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AML Act of 2020: Topics of interest for international banks

Kathleen A. Scott, *New York Law Journal* — March 12, 2021

The National Defense Authorization Act, (NDAA) became law on Jan. 1, 2021, after the U.S. Congress overrode a presidential veto. Division F of the Act is the "Anti-Money Laundering Act of 2020" (AMLA). This month's column highlights a few of the AMLA provisions that may be of interest to international banks.

Registration of beneficial ownership

As I noted in my Jan. 12, 2021 column, one of the amendments is aimed at making banks and other financial institutions that need to obtain beneficial ownership of certain of their customers easier. Under current regulations, banks and other financial institutions that maintain required customer identification programs must, when opening up accounts for certain legal entities, obtain beneficial ownership information on (1) individuals owning 25% or more of the entity and (2) an individual person with significant control over the entity such as a president or chief executive officer. These financial institutions long have felt it was burdensome to have to obtain that ownership information and new entity customers may be reluctant to provide it.

In the United States, corporations are formed at the state level, and information on ownership is scarce if available at all.

Section 6403 of the NDAA requires nonpublic companies to report their beneficial owners to the Financial Crimes Enforcement Network (FinCEN), the U.S. AML agency, in accordance with regulations to be promulgated by FinCEN by Jan. 1, 2022.

What entities must report: Reports are required to be filed by a "reporting company," which is defined as a corporation, limited liability company or other similar entity that is established by filing a document (such as articles of incorporation) with a U.S. state secretary of state, Indian Tribe, or under the laws of a foreign country that registers to do business in the United States by making a similar filing with a State or Indian Tribe. There are several exemptions, such as publicly traded companies, regulated financial services organizations and public utilities, which are similar to the exemptions from the customer identification program requirements generally.

What has to be reported: A reporting company at the time of its formation or registration must submit the following information to FinCEN identifying each beneficial owner of the reporting company with:

- Full legal name
- Date of birth
- Current residential or business address
- "Unique identifying number" such as a driver's license or passport number, or a "FinCEN identifier"

This information is similar to what is required currently, aside from the FinCEN identifier. A FinCEN identifier is a unique identifying number assigned by FinCEN to a direct or indirect individual beneficial owner, or entity that has filed the required beneficial ownership information, that is issued upon the request of the individual or entity in question.

The reporting company will be required to file with FinCEN a report of any changes in the reported information (but no later than one year after the change). However, the Treasury Department in consultation with the Attorney General and the Department of Homeland Security must review whether updates should be provided on a more frequent basis. The reported information must be retained by FinCEN for at least five years after the date of termination of the reporting company.

Who is a beneficial owner: A "beneficial owner" of a reporting company is (subject to certain exceptions such as an individual acting as nominee or agent on behalf of another individual) an individual who (1) directly or indirectly exercises "substantial control" over the reporting company or (2) owns or controls a 25 percent or more ownership stake in the entity. The ownership chain needs to be traced back to an individual, whose ownership stake may be held through intermediary companies. The term "substantial control" is not defined in the statute; the current regulation uses the phrase "a single individual with significant responsibility to control, manage, or direct a legal entity customer" such as a president or chief executive officer. We will need to wait for FinCEN's promulgating regulations to see if a person exercising "substantial control" over the company is defined similarly to how the position is defined in the current regulation.

How is the information to be disclosed: The reported information is confidential by law and cannot be disclosed unless otherwise permitted by the legislation or accompanying regulations. Pursuant to protocols to be established by FinCEN, the reported information may be disclosed: (1) to certain Federal or state government agencies, (2) with the consent of the reporting company, to a financial institution that needs the information to comply with its customer due diligence requirements, and (3) to the financial institution's regulator. This information is not to be further disclosed by the recipient of the information. The Secretary of the Treasury must maintain information security protections, including encryption, for the beneficial owner information reported to FinCEN under the new law.

Obtaining Foreign Bank Records

Section 6308 of the NDAA "Obtaining foreign bank records from banks with United States Correspondent Accounts" mends and expands the current §5318(k)(3) on obtaining non-U.S. ("foreign") bank records. Subsection 31 U.S.C. 5318(k)(3) is the basis for the current regulation on obtaining foreign records at 31 CFR 1010.670. Changes to the statute expand the records that can be sought but at the same time, more clearly specify the circumstances under which a subpoena can be issued.

As revised, the general subpoena power relates to the ability by the Secretary of the Treasury or the Attorney General 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: (I) any investigation of a violation of a criminal law of the United States; (II) any investigation of a violation of [the Bank Secrecy Act]; (III) a civil forfeiture action; or (IV) an investigation pursuant to [the special measures provisions of the Bank Secrecy Act]." These specifications were not previously spelled out in the legislation.

Prior to amendment, the records could be requested by means of a summons or subpoena and the request was limited to seeking information on a non-U.S. bank's correspondent accounts with a U.S. bank, and records related

to the correspondent account, including records maintained outside the United States relating to deposit of funds into the bank.

As revised, the request must be made by subpoena only but, as noted above, the information that can be sought has been expanded from merely the correspondent account to include information on any account at the foreign bank, even if the records are held outside the United States. Prior to the return date on the subpoena, the non-U.S. bank may move in the appropriate U.S. district court to quash or modify the scope of the subpoena. The law explicitly states that secrecy laws of another country cannot be the sole basis for quashing or modifying the subpoena. The law does not otherwise specify what could be permissible grounds to quash or modify a subpoena.

The bank is prohibited from disclosing the existence of the subpoena to the holder of the account to which it pertains, or any other person named in the subpoena. If the bank fails to provide the records, the Attorney General can go into court and seek an order to compel production.

The Treasury Secretary, in conjunction with the Attorney General, can order the U.S. bank to terminate its correspondent relationship with the non-U.S. bank if the non-U.S. bank does not provide the records listed in the subpoena or loses in its attempt in court to quash or modify the subpoena.

International Cooperation and Coordination

In §6111, funds are appropriated to the Treasury Secretary for the purpose of providing technical assistance to other countries and their financial institutions to promote compliance with international standards and best practices, in particular those relating to establishing effective AML compliance programs and programs for countering the financing of terrorism.

In §6112, the Secretary of the Treasury is charged with working with her counterparts at international institutions such as the United Nations, Financial Action Task Force and the Bank for International Settlement's Basel Committee for Banking Supervision "to promote stronger [AML] frameworks and enforcement of [AML] laws." There are no more details at this time but this statutory provision does indicate legislative intent to continue international cooperation on AML issues.

In addition, §§6106 and 6108 establish a Treasury Financial Attaché Program and a Foreign Financial Intelligence Unit Liaison program to station Treasury and FinCEN employees, respectively, at U.S. embassies, or other appropriate government locations in different countries, to assist in developing and executing the furthering of U.S. economic and financial policy in the international fight against terrorism, money laundering and other illicit finance. Their duties will include establishing and maintaining relationships with their counterparts in that country and conducting outreach to local and financial institutions and other commercial actors, and coordinate with other U.S. government employees performing similar functions.

Studies, Reviews and Reports

Not surprisingly, the law requires several studies and reports. A few of the more interesting ones:

- The Treasury Department, along with other federal and state government agencies and others must undertake a formal review of the current currency transaction reporting (CTR) and suspicious activity reporting (SAR) requirements and propose changes to "reduce any unnecessarily burdensome regulatory requirements and ensure the information provided fulfills the purposes of the [BSA]"
- At the same time, the law tasks GAO with studying, in conjunction with federal, state and local law enforcement, the effectiveness of the current CTR regulations, including an analysis of the importance of the CTRs to law enforcement and the consequences possibly arising if the current reporting threshold of US$10,000 was raised, along with recommendations on improving the CTR reporting regimes generally
- A Treasury Department study and report on proposed strategies to combat trade-based money laundering

- A study on the extent of illicit finance risks coming from the People's Republic of China and development of a strategy to combat Chinese money laundering activities ▪A study on how authoritarian regimes in other countries may use the U.S. financial system to conduct political influence operations, export corruption, and undermine democratic governance in the United States and its partners and allies. Recommendations from the study should provide for legislative or regulatory action, or steps to be taken by U.S. financial institutions that address exploitation of the financial system of the United States by foreign authoritarian regimes

Conclusion

The beneficial ownership provisions on the new law should provide some assistance to those banks and other financial institutions in fulfilling their customer identification program's beneficial ownership requirements. The amendments to the statutory provision regarding access to foreign bank records make it clearer the circumstances under which that authority can be utilized. The NDAA's international coordination and cooperation provisions one hopes will indeed lead to better international AML enforcement.

Finally the studies focusing on review of the CTR and SAR reporting regimes may update some longstanding reporting thresholds that might continue to effectively assist the law enforcement community while at the same time tailoring those reporting requirements for financial institutions. Time will tell.

Kathleen A. Scott is senior counsel at Norton Rose Fulbright in New York.