

December 17, 2020

## Anti-Money Laundering Act of 2020

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### New Legislation to Implement Comprehensive Modernization and Reform of the US AML/CFT Regime

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#### SUMMARY

On December 11, 2020, the Senate passed the Anti-Money Laundering Act of 2020 (“AMLA” or the “Act”)—DIVISION F of the National Defense Authorization Act for fiscal year 2021 (the “NDAA”). The House of Representatives had previously passed the measure on December 8, 2020. The NDAA was promptly enrolled and sent to the President. President Trump has publicly indicated that he intends to veto the bill for reasons unrelated to the Act, and the White House has issued a Statement of Administration Policy explaining that the President’s advisors would recommend a veto. If the legislation is vetoed by the President, Congress may seek to override the veto. The measure was passed in both chambers by margins that exceed those required to override a Presidential veto.

This memorandum provides an overview of the key themes and significant provisions in the Act. We plan to issue additional memoranda in the near future addressing in greater depth and detail various aspects of the legislation.

Although the Bank Secrecy Act (“BSA”) has been amended numerous times since its enactment in 1970, including the significant changes made by the USA PATRIOT Act following the September 11th terrorist attacks, as the Joint Explanatory Statement accompanying the Act states, the anti-money laundering regime has not seen such “comprehensive reform and modernization” since the BSA’s inception.<sup>1</sup> The wide-ranging legislation includes numerous substantive provisions aimed at modernizing and addressing perceived gaps in the country’s approach to anti-money laundering/countering the financing of terrorism (“AML/CFT”), including the absence of corporate beneficial ownership reporting requirements at the national level.

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The Act represents the culmination of multi-year efforts to reform the BSA regime by addressing longstanding concerns voiced by the private and public sectors. The Act draws from several prior legislative attempts to reform various specific aspects of the BSA—including the Corporate Transparency Act of 2019, the Illicit CASH Act of 2020 and the STIFLE Act of 2020. And it responds to a diverse coalition of stakeholders who have advocated for changes to the BSA regime by addressing a range of concerns regarding the need for increased corporate transparency and an end to anonymous shell companies, increased information-sharing, the use of feedback to improve the effectiveness of AML/CFT programs, and reinforcing FinCEN's role as the country's principal BSA/AML authority. These concerns, and to a large extent the Act's mechanisms to address them, have been identified and discussed in various BSA-focused fora over the years, with input and substantial participation from not only financial institutions and their regulators, but also law enforcement and public policy experts. Although much of the Act's effectiveness hinges on implementation through various regulations, reports and assessments, it represents one of the most significant milestones to date in Congressional efforts to modernize and reform the BSA.

This memorandum provides an overview of key aspects of the legislation, focusing on the following themes:

- Codification of the risk-based approach to AML/CFT compliance
- Modernization through technology and innovation, streamlining low-value processes, eliminating obsolete regulations and guidance, and broadening the BSA's reach to confront emerging money-laundering threats
- Expanding enforcement- and investigation-related authority, including a significant expansion in the authority to subpoena foreign banks that maintain correspondent accounts with U.S. banks
- Beneficial ownership disclosure, including reporting requirements for certain corporations and limited liability companies
- Emphases on coordination, cooperation, and information-sharing among and between financial institutions, domestic financial regulators and foreign financial regulators<sup>2</sup>
- Balancing financial inclusion and de-risking concerns with AML/CFT program effectiveness goals

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### 1. CODIFICATION OF THE RISK-BASED APPROACH

One of the Act's goals is to reinforce and codify a risk-based approach to AML/CFT. This goal is reflected in the Act's amendments to the enumerated purposes of the BSA to include:

- Requiring reports or records that are highly useful in assessing risks;
- Preventing money laundering and the financing of terrorism through the establishment by financial institutions of "reasonably designed risk-based programs"; and
- Assessing the money laundering, terrorism finance, tax evasion and fraud risks to financial institutions to protect the financial system from abuse.<sup>3</sup>

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*Preventing* money laundering and the financing of terrorism through reasonably designed risk-based programs, in particular, marks a departure from the existing purpose of the BSA, which is to require reports and records where they have a high degree of usefulness to law enforcement, regulators, and national security authorities.<sup>4</sup>

Following are three additional examples of ways in which the Act reinforces and codifies the risk-based approach:

- **National Priorities:** First, it requires Treasury<sup>5</sup> to establish national priorities for AML/CFT and financial institutions to incorporate these priorities into their risk-based AML/CFT programs. Such incorporation will be a basis on which financial institutions are examined for BSA compliance. The legislation not only makes explicit the responsibility of financial institutions to ensure that their programs are risk-based and reflective of published Treasury priorities, but it also aims to ensure alignment in this respect with the federal functional regulators' BSA-related supervision and examinations.
- **AML/CFT Program Standards:** Second, it requires Treasury and the federal functional regulators to use a risk-based approach to setting minimum standards for AML/CFT programs and examining for compliance with those standards. Over the years, FinCEN and the functional regulators have moved towards a risk-based approach, primarily via guidance. The Act codifies that approach, with factors in prescribing, supervising and examining AML/CFT programs to include that they be (a) "reasonably designed" to assure and monitor compliance with the BSA and (b) "risk-based, including ensuring that more attention and resources of financial institutions are directed toward higher-risk customers and activities," consistent with the financial institution's risk profile. The Act provides that the duty to establish, maintain and enforce an AML/CFT program must remain the responsibility of, and be performed by, persons in the United States, which could impact institutions that conduct certain elements of U.S. financial crimes compliance abroad.<sup>6</sup>
- **Factors in Requiring Suspicious Activity Reports:** Third, it requires Treasury to consider the purposes of the BSA, as amended, as well as national priorities, when requiring financial institutions to file suspicious activity reports ("SARs").<sup>7</sup> SARs must be "guided by" a financial institution's BSA program, including risk assessment processes that take into account the national priorities.<sup>8</sup>

Although the reinforcement and codification of the risk-based approach are welcome, the Act does not appear to require conforming or aligning amendments to be made to the federal functional regulators' AML/CFT-related rules, including those requiring AML/CFT programs and SARs. Those rules generally were issued under authorities *other than* the BSA and, although in many respects they are consistent with FinCEN's rules, there are notable differences and, in some instances, non-BSA-related purposes that are also served.<sup>9</sup> Accordingly, one issue that Treasury will likely consider, consistent with the Act's various references to minimizing or reducing burden, is whether any new AML/CFT program and SAR rules increase the burden on financial institutions by adding to obligations imposed by the federal functional regulators' rules.<sup>10</sup>

## 2. MODERNIZATION OF THE AML/CFT REGIME

Another theme of the Act is the modernization of the AML/CFT regime, with emphases on embracing technology and innovation, streamlining low-value processes, and eliminating obsolete regulations and

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guidance.<sup>11</sup> The legislation seeks to accomplish this objective in several ways including, among others: requirements that an Innovation Officer be appointed at FinCEN and each federal functional regulator; the establishment of a Bank Secrecy Act Advisory Group subcommittee on innovation and technology; a mandatory financial technology assessment by Treasury and a requirement that FinCEN maintain emerging technology experts. However, in our view, the most significant changes will likely come through several mandatory review, rule-writing and revision requirements. We believe the following five such requirements are particularly noteworthy:<sup>12</sup>

- **Technology Testing Rulemaking:** Treasury must issue a rule that specifies the standards for testing the technology and internal processes that are used to comply with the BSA, such as transaction monitoring systems.<sup>13</sup> The standards are intended to allow for innovation, such as the use of machine learning, with risk-based approaches to the testing and risk management of these innovative methods. The Federal Financial Institutions Examination Council (the “FFIEC”) will be required to update its manuals to reflect Treasury’s rule and to be consistent with relevant FinCEN and federal functional regulator guidance, including the 2018 Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing.<sup>14</sup>
- **Streamlined Noncomplex SAR Filings:** Mandatory considerations for Treasury, when imposing suspicious activity reporting requirements will include requiring that FinCEN establish streamlined (automated) processes for filing noncomplex categories of reporting.<sup>15</sup>
- **Formal Review of CTR and SAR Requirements:** Treasury will be required to conduct a formal review of currency transaction and suspicious transaction reporting requirements, including adjustments with respect to continuing activity SARs and SAR and currency transaction report (“CTR”) fields, applicability of different thresholds to different categories of activities, ways to address adverse consequences of de-risking, and streamlining suspicious activity determinations and narratives for particular types of customers or transactions.<sup>16</sup> Further, Treasury will be required to propose changes to reduce any unnecessarily burdensome regulatory requirements and ensure that the information provided fulfills the purposes of the BSA, as amended. The findings from the review must be reported to Congress, along with proposed recommendations to address those findings.
- **CTR and SAR Thresholds:** Treasury will be required to review and determine whether CTR and SAR dollar thresholds, including aggregate thresholds, should be adjusted.<sup>17</sup> Treasury must publish these findings and propose rules.
- **Expanded BSA Coverage:** The Act takes steps to modernize the AML/CFT regime by recognizing previously unregulated channels that may be exploited to launder money and finance terrorism: antiquities and virtual currencies.
  - **Antiquities:** The definition of “financial institution” in the BSA will be expanded to include “a person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities, subject to regulations prescribed by the Secretary[.]”<sup>18</sup>
  - **Virtual Currencies:** Several BSA definitions will be expanded to encompass “value that substitutes for currency,” including those pertaining to “financial agency,” “financial institution,” “money transmitting business” and “money transmitting service.” By virtue of the latter two, virtual currency businesses that qualify as money transmitters must register with FinCEN,<sup>19</sup> effectively codifying existing FinCEN guidance.<sup>20</sup> Treasury will be explicitly authorized to expand the definition of a “monetary instrument” to encompass “value that substitutes for currency.”

### 3. ENFORCEMENT- AND INVESTIGATION-RELATED AUTHORITIES; WHISTLEBLOWERS

The Act will amend, in significant ways, BSA enforcement- and investigation-related provisions. The following changes warrant particular attention:

- **Expanded Subpoena Authority for Foreign Banks with U.S. Correspondent Accounts:** Under 31 U.S.C. § 5318(k)(3), Treasury and Department of Justice (“DOJ”) have authority to subpoena “any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside the United States relating to the deposit of funds into the foreign bank.” The Act expands that authority to include “any records relating to the correspondent account or *any account* at the foreign bank, including records maintained outside the United States” (emphasis added), provided it is the subject of any one of several enumerated types of investigations or actions.<sup>21</sup> Although courts have broadly interpreted the existing authority, the Act’s inclusion of “any account” (and not just those records related to the correspondent account) marks an expansion and appears to reflect a legislative proposal by DOJ intended to enhance law enforcement’s authority to access foreign bank records, although the relevant provision of the Act is worded even more broadly than the DOJ proposal.<sup>22</sup> The Act will permit a subpoenaed foreign bank to petition a federal district court to modify or quash the subpoena, but it provides that conflict with foreign confidentiality law may not be the only basis for quashing or modifying the subpoena. Moreover, a foreign bank will be prohibited from disclosing the existence or contents of any subpoena to any account holder involved or any person named in the subpoena, and DOJ will be authorized to seek civil penalties in the event of a breach. Although courts have used their inherent civil contempt powers to enforce compliance with subpoenas issued under 31 U.S.C. § 5318(k)(3), the Act empowers DOJ to invoke the aid of a federal district court to compel compliance, including by holding the foreign bank in contempt, and to pursue civil penalties enforceable via seizure of funds held in the foreign bank’s correspondent account at any U.S. financial institution.<sup>23</sup>
- **Heightened Penalties for BSA Violations:** The Act will substantially heighten available sanctions for certain BSA violations. Specifically, the BSA’s civil penalty provision, 31 U.S.C. § 5321, will be amended to permit Treasury to impose an *additional* fine in the case of repeat BSA violations (including violations of rules issued under the BSA) up to the greater of (a) three times the profit gained or loss avoided as a result of the violation or (b) two times the maximum applicable penalty.<sup>24</sup> For this purpose, only violations occurring after the Act’s enactment will be subjected to the heightened sanctions. No minimum or maximum duration between violations is specified. In addition, the BSA’s criminal penalty provision, 31 U.S.C. § 5322, will be amended to mandate *additional* sanctions against persons convicted of violating the BSA or a rule issued under it—namely, (a) a fine in an amount equal to the profit gained by reason of the violation and (b) if the person is an individual who was a partner, director, officer, or employee at the time of the violation, repayment to the financial institution of any bonus paid during the year in which the violation occurred or the following year.<sup>25</sup>
- **Bar on Board Service for Individuals:** Another amendment to 31 U.S.C. § 5321 will provide for a 10-year prohibition on serving on the board of directors of a U.S. financial institution for any individual who commits an “egregious violation” of the BSA.<sup>26</sup> “Egregious violation” will be defined as a conviction with a maximum prison term of more than one year, or a “willful” civil violation that facilitated money laundering or terrorism financing.
- **Fraud Provisions for Misrepresentations Related to Control of Assets and Source of Funds:** The Act will amend the BSA to include new fraud-based prohibitions related to senior foreign political figures (or their family members or close associates) (“SFPFs”) and entities found to be of primary money-laundering concern.<sup>27</sup> Specifically, SFPFs will be prohibited from knowingly concealing, falsifying, or misrepresenting a material fact from a financial institution concerning the control of assets, subject to a minimum \$1 million asset threshold. A similar prohibition will apply

to entities found to be of primary money laundering concern that violate prohibitions or conditions imposed by Treasury on opening or maintaining certain correspondent or payable-through accounts. A person convicted of either offense may be subject to fines, imprisonment, and/or forfeiture.

- **Congressional Oversight of BSA-related DPAs and NPAs:** The Act will establish a framework for Congressional oversight of BSA-related deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”) by requiring DOJ to submit to Congress annual reports containing a list of DPAs and NPAs entered into, amended, or terminated with any person during that year for “a violation or suspected violation” of the BSA.<sup>28</sup> DOJ will be required to include in the annual reports, its justification for the action taken, a list of factors taken into account in determining to take that action, and the extent to which DOJ coordinated with Treasury and federal functional or state regulators before taking the action. This reporting obligation has the potential to impact ongoing and future criminal BSA investigations and proceedings, although the precise implications remain to be seen.
- **Keep Open Requests:** The Act will amend the BSA—through the establishment of statutory safe harbors—to encourage cooperation relating to law enforcement “keep open requests.”<sup>29</sup> Under the amendments, if a federal law enforcement agency, after notifying FinCEN (or a state, local or tribal law enforcement agency with FinCEN’s concurrence), submits a keep open request to a financial institution, the financial institution will neither be liable for maintaining the account or transaction nor be subject to any adverse federal or state supervisory action for such maintenance as long as it is consistent with the request. The provisions will encourage prudent administration of keep open requests by mandating termination dates and requiring that the relevant law enforcement agency submit the keep open request to FinCEN and alert FinCEN about whether the financial institution has implemented the request.
- **BSA-Specific Whistleblower Incentives and Protections:** The Act will expand the BSA’s existing provisions for rewards for informants and protections to whistleblowers. The amendments will provide incentives for, and protections against retaliation against, individuals who provide original information relating to violations of the BSA to their employer, Treasury or DOJ.<sup>30</sup> In terms of incentives, Treasury will be permitted to award up to 30 percent of the total recovered monetary sanctions (excluding forfeiture, restitution, and victim compensation), provided that the sanctions exceed \$1 million. In terms of protections against retaliation, employees of insured depository institutions will remain subject to the existing regulatory protections against retaliation.<sup>31</sup>

#### 4. BENEFICIAL OWNERSHIP

The Act will impose substantial federal beneficial ownership reporting requirements on certain corporations and limited liability companies.<sup>32</sup> The new requirements are intended to prevent the use of “fronts” or “shell companies” for money laundering, terrorism finance, or other illicit activity by creating a centralized database of beneficial owner information for covered entities. The United States has been criticized by, among others, the Financial Action Task Force (“FATF”) for the absence of beneficial ownership reporting requirements at the national level. FATF has described such absence as a “significant gap” and a “serious deficiency” in the U.S. AML regime.<sup>33</sup> Ready access to beneficial ownership information has also long been a goal of federal law enforcement and national security officials.

The Act will require any “reporting company” to submit, as part of the company formation or registration process, a report to FinCEN that includes specific identification information for each “beneficial owner.” FinCEN will then issue to the reporting individual or entity a unique FinCEN identifier number. The Act will

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subject to civil and criminal penalties any person who (a) willfully provides, or attempts to provide, false or fraudulent beneficial ownership information, or (b) willfully fails to report complete or updated beneficial ownership information. A safe harbor will be available for persons who correct inaccurate information if they did not have actual knowledge of the inaccuracy at the time they submitted the report and were not trying to evade the reporting requirement. We note the following with regard to the terms “reporting company” and “beneficial owner,” as defined in the Act:

- **“Reporting Company”**: “Reporting company” will be defined to mean corporations, limited liability companies, and similar U.S. entities, as well as those same foreign entities that register to do business in the United States. The Act includes more than 20 categories of exemptions, and several entity forms are not covered by the reporting requirements.
  - Many of the exemptions are for entities that are already required to disclose beneficial ownership information publicly or to federal regulators—for example, publicly traded companies, banks, insurance companies, registered money service businesses, broker/dealers, investment companies and investment advisers—and exempting them from the reporting requirement does not appear to represent a gap in coverage.
  - Other exemptions appear to reflect Congress’s view that certain types of entities generally present less money laundering and terrorism financing risk—for example, because they would be expected to function as true operating companies and not shell companies.<sup>34</sup> Nevertheless, ensuring that there is effective compliance by companies that purport to rely on these exceptions is likely to be a key implementation issue. To that end, the Act provides that this list of exemptions will be subject to continuous review by Treasury and, if a determination is made that one of the exempt categories is involved in significant abuse related to financial crime, Treasury may propose administrative or legislative steps to address the issue.
- **“Beneficial Owner”**: “Beneficial owner” will be defined to mean any individual who (a) exercises substantial control over an entity or (b) owns or controls 25 percent or more of the ownership interests of an entity. There are several exclusions, including an individual acting as an agent for another individual and an individual acting solely as an employee.
  - In this respect, the legislation differs notably from FinCEN’s Customer Due Diligence (“CDD”) Rule,<sup>35</sup> which includes within the “control prong” of the definition of “beneficial owner” an executive officer or manager. Regardless, Treasury will be required to issue regulations implementing the beneficial ownership reporting requirements, which we anticipate will attempt to clarify the meaning of “substantial control.”
  - Treasury will be required to revise the CDD Rule so that it conforms with those regulations and simultaneously mandates that “nothing in [the beneficial ownership provisions of the Act] may be construed to authorize the Secretary of the Treasury to repeal the requirement that financial institutions identify and verify beneficial owners of legal entity customers” under the CDD Rule.<sup>36</sup>

The Act also provides a framework, subject to further rulemaking, regarding access by various stakeholders to beneficial ownership information collected by FinCEN.

- **Who Can Access**: FinCEN will be authorized to disclose collected beneficial ownership information in particular circumstances to (a) a financial institution, (b) federal law enforcement, intelligence, and national security agencies, (c) state, local, and Tribal law enforcement agencies, (d) foreign law enforcement agencies (on whose behalf federal agencies must submit requests), and (e) subject to certain limitations, federal functional and “other appropriate” regulators.<sup>37</sup>

- **Financial Institution Access and CDD Rule Considerations:** Financial institutions will be permitted to request beneficial ownership information from FinCEN to facilitate compliance with the CDD rule, but only with the consent of the reporting company customer who submitted the information. The Act does not specify how a financial institution should respond if a customer refuses consent with respect to a request.
- **Enforcement for Unauthorized Disclosures:** The Act will make it unlawful for any person to “knowingly disclose or knowingly use” the beneficial ownership information obtained by the person through either a report submitted to FinCEN or a disclosure made by FinCEN, except as provided for in the Act. A violator will be subject to civil and criminal penalties, with the sanction escalating if the violation occurs while violating another law or as part of a pattern of illegal activity. Of note, the maximum sanction will be greater in the case of unlawful disclosure of beneficial ownership information than in the case of a reporting violation.
- **Confidentiality Safeguards:** The Act emphasizes the confidential and sensitive nature of reported beneficial ownership information and will impose both substantial information security obligations on FinCEN and significant restrictions on disclosing and accessing such information.

Significant work will be required to implement this beneficial ownership reporting regime, and the utility of the regime to financial institutions will ultimately turn on the outcome of that work.

### 5. FINCEN’S PROMINENT ROLE IN INCREASED COORDINATION AND INFORMATION SHARING

A key purpose of the Act is to expand coordination and information sharing among administering agencies, examining agencies, law enforcement agencies, national security agencies, the intelligence community and financial institutions. The Act places FinCEN at the helm of this endeavor, granting it a dominant role in managing relationships and cultivating information sharing and other forms of coordination across public and private stakeholders. We highlight the following four aspects of the Act emphasizing coordination and cooperation:

- **Coordination Duty of FinCEN Director:** The FinCEN Director’s duties will be amended to emphasize regular communication with federal functional regulators and a feedback loop with financial institutions and state banking supervisors.<sup>38</sup> In a similar vein, FinCEN will be required to (a) periodically solicit feedback from BSA officers representing a cross-section of financial institutions in order to review SARs from these institutions and discuss trends in suspicious activity observed by FinCEN and (b) periodically disclose to each financial institution a summary of SARs filed that proved useful to law enforcement agencies.
- **Examiner Training:** Each federal examiner reviewing BSA compliance will be required to receive annual training as determined by Treasury—a requirement that appears to be intended to ensure that examiners are aligned with Treasury on AML/CFT matters.<sup>39</sup>
- **Codification of Resource-Sharing Guidance:** The Act will codify prior interagency guidance authorizing financial institutions to share BSA compliance resources with other institutions,<sup>40</sup> and Treasury and supervising agencies will be required to provide best practices for such arrangements.<sup>41</sup>
- **No-Action Letter Assessment:** The FinCEN Director will be required to assess whether to institute a formal process for issuing no-action letters in response to inquiries about application of AML laws or regulations to specific conduct, including a request for a statement as to whether FinCEN or any relevant federal functional regulator intends to take action against such person with respect to such

conduct.<sup>42</sup> This requirement appears directly aimed at encouraging FinCEN and the federal functional regulators to coordinate, in a timely and efficient manner, in addressing questions regarding the permissibility of conduct under AML laws and regulations, thus enabling financial institutions to be more nimble in adapting their AML/CFT programs to address evolving threats and technological advances without fear that they will be penalized for doing so.<sup>43</sup>

The Act contemplates a number of new mechanisms for sharing BSA-related information, with a particular emphasis at times on the utilization of data, metrics, statistics and analytics. Three of these mechanisms are as follows:

- **Threat Pattern and Trend Analyses of BSA Reports:** FinCEN will be required to publish threat pattern and trend information to provide meaningful information about the preparation, use, and value of SARs and other reports filed by financial institutions.<sup>44</sup>
- **Strengthening the Feedback Loop on BSA Reports:** DOJ will be required to submit to Treasury an annual report on the use of data derived from financial institutions reporting under the BSA, to be used for specified purposes that include enhancing feedback and communications with financial institutions. Notably, a specific purpose of this report will be to provide more detail in Treasury's semiannual report to the financial services industry on suspicious activities.<sup>45</sup>
- **SAR Sharing with Foreign Branches, Subsidiaries and Affiliates:** Two provisions in the Act, described below, are aimed at facilitating cross-border sharing of SARs and suspicious transaction information within financial institutions.<sup>46</sup> Financial institutions will be prohibited from establishing or maintaining any operation located outside the United States for the primary purpose of BSA compliance as a result of these provisions.
  - Treasury will be required to establish a three-year pilot program that allows financial institutions to share information related to SARs, including that a SAR has been filed, with their foreign branches, subsidiaries and affiliates. Such sharing must be subject to appropriate data security requirements related to personally identifiable information.<sup>47</sup> Treasury will be prohibited from extending the pilot to include branches, subsidiaries and affiliates in Russia and China and jurisdictions that are state sponsors of terrorism or subject to sanctions imposed by the federal government, or where Treasury has determined that the jurisdiction cannot reasonably protect the information. As part of the pilot, Treasury will be able to hold a foreign affiliate liable for disclosure of SAR information.
  - The BSA's principal suspicious activity reporting provision will be amended to provide that information received by a financial institution from a foreign affiliate with respect to a suspicious transaction relevant to a possible violation of law or regulation will be subject to the same confidentiality requirement as SARs. Accordingly, the statutory prohibition on notifying a person involved in the transaction that the transaction has been reported, as well as the related prohibition applicable to domestic government employees, will encompass information received by a U.S. financial institution from a foreign affiliate.<sup>48</sup>

In addition to these three specific examples, the Act seeks to enhance coordination and information sharing through the creation or enhancement of several government programs and offices. Many of these programs and offices will be housed within FinCEN or Treasury or facilitated by Treasury, including: a foreign attaché program;<sup>49</sup> a Foreign Financial Intelligence Unit program;<sup>50</sup> a domestic liaison program, to facilitate, among other things, outreach to BSA officers, receive feedback from financial institutions and examiners regarding BSA exams, and promote consistency in guidance;<sup>51</sup> a voluntarily public-private information sharing program called the FinCEN Exchange;<sup>52</sup> and a "supervisory team" of relevant stakeholders, including

private sector experts, whose responsibilities include examining strategies to increase cooperation between the public and private sectors for purposes of countering illicit finance.

Also notable is the Act's expansion of the BSA's purpose to include "establish[ing] appropriate frameworks for information sharing among financial institutions, their agents and service providers, their regulatory authorities, associations of financial institutions, the Department of the Treasury and law enforcement."<sup>53</sup> The specific inclusion in this list of agents, service providers, and associations of financial institutions acknowledges the important role these entities can play in facilitating effective information sharing. FinCEN's recently revised Fact Sheet regarding information sharing under Section 314(b) specifically states that financial institution service providers are permitted to form and operate associations of financial institutions the members of which may share information pursuant to the Section 314(b) safe harbor.<sup>54</sup>

### **6. FINANCIAL INCLUSION AND MITIGATION OF EFFECTS OF DE-RISKING**

The Act also addresses the adverse consequences of "de-risking"—generally understood in the AML/CFT context to mean financial institutions' terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk. Various provisions reflect Congress's recognition that de-risking has resulted in the exclusion of certain non-profits and other underserved persons from regulated financial channels, driving money into less transparent channels and running counter to the complementary goals of protecting the integrity of the financial system and ensuring the availability of needed humanitarian aid and legitimate access to the financial system for underserved persons. For example, as indicated above, the mandatory Treasury review of currency transaction and suspicious activity reporting requirements will be required to include a review of ways to address adverse consequences of de-risking,<sup>55</sup> and the mandatory examiner training must address de-risking and its effects.<sup>56</sup>

Significantly, the Government Accountability Office ("GAO") will be required to conduct an analysis and report to Congress on financial services de-risking.<sup>57</sup> The analysis must consider drivers and identify options for financial institutions that serve high-risk categories of clients.

Following the analysis, Treasury will be required to undertake a formal review of financial institution reporting requirements and propose changes to reduce any unnecessarily burdensome regulatory requirements and ensure the information provided fulfills the BSA's purposes, as amended. In conducting the review, Treasury will be required to consider, among other things, adverse consequences of financial institutions de-risking, reasons for de-risking, examiner feedback that may have led to de-risking, the relationship between compliance resources and sophistication at entities experiencing de-risking compared to those that have not and an assessment of policy options to promote financial inclusion. Following the review, Treasury will be required to develop a strategy to reduce de-risking and its adverse consequences. Treasury will also be required to report the review findings and the de-risking strategy to Congress.

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Finally, in conducting this review, Treasury will be required to consider, as a policy option that appropriately promotes financial inclusion, “more effectively tailor[ing] Federal actions and penalties to the size of foreign financial institutions and any capacity limitations of foreign governments[.]” The imposition of this requirement would appear to acknowledge the potential collateral consequences that may occur when U.S. authorities impose significant penalties on foreign financial institutions in smaller, developing economies, particularly those with less resilient financial systems for which access to U.S. dollars through correspondent accounts may be both limited to a handful of institutions and a key dependency for their continued participation in global trade flows.

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### CONCLUDING OBSERVATIONS

As noted above, the Act comprehensively updates and modernizes the BSA. Its provisions reflect extensive work over many years by private institutions, federal agencies, and certain members of Congress who have advocated for modernization, clarifications, and amendments. Since many of the new statutory provisions will require rulemakings, reports, analyses, and other measures, the actual impact of the Act on financial institutions remains to be seen. Financial institutions and other interested parties may wish to prepare for those future measures by alerting key stakeholders, such as boards of directors, foreign affiliates, regulatory relations teams, and, of course, BSA/AML compliance personnel, to the themes and provisions highlighted in this memorandum. We plan to issue additional memoranda in the near future addressing various aspects of the legislation in greater detail.

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## ENDNOTES

- <sup>1</sup> H.R. REP. NO. 6395 (2020) at pg. 731 (Joint Explanatory Statement of the Committee of Conference).
- <sup>2</sup> This theme is consistent with recent guidance updated by FinCEN related to information sharing among financial institutions pursuant to the USA PATRIOT Act § 314(b) safe harbor. See FIN. CRIMES ENFORCEMENT NETWORK, *Section 314(b) Fact Sheet* (Dec. 11, 2020), available at <https://www.fincen.gov/sites/default/files/shared/314factsheet.pdf> (noting that information sharing among financial institutions can help them fulfill their AML/CFT obligations, including shedding more light on financial trails, building a more comprehensive picture of a customer's activities, facilitating the filing of more comprehensive SARs and facilitating more efficient SAR reporting decisions).
- <sup>3</sup> AMLA, § 6101.
- <sup>4</sup> In its recent Advanced Notice of Proposed Rulemaking, FinCEN discussed the variance among different agencies in how they define effective AML/CFT programs. Some programs require a financial institution to implement an AML/CFT program that is "reasonably designed" to achieve compliance with the BSA, some require programs to be "reasonably designed" to prevent money laundering or terrorist financing, and some require both. The Act now eliminates this confusion by defining an effective AML/CFT program as one which is reasonably designed to do the more onerous task of *preventing* money laundering and terrorism financing. See 85 Fed. Reg. 58,023, 58,026 (Sept. 17, 2020).
- <sup>5</sup> Generally, the Act requires Treasury activities to be conducted in consultation with stakeholders. Although those stakeholders vary, they often include the Attorney General, federal functional regulators, relevant state financial regulators, and relevant national security agencies. See, e.g., AMLA, § 6101 (establishment of national AML/CFT priorities), § 6308 (establishing annual AML training materials), § 6201 (requiring DOJ to submit annual BSA enforcement reports), § 6204 (undertaking a formal review of CTRs and SARs).
- <sup>6</sup> AMLA, § 6101.
- <sup>7</sup> AMLA, § 6101.
- <sup>8</sup> AMLA, § 6102.
- <sup>9</sup> A recent proposal by the OCC acknowledged that, although aligned with FinCEN's SAR regulations in many respects, the OCC's SAR regulations require national banks and federal savings associations to file SARs under certain circumstances not covered by FinCEN's regulations. On the date of publication of this memorandum, the OCC issued a notice of proposed rulemaking to amend its SAR regulation to establish a process through which national banks and federal savings associations could seek exemptions from the OCC's SAR filing regulation. Consistent with one of the key themes of the Act, the OCC anticipates that, as a result of continuing developments in financial technology and innovation, the OCC may need the flexibility to grant exemptive relief in the area of monitoring and reporting financial crime. DEPT. OF THE TREASURY, OFFICE OF THE COMPTROLLER OF THE CURRENCY, *Exemptions to Suspicious Activity Report Requirements* (Dec. 17, 2020), available at <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-174.html>. FinCEN already has this flexibility pursuant to delegated authority under the BSA. 31 U.S.C. § 5318(a)(7); 31 C.F.R. § 1010.970.
- <sup>10</sup> See AMLA, § 6202 ("In imposing any requirement to report any suspicious transactions . . . The Secretary . . . shall consider items that include . . . the means by or form in which the Secretary shall receive such reporting, including the burdens imposed by such means or form of reporting on persons required to provide such reporting . . . ."), § 6204 ("The Secretary . . . shall undertake a formal review of the financial institution reporting requirements relating to currency transaction

## ENDNOTES (CONTINUED)

- reports and suspicious activity reports . . . and propose changes . . . to reduce any unnecessarily burdensome regulatory requirements . . .”).
- 11 H.R. REP. NO. 6395 (2020) at pg. 731 (Joint Explanatory Statement of the Committee of Conference).
- 12 Although the expansion of AML regulation to real estate transactions is discussed in the Joint Statement to the report, it is not covered by any provisions of the Act itself. See H.R. REP. NO. 6395 (2020) at pg. 733 (Joint Explanatory Statement of the Committee of Conference).
- 13 AMLA, § 6209.
- 14 The FinCEN and federal functional regulator guidance encouraged banks to consider and implement innovative approaches to BSA/AML compliance obligations. The guidance noted that participation alone in innovative pilot programs should not subject a bank to supervisory criticism, even if the program ultimately proved unsuccessful. Additionally, if a pilot program helped reveal a gap in the bank’s AML/CFT program, that would not necessarily result in supervisory action with respect to that program because the agencies will not automatically assume that benefits, such as a bank’s use of emerging technology to identify incremental suspicious activity, represent deficiencies in the bank’s existing processes. Moreover, a bank’s implementation of innovative approaches in AML compliance will not result in additional regulatory expectations. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INSURANCE CORP., FIN CRIMES ENFT NETWORK, NAT. CREDIT UNION ADMIN, & OFFICE OF THE COMPTROLLER OF THE CURRENCY, *Joint Statement on Innovative Efforts to Combat Money Laundering and Terrorist Financing* (Dec. 3, 2018), <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20181203a1.pdf>.
- 15 AMLA, § 6202. This provision of the Act was foreshadowed by prior regulatory relief. In a September 27, 2019 Interpretive Letter responding to a request from an anonymized financial institution, the OCC confirmed that certain streamlined and automated filing of noncomplex SAR reports related to structuring activity were consistent with the OCC’s suspicious activity reporting requirement (12 C.F.R. § 21.11(c)). The OCC was receptive to this form of AML innovation noting that it could provide consistency in reporting and possibly improve the utility and timing of data available to law enforcement, while also enabling stakeholders to focus resources on more complex issues. The OCC cautioned that a filer would, after implementation, need to regularly review and update its processes to ensure that the automated SAR filing process remains reasonably designed to achieve compliance with the OCC’s BSA/AML Compliance Program regulation. OCC Interpretive Letter #166 (Sept. 27, 2019), available at <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2019/int1166.pdf>.
- 16 AMLA, § 6204.
- 17 AMLA, § 6205.
- 18 AMLA, § 6110.
- 19 Registration Requirements for Covered Financial Institutions, 31 C.F.R. § 1022.380.
- 20 AMLA, § 6102. Previous FinCEN guidance has indicated that certain virtual currency businesses are required to register with FinCEN. See, e.g., *Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FINCEN (May 9, 2019), available at <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.
- 21 AMLA, § 6308.
- 22 The D.C. Circuit released a significant decision in 2019 affirming contempt penalties against foreign banks that did not comply with DOJ subpoenas calling for production of records related to a terrorist financing allegation. The DC Circuit held that a foreign bank’s failure to comply with a subpoena can result in a finding of contempt pursuant to courts’ authority to impose a civil contempt citation

## ENDNOTES (CONTINUED)

for violating a clear and unambiguous order, as well as significant daily fines. The Act's authorization is consistent with this holding. See *In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019). The D.C. Circuit also discussed the DOJ's proposal to broaden this authority, which would have covered "any records pertaining to any related account at the foreign bank." The court held that the current version of 31 U.S.C. § 5318(k) applies to "records of transactions that do not themselves pass through a correspondent account when those transactions are in service of an enterprise entirely dedicated to obtaining access to U.S. currency and markets using a U.S. correspondent account." Significantly, the Act's amendment is even more expansive than the DOJ proposal—it covers "records relating to . . . any account," not just those pertaining to "any related account." See *id.* at 929–30.

23 See *In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019).

24 AMLA, § 6309.

25 AMLA, § 6312.

26 AMLA, § 6310.

27 AMLA, § 6313

28 AMLA, § 6311.

29 AMLA, § 6306.

30 AMLA, § 6314.

31 In the case of whistleblowing employees of insured depository institutions, the applicable protections are found in 12 U.S.C. § 1831j.

32 AMLA, § 6403.

33 Financial Action Task Force, Mutual Evaluation Report: United States (Dec. 2015), available at <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

34 Other examples of exempted entities include tax-exempt 501(c) and political organizations, charitable trusts and certain U.S. person-owned dormant companies that lack assets.

35 Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29397 (May 11, 2016).

36 Revisions to the CDD requirements will include rescinding paragraphs (b)–(j) of 31 C.F.R. § 1010.230.

37 Upon the issuance of applicable regulations by Treasury, FinCEN may provide beneficial ownership information to a federal functional regulator of a financial institution or other appropriate regulatory agency, provided that the agency is: (a) authorized by law to assess, supervise, enforce, or otherwise determine the compliance of the financial institution with CDD requirements; (b) uses the information solely for the purpose of conducting the assessment, supervision, or authorized investigation; and (c) enters into an agreement with Treasury providing for appropriate data security protocols.

38 AMLA, § 6101.

39 AMLA, § 6307.

40 This is consistent with the statement, "Interagency Statement on Sharing Bank Secrecy Act Resources" published on October 3, 2018 by various financial regulatory agencies.

41 AMLA, § 6213.

42 AMLA, § 6305.

## ENDNOTES (CONTINUED)

- 43 In this context, we note FinCEN's Statement on Enforcement of the Bank Secrecy Act, which includes "No Action" as among the actions FinCEN can take when it identifies an actual or possible violation of the BSA or any BSA regulation or order. See *FinCEN Statement on Enforcement of the Bank Secrecy Act statement on enforcement of the Financial Crimes Enforcement Network (FinCEN)* (Aug. 18, 2020), available at [https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement\\_FINAL%20508.pdf](https://www.fincen.gov/sites/default/files/shared/FinCEN%20Enforcement%20Statement_FINAL%20508.pdf).
- 44 AMLA, § 6206.
- 45 31 U.S.C. § 5311 note. Pub. L. 107–56, title III, § 314, Oct. 26, 2001, 115 Stat. 307, as amended by Pub. L. 108–458, title VI, § 6202(f), Dec. 17, 2004, 118 Stat. 3745.
- 46 AMLA, § 6212.
- 47 Presumably the Act is referring to personally identifiable financial information as defined in Regulation P (12 C.F.R. § 1016.3(q)), which, subject to certain important exclusions, generally refers to information a financial institution obtains about a consumer in connection with the provision of a financial product or service to that consumer.
- 48 31 U.S.C. § 5318(g)(2)(A)(i).
- 49 Treasury will appoint at least six attachés who will be co-located in a U.S. Embassy or foreign government facility. These attachés will establish and maintain relationships with foreign counterparts and further financial and economic policy in the fight against terrorism and money laundering.
- 50 No fewer than six liaisons will be co-located in U.S. embassies or foreign government facilities with duties mirroring those of the Treasury attaché program.
- 51 The program will be led by a Chief Domestic Liaison, out of Washington D.C., and is equipped with at least six inferior domestic liaisons, who will be located in and responsible for unique regions throughout the U.S. These liaisons will conduct outreach with Bank Secrecy Officers at financial institutions, receive feedback from financial institutions and examiners to report back to FinCEN, and promote coordination and consistency of supervisory guidance.
- 52 The goal of the new exchange is to allow both sides to join forces in combatting money laundering and terrorism financing, promote innovation and technology in reporting, and promote the protection of the financial system and national security through a private-public symbiotic relationship. A bi-annual report will reflect the effectiveness of this new information sharing tool. This subsection of the Act represents a codification of the existing FinCEN Exchange effort, which includes regularly scheduled and as-needed operational briefings across the nation with law enforcement, FinCEN and financial institutions to exchange information on priority illicit finance and national security threats followed by FinCEN taking typologies learned from these engagements and sharing them with the broader financial community to assist others in identifying and reporting similar activity. See *FinCEN Exchange Questions and Answers*, FINCEN (last visited Dec. 9, 2020), <https://www.treasury.gov/press-center/press-releases/Pages/sm0229.aspx>; *Under Secretary Sigal Mandelker Speech before the American Bankers Association & American Bar Association Financial Crimes Enforcement Conference*, FINCEN (Dec. 4, 2017), <https://www.fincen.gov/resources/fincen-exchange/fincen-exchange-frequently-asked-questions>. Notably, a May 2019 FinCEN Exchange session in New York City focused on virtual currency, which is a key topic of the Act's expanded BSA coverage. See *FinCEN Exchange in New York City Focuses on Virtual Currency*, FINCEN (last visited Dec. 9, 2020), discussed at <https://www.fincen.gov/resources/financial-crime-enforcement-network-exchange>.
- 53 31 U.S.C. § 5311(5), as amended by Section 6101 of the Act.
- 54 FIN. CRIMES ENFORCEMENT NETWORK, *Section 314(b) Fact Sheet*.
- 55 AMLA, § 6204.

ENDNOTES (CONTINUED)

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<sup>56</sup> AMLA, § 6307.

<sup>57</sup> AMLA, § 6215.

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