

The National Defense Authorization Act: BSA/AML Initiatives

On January 1, 2021, the Senate voted to override President Trump's veto on the National Defense Authorization Act (NDAA or Act). It was previously overridden by the House back on December 28, 2020. The NDAA included over 200 pages of significant reforms to the Bank Secrecy Act (BSA) and other anti-money laundering (AML) laws putting forth the most comprehensive set of BSA/AML reforms since the USA PATRIOT Act of 2001. A continuing question is what are the implications of this Act? How is this going to impact not only financial institutions but U.S. companies and companies doing business in the United States at large?

For starters, certain U.S. companies and companies doing business in the U.S. ("reporting companies") will be required to provide FinCEN with information regarding their beneficial owners. This includes names, addresses, date of birth, and unique identifying numbers. Newly incorporated companies will be required to do so at time of incorporation. Exempt companies include public companies, as well as companies that: (i) have more than 20 full-time employees, (ii) report more than \$5 million in yearly revenue to the Internal Revenue Service, and (iii) have an operating presence at a physical office within the United States. Changes in beneficial ownership will require reporting companies to provide FinCEN with updated information within a year. FinCEN has stated it will maintain a registry of this beneficial ownership information, but it will not be public. This does not, however, prevent FinCEN from sharing this information with federal, state, local and tribal law enforcement agencies if there is appropriate court approval. FinCEN can also share the beneficial ownership information with financial institutions for customer due diligence purposes, but only with the reporting company's consent.

Second, this NDAA creates a new whistleblower program, as well as establishes a private right of action for whistleblowers who have experienced retaliation. Aiming to incentivize reporting of BSA/AML violations, this program will award whistleblowers who give tips with as much as 30% of the monetary penalties assessed against the company if it leads to monetary penalties in excess of \$1 million. This will be dependent on the significance of the information, the degree of assistance provided, and the interest of the government in deterring BSA violations through these awards. Additionally, a private right of action for whistleblowers who suffer retaliation will be available—whistleblowers can file complaints with the Occupational Safety and Health Administration (OSHA) where, if OSHA fails to issue a decision within 180-days, the whistleblower will be free to file a claim in federal district court.

Third, the Act considerably increases the penalties for BSA/AML violations for both companies and individuals. For repeat violations, additional civil penalties of either (i) three times the profit gained, or loss avoided (if practicable to calculate) or (ii) two times the otherwise applicable maximum penalty for the violation are now in play. A new BSA provision will allow for fines "equal to the profit gained by such person by reason" of the violation. For financial institution directors and employees, it will also include bonuses paid out the year in which the violation occurred or the following year. Those who have been determined to have engaged in "egregious" violations of BSA/AML provisions may even be barred from serving on the board of directors of a U.S. financial institution for ten years from the date of the conviction or judgment. Lastly, the Justice Department will, for the next five years, submit reports to Congress on the use of non-prosecution and deferred prosecution agreements during BSA/AML concerns.

The NDAA will also require the Treasury, in conjunction with the Justice Department and other agencies, to evaluate how it plans to streamline SAR and CTR requirements, thresholds and processes. Within one

year of the NDAA's enactment, the Treasury must propose regulations to Congress to reduce burdensome requirements and adjustment thresholds accordingly, with the expectation of these threshold adjustments taking place once every five years, for the next ten years.

Fifth, the Act highlights the importance regarding law enforcement's involvement with international AML issues. FinCEN's mission requires working with foreign law enforcement authorities when it comes to safeguarding the U. S.'s financial system. To assist, the Treasury will be required to establish a Treasury Attachés program at U.S. embassies abroad, as well as work with international organizations including the Financial Action Task Force, International Monetary Fund, and Organization for Economic Cooperation and Development to promote global AML frameworks. Additionally, FinCEN will appoint a Foreign Financial Intelligence Unit Liaisons at U.S. embassies to engage with their foreign counterparts. Over \$60 million per year has been allocated between 2020 and 2024 to the Treasury to provide technical assistance to foreign countries promoting compliance with international standards and best practices for establishing effective AML and counter-terrorist financing (CTF) programs.

Additionally, the NDAA expands the ability of financial institutions to share SARs with foreign branches, subsidiaries, and affiliates, and requires the Secretary of the Treasury and FinCEN to create a pilot program to achieve this objective. Currently, financial institutions are only permitted to disclose SARs to foreign affiliates that are a "head office" or "controlling company." This has posed as a roadblock for enterprise-wide compliance within global banks. It is important to note that the Act does prohibit participants in this pilot program from sharing SARs with branches, subsidiaries and affiliates in China, Russia, and other specific jurisdictions.

Lastly, the NDAA significantly modifies the U.S. BSA/AML program in the following areas:

- Introduces several studies relating to (i) artificial intelligence, blockchain and other emerging technologies; (ii) beneficial ownership reporting requirements; (iii) trade-based money laundering; and (iv) money laundering by the People's Republic of China.
- Modifies various definitions relative to virtual currencies and other non-traditional cash substitutes;
- Introduces antiquities dealers (but not art dealers) to BSA's applicable scope;
- Expands ability to subpoena foreign banks' records that maintain correspondent accounts in the U.S.;
- Creates a "FinCEN Exchange" to oversee voluntary public-private information sharing between law enforcement, national security agencies, and financial institutions; and
- Envisions a no-action letter process for FinCEN;

Apart from these topics, the NDAA reincorporates an emphasis on risk-based approaches to AML program requirements and discusses prior proposed rulemaking from FinCEN. It even includes discussions on the Treasury being required to periodically publish on national AML and CTF initiatives.

There is no doubt that the NDAA's initiatives will be extended over several years and will require continued efforts by both public and private sectors. The cost of these initiatives to not only the financial industry but small businesses has yet to be determined and remains a cry of protest from those against the reform. But this does appear to be the start of a more globally centric effort to combat financial terrorism and money laundering crimes.



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"Elizabeth is the Vice President of Compliance Operations and Deputy General Counsel at Compliance Alliance. In the past, she served as both the Operations Compliance Manager and Enterprise Risk Manager for Washington Federal Bank, a \$16 billion dollar organization headquartered in Seattle, WA. She has industry expertise and real-world solutions surrounding bank-enterprise initiatives and knowledge of contract law and bank regulatory compliance. An attorney since 2010, Elizabeth was a Summa Cum Laude, Phi Beta Kappa, Delta Epsilon Sigma graduate of Saint Michael's College in Burlington, VT, and a Juris Doctor from Valparaiso University School of Law in Indiana.

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