**AML**) since the USA PATRIOT Act of 2001.
- While the new law **clarifies and streamlines** certain Bank Secrecy Act (**BSA**) and AML obligations, it also imposes **new regulatory requirements** such as requiring financial institutions to integrate a set of National AML / Countering the Financing of Terrorism (**CFT**) Priorities into their compliance programs.

## KEY PROVISIONS

- Establishes new **beneficial ownership reporting requirements** for certain entities doing business in the United States designed to combat money laundering through shell companies;
- Requires the U.S. Treasury to establish **National AML and CFT Priorities**;
- Increases AML **whistleblower awards** and expands **whistleblower protections**;
- Modernizes the statutory definition of **"financial institution"** to include, consistent with existing Financial Crimes Enforcement Network (**FinCEN**) regulations, entities that provide services involving **"value that substitutes for currency"** – a category that includes **stored value** and **virtual currency** instruments.
- **Enhances penalties** for BSA and AML violations;
- **Streamlines and modernizes BSA and AML** requirements and regulations; and
- Improves **coordination and cooperation** among international, federal, state, and tribal AML law enforcement agencies.

# Who Is Covered by the Act?

The **Anti-Money Laundering Act of 2020** impacts various types of entities and many of its provisions are applicable to **"financial institutions"** as broadly defined in the **Bank Secrecy Act** (**31 U.S.C § 5312**), including those engaged in the following businesses:

- Banks, thrifts, credit unions and any other insured depository institutions
- Branches and agencies of foreign banks
- Broker-dealers of securities
- Money services businesses, including money transmitters, issuers of checks, money orders or "similar instruments," and foreign exchange dealers
- Nonbank lending companies
- Insurance companies
- Operators of credit card systems
- Mutual funds
- Futures commission merchants
- Travel agencies
- Casinos with revenues over $1,000,000
- Pawnbrokers
- Dealers in precious metals, stones or jewels
- Other businesses or agencies designated by the Secretary of the Treasury to be an activity similar to a financial institution or whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

## Entities Added to the Definition of "Financial Institutions"

The Anti-Money Laundering Act of 2020 amends the **Bank Secrecy Act's** definition of "**Financial Institutions**:"

- Clarifies that a **financial institution** includes any person or business who "engages in as a business the transmission of currency, funds, or **value that substitutes for currency**."
- Adds any person "engaged in the **trade of antiques**, including an advisor, consultant, or any other person" who deals in the "**sale of antiquities**."

# Codification of the BSA's Applicability to Virtual Currency

## Virtual Currency Related Definitions

- The Anti-Money Laundering Act amends the BSA's definition of **financial institution** to clarify that a financial institution includes any person or business who engages as a business in the transmission of "**value that substitutes for currency**."
- FinCEN guidance and proposed rulemaking since 2013 have included convertible virtual currencies, such as bitcoin and stablecoins, as value that substitutes for currency for purposes of the money services business definition in FinCEN regulations.

## A Focus on FinTech

- U.S. Department of the Treasury must establish a **Subcommittee on Innovation and Technology** of the **Bank Secrecy Act Advisory Group** to advise federal and state financial regulators on ways to "most effectively encourage and support technological innovation in the areas" of AML and CFT and reduce certain "obstacles to innovation" resulting from existing BSA regulations.
- FinCEN will appoint an **Innovation Officer** to support federal and state enforcement agencies and regulators as well as private sector participants with new technologies to assist in compliance with the BSA.
- The U.S. Government Accountability Office Director must conduct a study on the use of virtual currencies to facilitate drug trafficking and human trafficking on online markets.

# New Beneficial Ownership Registry

- The **Anti-Money Laundering Act of 2020** includes the **Corporate Transparency Act**, which is intended to discourage the use of **shell corporations** to disguise and move illicit funds.
- The **Corporate Transparency Act** requires certain U.S. entities and entities doing business in the U.S. to report beneficial ownership information to FinCEN.
- **Reporting Companies** must provide information for each **Beneficial Owner**, including:
  - Full legal name
  - Date of birth
  - Current residential or business address
  - The Unique Identifying Number of an acceptable identification document (e.g., passport, driver's license)
- FinCEN will maintain a **national registry** of beneficial ownership information, which will **not be public**.
  - Federal, state, and tribal law enforcement agencies may obtain beneficial ownership information pursuant to a court order.
  - Financial institutions will be able to access the information with their customer's permission.

### Corporate Transparency Act v. Customer Due Diligence (CDD) Rule

- The **Corporate Transparency Act** includes many requirements similar to those in FinCEN's **CDD Rule**; however, the requirements are imposed on reporting companies, not covered financial institutions.
- FinCEN is directed to rescind provisions of the existing CDD Rule that overlap with the Corporate Transparency Act's beneficial ownership requirements.
- FinCEN is specifically prohibited from rescinding the requirement to maintain procedures to identify legal entity customers' beneficial owners.

# Applicability of New Beneficial Ownership Requirements

- The new beneficial ownership requirements are intended to capture ownership information about **shell companies**.
- The requirements are limited to **Beneficial Owners** of **Reporting Companies** with a number of exceptions.
- A **Reporting Company** includes:
  - an entity created under the laws of the United States or Indian Tribe; or
  - a foreign entity registered to do business in the United States.
- A **Beneficial Owner** is any entity or individual who (directly or indirectly):
  - exercises substantial control over the entity; or
  - owns or controls 25% or more of the entity's ownership interest.
- The **Beneficial Owner** definition **excludes** several categories of entities and individuals, including:
  - **Creditors** of the entity **unless** the creditor otherwise holds **25% or more ownership interest** or **substantial control**;
  - Certain individuals acting as **custodians or agents** for an individual or acting **solely as an employee of the entity**.
- The Corporate Transparency Act does not define **"substantial control"** and delegates authority to FinCEN to define the term.

## Excluded from the Reporting Company Definition

- **Publicly traded companies**
- **Certain non-profits and government entities**
- **Certain Financial Institutions:** banks, credit unions, bank holding companies, savings & loan holding companies, money transmitting businesses, broker-dealers, exchanges or clearing agencies, insurance companies, commodities and futures dealers, public accounting firms, designated financial market utilities, and pooled investment vehicles
- **Other entities** that meet the following conditions:
  - Employ more than **20 full-time employees**;
  - Filed a **federal income tax** return with **more than $5 million** in sales or gross receipts; and
  - Maintain an **operating presence** in a physical office **within the United States**.

# Implementation of New Beneficial Ownership Requirements

- The Corporate Transparency Act provides an extended timeframe for compliance with the new beneficial ownership reporting requirements.
- Existing entities are not required to report beneficial ownership requirements until 2 years after the effective date of the regulations promulgated under this law, which will likely take at least 18 months.
- Reporting Companies are subject to ongoing obligations to report updated changes in beneficial ownership information no later than 1 year after the date of the change.

## Effective Date

- **Existing Entities**
  - Reporting Companies formed or registered before the effective date of the promulgated regulations must report beneficial ownership information **within 2 years** of the **effective date of the regulations**.
- **Newly Formed Entities**
  - Reporting Companies formed after the effective date of the promulgated regulations must report beneficial ownership information **at the time of formation**.

# Anti-Money Laundering Supervision and Compliance

## National AML Priorities

- The Secretary of the Treasury is required to establish National AML Priorities and update them at least every four years.
- Financial institutions are required to incorporate the National AML Priorities into their AML compliance programs and will be evaluated on that basis.

## AML Resource Sharing

- Financial institutions are permitted to enter into collaborative arrangements (as described in the 2018 Interagency Statement on Sharing Bank Secrecy Act Resources) whereby two or more financial institutions may participate in a common activity or pool resources related to AML / BSA compliance.

## FinCEN AML Threat Pattern / Trend Sharing

- FinCEN is tasked with sharing threat pattern and trend information with financial institutions.

## Treasury Review of Existing BSA Regulations

- The Secretary of the Treasury is required to lead a review of existing BSA regulations and guidance and update them as appropriate.
- By January 2, 2022 and annually thereafter, the Secretary is required to submit to Congress a report of its findings, including administrative and legislative recommendations.

## BSA / AML Training

- Annual BSA / AML training is required for all federal bank examiners.

# Updated AML Whistleblower Incentives

### Expanded AML Whistleblower Incentives

- The Anti-Money Laundering Act **expands** the whistleblower awards that result in monetary sanctions of **more than $1 million**.
- Eligible whistleblowers may receive **up to 30%** of the collected monetary sanction imposed in the action.

### Current SEC Whistleblower

- The expanded AML whistleblower incentives mirror the Securities and Exchange Commission's (**SEC**) current whistleblower incentives.
- Under the SEC's current whistleblower rules, to be eligible for an award, the individual must provide **original information** about a violation to the SEC, and the information must lead to a successful resolution with **total monetary sanctions over $1 million**.
- Whistleblower awards can range from **10 to 30%** of the sanctions collected.

## Comparison of AML Whistleblower Incentives

| | Prior AML Whistleblower Incentive | Current SEC Whistleblower Incentives | Anti-Money Laundering Act of 2020 |
|---|---|---|---|
| **Eligibility** | **Original information** that leads to a fine, penalty, or forfeiture of **$50,000 or more** | **Original information** that leads to successful resolution with total money sanctions **exceeding $1 million** | **Original information** that leads to any monies (other than forfeiture, restitution, or victim compensation) **exceeding $1 million** |
| **Award** | The lesser of **up to 25%** of the collected money or **$150,000** | **10 to 30%** of the collected money | **Up to 30%** of the collected money |

## SEC Whistleblower Incentives by the Numbers

- **Since 2012**: $736 million was awarded to 128 individuals
- **For Fiscal Year 2020**: 23,650 tips, complaints, and referrals resorting in $175 million awarded to 29 individuals

# New AML Whistleblower Protections

- The Anti-Money Laundering Act also includes new provisions to protect eligible AML whistleblowers from employer retaliation, including discharge, demotion, blacklisting, and harassment.
- Whistleblowers subject to retaliation may file a complaint with the U.S. Secretary of Labor.
- Prevailing whistleblowers are eligible for relief, including:
  - Reinstatement with the same seniority status;
  - Compensatory damages (including litigation expenses);
  - Two times the amount of back pay otherwise owed to the individual (with interest); and
  - Any other appropriate remedy with respect to the conduct that is subject to the complaint or action.

## Comparison to Current SEC Whistleblower Protections

- **SEC Rule 21F-17** prohibits any person from taking action to prevent whistleblowing to the SEC.
- The SEC has brought enforcement cases for severance agreement clauses meant to prevent whistleblower submissions.
- **Digital Realty v. Somers (2018)**: The U.S. Supreme Court found that the Dodd-Frank Act's whistleblower protection is only available to whistleblowers who report directly to the SEC, not those who solely report internally.

# Enhanced Anti-Money Laundering Penalties

### Additional Civil Monetary Damages for Repeat AML Violations

- The Secretary of the Treasury may impose additional civil monetary penalties for certain repeat violators of AML laws, including three times the profit gained or loss avoided as a result of the violation or two times the maximum penalty for the violation.

### Claw Back of Certain Bonuses for AML Convictions

- Certain partners, directors, officers, or employees of financial institutions convicted of violating the BSA are required to repay any bonus paid to that individual during the calendar year during which or after the violation occurred.

### Report to Congress on AML Deferred Prosecution Agreements and Non-Prosecution Agreements

- The Department of Justice is required to provide an annual report to Congress for the next five years, which includes a list of deferred prosecution agreements and non-prosecution agreements during the covered year with respect to a violation or suspected violation of the BSA as well as a justification for such actions.

### Prohibition of Certain AML Violators from Serving on Boards of U.S. Financial Institutions

- Any individual found to have committed an “egregious violation” of the BSA is barred from serving on the board of directors of a U.S. financial institution for 10 years from the date of conviction or judgment.

# Other Anti-Money Laundering Provisions

### Assessment of BSA No-Action Letters

- The Director of FinCEN must conduct an assessment as to whether to establish a process for the issuance of FinCEN no-action letters and, if appropriate, promulgate regulations to implement the findings of the assessment.

### Review and Update of Currency Transaction Reporting (CTR) and Suspicious Activity Reporting (SAR) Requirements

- By January 2, 2022 and at least once every 5 years for the 10 year duration period, the Secretary of the Treasury must review financial institution reporting requirements related to CTRs and SARs – including dollar thresholds and streamlined and automated SARs for noncomplex reports – and propose changes to those requirements to reduce those that are unnecessarily burdensome and determine the appropriate dollar amount threshold for such requirements.

### FinCEN Exchange

- FinCEN is required to establish a voluntary public-private information sharing partnership among law enforcement agencies and financial institutions to coordinate and combat money laundering and terrorist financing.
- The information shared on the FinCEN Exchange may “not be used for any purposes other than identifying and reporting activities that may involve” anti-money laundering violations.
- FinCEN will promulgate regulations that establish policies and procedures for protecting shared information.

### Coordination with International AML Enforcement Agencies

- The Secretary of the Treasury is required to work with foreign counterparts to promote stronger AML frameworks and enforcement of AML laws.

### Pilot Program on Sharing SARs with Certain Foreign Affiliates

- By January 2, 2020, the Secretary of the Treasury is required to issue rules establishing a pilot program to enable financial institutions to share SARs with their foreign affiliates—except for foreign branches, subsidiaries, and affiliates in certain locations such as China, Russia, and jurisdictions subject to U.S. sanctions.

# Davis Polk Contacts

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