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THE TOP 10 TAKEAWAYS FOR FINANCIAL INSTITUTIONS FROM THE ANTI-MONEY LAUNDERING ACT OF 2020

To Our Clients and Friends:

After a complicated path to passage, today the Senate completed the override of President Trump's veto of the National Defense Authorization Act and, as part of that legislation, passed the Anti-Money Laundering Act of 2020 ("AMLA" or the "Act").[1] The AMLA is the most comprehensive set of reforms to the anti-money laundering ("AML") laws in the United States since the USA PATRIOT Act was passed in 2001. The Act's provisions range from requiring many smaller companies to disclose beneficial ownership information to FinCEN to mandating awards to whistleblowers that report actionable information about Bank Secrecy Act ("BSA")/AML violations. This alert identifies 10 of the biggest takeaways for financial institutions from the AMLA.[2]

1. *The AMLA May Lead to More AML Enforcement, Including Through Expanded Whistleblower Provisions*

The AMLA has a number of provisions that could result in significantly increased civil and criminal enforcement of AML violations. First and foremost, it provides for a significantly expanded whistleblower award program. Specifically, it states that when an AML enforcement action brought by DOJ or the U.S. Treasury Department results in monetary sanctions over $1 million, the Secretary of the Treasury "shall" pay an award of up to 30 percent of what was collected to whistleblowers who "voluntarily provided original information" that led to a successful enforcement action.[3] The previous whistleblower award program limited awards in most cases to $150,000 and was discretionary[4] – in our experience, that much more modest award program did not generate significant interest among potential whistleblowers or the plaintiffs' bar. The Act also includes anti-retaliation protections for whistleblowers and, in the event of a violation of these provisions, allows them to file a complaint with the Department of Labor and, if it is not adjudicated within a certain period of time, to seek recourse in federal district court.[5]

It would be hard to overstate the far-reaching potential effects of this new program. By way of analogy, in 2010, the SEC announced its own whistleblower program to reward individuals who provided the agency with high-quality information.[6] The program has prompted a significant number of tips to the SEC. As of October 2020, the SEC Office of the Whistleblower had received more than 40,000 tips from whistleblowers in every state in the United States and approximately 130 countries around the world.[7] And this program has led to some significant SEC whistleblower awards, which may have encouraged further reporting. In October 2020, for instance, the SEC awarded $114 million to a whistleblower, the largest single award in history.[8]

As with the SEC whistleblower program, the new awards for BSA whistleblowers may incentivize employees and plaintiffs' attorneys to provide a substantial number of new tips to law enforcement, even

if many of them do not result in enforcement actions. Indeed, the number of employees at financial institutions who have access to information that could potentially form the basis for an AML whistleblower complaint is many times greater than in other contexts. Many large financial institutions employ hundreds of individuals in functions with AML responsibilities. For example, it remains to be seen whether this provision will weaponize the information held by even front-line compliance employees tasked with elevating suspicious activity for potential SAR filings when those employees do not see a SAR ultimately get filed.

2. *The AMLA Increases Penalties for BSA/AML Violations in a Number of Ways*

Another harbinger of increased enforcement is the expanded penalties enacted under the AMLA. As we explained in a January 2020 client alert, in recent years DOJ has been increasingly aggressive in using its money laundering authority to police international corruption and bribery, as illustrated by the 1MDB, FIFA, and PDVSA prosecutions.[9] And the incoming Biden administration has indicated that cracking down on illicit finance at home and abroad will be a top priority.[10]

The AMLA creates a number of new penalties that will help the government do so. It creates a new prohibition on knowingly concealing or misrepresenting a material fact from or to a financial institution concerning the ownership or control of assets involved in transactions over $1 million involving assets of a senior foreign political figure, close family member, or other close associate.[11] The Act also makes it a crime to knowingly conceal or misrepresent a material fact from or to a financial institution concerning the source of funds in a transaction that involves an entity that is a primary money laundering concern.[12] The penalties for violating these provisions are up to 10 years imprisonment and/or a $1 million fine.[13]

The Act also generally enhances penalties for various BSA/AML violations. For instance, it provides that any person "convicted" of violating the BSA shall, "in addition to any other fine under this section, be fined in an amount that is equal to the profit gained by such person by reason of such violation," and, in the event the person was employed at a financial institution at the time of the violation, repay to the financial institution any bonus paid during the calendar year during or after which the violation occurred.[14] The Act additionally prohibits individuals who have committed an "egregious" violation of the BSA from sitting on the boards of U.S. financial institutions for 10 years.[15] Furthermore, the AMLA creates enhanced penalties for repeat violators, providing that if a person has previously violated the BSA, the Secretary of the Treasury "may impose" additional civil penalties of up to the greater of three times the profit gained or loss avoided by such person as a result of the violation or two times the maximum statutory penalty associated with the violation.[16]

3. *The AMLA Significantly Increases the Government Resources Committed to Address Money Laundering*

The AMLA also contains a host of provisions designed to better resource the government to address money laundering. It establishes special hiring authority for FinCEN and the Office of Terrorism and Financial Intelligence.[17] It also creates a number of unique roles, including FinCEN domestic liaisons to oversee different regions of the United States, as well as Treasury attachés and FinCEN foreign

intelligence unit liaisons to be stationed at U.S. embassies or foreign government facilities.[18] The Act additionally creates a Subcommittee on Innovation and Technology to advise the Secretary of the Treasury on innovation with respect to AML and calls for BSA "Innovation Officers" and "Information Security Officers" at FinCEN and other federal financial regulators.[19] Although these staffing reforms may not directly impact financial institutions, the government's increased focus and sophistication in addressing money laundering may result in additional inquiries from law enforcement, regulations, and guidance.

4. *The AMLA Provides Additional Statutory Authority for DOJ to Seek Documents from Foreign Financial Institutions*

DOJ typically has three avenues to pursue documents from foreign financial institutions. It can: (i) make a request under the Mutual Legal Assistance Treaty (or, in the absence of a treaty, a letter rogatory) with the country in question, which can be a slow process; (ii) it can issue a *Bank of Nova Scotia* subpoena, which requires written approval from DOJ's Office of International Affairs[20]; or (iii) it can issue a subpoena pursuant to 31 U.S.C. § 5318(k) to a foreign financial institution that maintains a correspondent bank account in the United States.

The AMLA significantly expands the scope of DOJ's (and Treasury's) authority to seek and enforce correspondent account subpoenas under Section 5318. Previously, these subpoenas could be issued to any foreign bank that maintained a correspondent account in the United States and could "request records related to such correspondent account."[21] The AMLA broadens this authority to allow DOJ to seek "any records relating to the correspondent account *or any account at the foreign bank*, including records maintained outside of the United States," if the records are the subject of an investigation that relates to a violation of U.S. criminal laws, a violation of the BSA, a civil forfeiture action, or a Section 5318A investigation.[22] Thus, by statute, DOJ now has the authority to subpoena from foreign banks not only records related to correspondent accounts, but records from *any* account at the foreign bank if they fall within one of the broad investigative categories identified in the statute. The AMLA also requires the foreign financial institution to authenticate all records produced.[23] In the event a foreign financial institution fails to comply, the Act authorizes the Attorney General to seek contempt sanctions, and the Attorney General or Secretary of the Treasury may direct covered U.S. financial institutions to terminate their correspondent relationships with the foreign financial institution refusing to comply and can impose penalties on those institutions that fail to do so.[24]

5. *The AMLA Includes a Pilot Project for Sharing SAR Data Across International Borders*

An issue that many of our financial institution clients face is how to share information contained in suspicious activity reports ("SARs") across U.S. borders to affiliates located in other countries.[25] Historically, FinCEN has issued guidance to partially address the problem by permitting sharing of SAR information with foreign parent organizations or U.S. affiliates.[26] The AMLA further addresses this issue by providing that within a year after the legislation is enacted, the Treasury Department shall issue rules that create a pilot program for financial institutions to share information related to SARs, including their existence, "with the institution's foreign branches, subsidiaries, and affiliates for the purpose of combating illicit finance risks."[27] Notably, it contains jurisdictional carve-outs that would not permit

sharing with any entities located in China or Russia (which can be waived by the Secretary of the Treasury on a case-by-case basis for national-security reasons) or in jurisdictions that are state sponsors of terrorism, subject to U.S. sanctions, or that the Secretary of the Treasury determines cannot reasonably protect the security and confidentiality of the data.[28] The pilot project is set to last three years, and can be extended for an additional two years upon a showing by the Treasury Department that it is useful and in the U.S. national interest.[29]

6. *The AMLA Specifically Applies the BSA to Nontraditional Value Transfers, Including Cryptocurrency*

As financial institutions have become more adept at fighting money laundering in the past decade, the government has become increasingly concerned that criminals may turn to other mediums, such as cryptocurrency and art, to try to launder money. For instance, in November 2020, DOJ announced that it seized over $1 billion worth of Bitcoin that was tied to drug sales and other illicit products and services on the online marketplace Silk Road before it was shut down.[30] And using high-end artwork was one of the ways in which the alleged co-conspirators in the 1MDB scandal attempted to launder the proceeds of their alleged crimes, by purchasing various high-end pieces of art and then seeking banks or financiers "who take art as security for … bank loans."[31]

While U.S. enforcers had argued that preexisting anti-money laundering authorities could reach transactions involving cryptocurrency and art, the application of preexisting AML regulations to cryptocurrency, in particular, has often been an uneasy fit. The preexisting AML regime was a set of rules written largely for an analog world, and its application to the digital realm left open important questions, particularly in the context of criminal enforcement actions. Now, however, the Act expands the definition of financial institution and money transmitting business to include businesses engaged in the exchange or transmission of "value that substitutes for currency," potentially reinforcing the government's position that the BSA applies to cryptocurrency.[32] The AMLA also adds antiquities dealers, advisors, and consultants to the definition of "financial institution" under the BSA.[33] As to art, the AMLA requires the government to prepare a study within a year that assesses money laundering and terrorist financing through the art trade, including "which markets … should be subject to regulation," "the degree to which the regulations, if any, should focus on high-value trade in works of art," and "the need, if any, to identify persons who are dealers, advisors, consultants, or any other persons who engage as a business in the trade in works of art."[34]

7. *Many Smaller Companies Will Be Required to Disclose Beneficial Ownership Information to FinCEN, Which Will Also Be Available to Financial Institutions*

The lack of a requirement for corporations to provide beneficial ownership information at the state or federal level in the United States has long been seen by law enforcement as a loophole that criminals can exploit. For instance, in 2016, the Financial Action Task Force ("FATF," an international body that sets AML standards) recommended that the United States "[t]ake steps to ensure that adequate, accurate and current [beneficial owner] information of U.S. legal persons is available to competent authorities in a timely manner, by requiring that such information is obtained at the Federal level."[35]

Accordingly, one of the most significant developments in the AMLA is the requirement for "reporting compan[ies]" to disclose beneficial ownership information to FinCEN, which will in turn maintain a nonpublic beneficial ownership database.[36] The definition of "reporting company" exempts a wide range of entities, including many classes of financial institutions (such as registered issuers, credit unions, broker-dealers, money transmitters, and exchanges) and larger U.S. companies, which are defined as companies that employ more than 20 full-time employees in the United States, had more than $5 million in gross revenue in the past year, and are operating at a physical office in the United States.[37] Thus, the new requirement is aimed at smaller businesses and shell companies.

Although the reporting requirement generally does not apply to financial institutions, it nevertheless has important consequences for them. The Act allows FinCEN to disclose beneficial ownership information to a financial institution with the reporting company's consent to facilitate the financial institution's compliance with Customer Due Diligence requirements.[38] As such, financial institutions will have to develop processes to effectively evaluate information from this beneficial ownership database. Moreover, the AMLA provides significant penalties for misuse of beneficial ownership information. Failure to disclose beneficial ownership information subjects a person to civil monetary penalties of $500 per day and a fine up to $10,000 and/or imprisonment of up to two years.[39] By contrast, unauthorized disclosure of beneficial ownership information is subject to the same civil penalty, but with fines up to $250,000—25 times the fine for failure to report—and/or imprisonment of up to five years.[40]

8. *The AMLA Requires the Government to Establish AML Priorities That Will Feed Into Examinations of Financial Institutions*

The AMLA requires the Secretary of the Treasury to publish "public priorities for anti-money laundering and countering the financing of terrorism policy" within 180 days after the law's enactment.[41] The priorities must be "consistent with the national strategy for countering the financing of terrorism and related forms of illicit finance."[42] FinCEN will have 180 days after the priorities are released to promulgate rules to carry out these priorities.[43] Financial institutions, for their part, will be required to "review" and "incorporat[e]" these priorities into their AML programs, which will be a measure "on which a financial institution is supervised and examined."[44]

9. *The AMLA Begins to Address Inefficiencies in SAR and CTR Filing Processes*

Some argue that the current SAR and CTR filing processes are the worst of both worlds: they are incredibly burdensome for financial institutions but simultaneously bury enforcers with so much information that they cannot separate the wheat from the chaff. The $10,000 threshold for CTRs, for example, was set in 1970, and were it to be adjusted for inflation, the current threshold for filing a CTR today would be more than $60,000.[45] The lack of indexing for these thresholds has resulted in a swelling volume of mandatory reports; more than 16 million CTRs were filed in 2019.[46] Similarly, the SAR thresholds were set over 20 years ago, and the "current regime promotes the filing of SARs that may never be read, much less followed up on as part of an investigation"[47]—resulting in over 2.7 million SARs filed in 2019.[48]

The AMLA begins to take steps to address these criticisms. It requires that, when imposing requirements to report suspicious transactions, the Secretary of the Treasury shall, among other things, "establish streamlined, including automated, processes to, as appropriate, permit the filing of noncomplex categories of reports."[49] It also requires the government to conduct formal reviews of whether the CTR and SAR thresholds should be adjusted and to determine if there are changes that can be made to the filing process to "reduce any unnecessarily burdensome regulatory requirements" while ensuring the information has a high degree of usefulness to enforcers.[50]

The AMLA also contains a number of provisions to try to ensure the usefulness of information provided by financial institutions. For instance, it requires FinCEN to periodically disclose to financial institutions "in summary form[] information on suspicious activity reports filed that proved useful to Federal or State criminal or civil law enforcement agencies during the period since the most recent disclosure," provided the information does not relate to an ongoing investigation or implicate national security.[51] Similarly, the AMLA requires FinCEN to publish threat pattern and trend information at least twice a year to provide meaningful information about the preparation, use, and value of reports filed under the BSA.[52]

10. *The AMLA Continues to Promote Collaboration Between the Public and Private Sectors*

As FinCEN has recognized, "[s]haring information through … public-private partnerships supports more, and higher-quality, reports to FinCEN and assists law enforcement in detecting, preventing, and prosecuting terrorism, organized crime, money laundering, and other financial crimes."[53] To that end, FinCEN has sought to improve collaboration between law enforcement and financial institutions over the years. For instance, in 2017, FinCEN created the "FinCEN Exchange" to "enhance information sharing with financial institutions."[54]

The AMLA contains a number of provisions designed to further promote collaboration between the public and private sectors. It formalizes the FinCEN Exchange by statute, and requires the Secretary of the Treasury to periodically report to Congress about the utility of the Exchange and recommendations for further improvements.[55] The Act requires that data shared under the Exchange be done so in accordance with federal law and in "such a manner as to ensure the appropriate confidentiality of personal information"; it also "shall not be used for any purpose" other than identifying and reporting on financial crimes.[56] Furthermore, the Act requires the Secretary of the Treasury to convene a team consisting of stakeholders from the public and private sector "to examine strategies to increase cooperation between the public and private sectors for purposes of countering illicit finance."[57]

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[1] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395. Division F of the NDAA is the Anti-Money Laundering Act of 2020, and Title XCVII within the bill contains additional provisions relevant to the financial services industry.

[2] This alert is not a comprehensive summary of every provision of the AMLA, the specific provisions of the law discussed herein, or the broader NDAA. For example, the NDAA contains a provision providing the SEC explicit authority to seek disgorgement in federal court, which is discussed in a separate Gibson Dunn client alert available here.

[3] AMLA, § 6314 (adding 31 U.S.C. § 5323(b)(1)).

[4] *See* 31 U.S.C. § 5323.

[5] AMLA, § 6314 (adding 31 U.S.C. § 5323(g)).

[6] Press Release, U.S. Secs. & Exch. Comm'n, *SEC Proposes New Whistleblower Program Under Dodd-Frank Act*, (Nov. 3, 2010), https://www.sec.gov/news/press/2010/2010-213.htm.

[7] U.S. Secs. & Exch. Comm'n, Whistleblower Program Annual Report 27-30 (2020), https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.

[8] Press Release, SEC Issues Record $114 Million Whistleblower Award, Securities and Exchange Commission, Oct. 22, 2020, https://www.sec.gov/news/press-release/2020-266.

[9] *Developments in the Defense of Financial Institutions – The International Reach of the U.S. Money Laundering Statutes*, Gibson Dunn (Jan. 9, 2020), https://www.gibsondunn.com/developments-in-defense-of-financial-institutions-january-2020/.

[10] Amy MacKinnon, *Biden Expected to Put the World's Kleptocrats on Notice*, Foreign Policy (Dec. 3, 2020), https://foreignpolicy.com/2020/12/03/biden-kleptocrats-dirty-money-illicit-finance-crackdown/.

[11] AMLA, § 6313 (adding 31 U.S.C. § 5335(b)).

[12] AMLA, § 6313 (adding 31 U.S.C. § 5335(c)).

[13] AMLA, § 6313 (adding 31 U.S.C. § 5335(d)).

[14] AMLA, § 6312 (adding 31 U.S.C. § 5322(e)).

[15] AMLA, § 6310 (adding 31 U.S.C. § 5321(g)).

[16] AMLA, § 6309 (adding 31 U.S.C. § 5321(f)).

[17] AMLA, § 6105.

[18] AMLA, §§ 6106, 6107, 6108.

[19] AMLA, §§ 6207, 6208, 6303.

[20] Justice Manual § 9-13.525, U.S. Department of Justice, https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.525 ("[A]ll Federal prosecutors must obtain written approval from the Criminal Division through the Office of International Affairs (OIA) before issuing any unilateral compulsory measure to persons or entities in the United States for records located abroad.").

[21] 31 U.S.C. § 5318(k)(3)(A).

[22] AMLA, § 6308 (31 U.S.C. § 5318(k)(3)(A)(i) as revised).

[23] AMLA, § 6308 (31 U.S.C. § 5318(k)(3)(A)(ii) as revised).

[24] AMLA, § 6308 (31 U.S.C. § 5318(k)(D), (E) as revised).

[25] *See* 31 U.S.C. § 5318(g)(2)(A)(i) (providing that financial institutions or their employees involved in reporting suspicious transactions may not notify "any person involved in the transaction that the transaction has been reported.").

[26] *Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices or Controlling Companies* (Jan. 20, 2006), https://www.fincen.gov/sites/default/files/guidance/sarsharingguidance01122006.pdf; Fin. Crimes Enf't Network, FIN-2010-G006, *Sharing Suspicious Activity Reports by Depository Institutions with Certain U.S. Affiliates* (Nov. 23, 2010), https://www.fincen.gov/sites/default/files/shared/fin-2010-g006.pdf.

[27] AMLA, § 6212 (adding 31 U.S.C. § 5318(g)(8)(B)(i)).

[28] AMLA, § 6212 (adding 31 U.S.C. § 5318(g)(8)(C)).

[29] AMLA, § 6212 (adding 31 U.S.C. § 5318(g)(8)(B)(iii)).

[30] Press Release, U.S. Dept. of Justice, *United States Files A Civil Action To Forfeit Cryptocurrency Valued At Over One Billion U.S. Dollars*, (Nov. 5, 2020), https://www.justice.gov/usao-ndca/pr/united-states-files-civil-action-forfeit-cryptocurrency-valued-over-one-billion-us.

[31] *United States of America v. One Pen and Ink Drawing By Vincent Van Gogh Titled "La Maison De Vincent A Arles" et al.*, No. 2:16-cv-5366 (C.D. Cal. July 20, 2016), Dkt. 1 ¶¶ 440-43, https://www.justice.gov/archives/opa/page/file/877156/download

[32] AMLA, § 6102(d); *see also* Press Release, Sen. Mark Warner, *Warner, Rounds, Jones Applaud Inclusion of Bipartisan Anti-Money Laundering Legislation in NDAA* (Dec. 3, 2020), https://www.warner.senate.gov/public/index.cfm/2020/12/warner-rounds-jones-applaud-inclusion-of-bipartisan-anti-money-laundering-legislation-in-ndaa (highlighting "[e]nsuring the inclusion of current and future payment systems in the AML-CFT regime" as among the achievements of the new NDAA).

[33] AMLA, § 6110(a)(1) (31 U.S.C. § 5312(a)(2)(Y) as amended).

[34] AMLA, § 6111(e).

[35] FATF, *Anti-money laundering and counter-terrorist financing measures in the United States: Executive Summary* 11 (2016), http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016-Executive-Summary.pdf.

[36] AMLA, § 6403 (adding 31 U.S.C. § 5336)

[37] AMLA, § 6403 (adding 31 U.S.C. § 5336(a)(11)).

[38] AMLA, § 6403 (adding 31 U.S.C. § 5336(c)(2)(B)(iii)).

[39] AMLA, § 6403 (adding 31 U.S.C. § 5336(h)(3)(A)).

[40] AMLA, § 6403 (adding 31 U.S.C. § 5336(h)(3)(B)).

[41] AMLA, § 6101(a) (adding 31 U.S.C. § 5311(b)(4)(A)).

[42] AMLA, § 6101(a) (adding 31 U.S.C. § 5311(b)(4)(C)).

[43] AMLA, § 6101(a) (adding 31 U.S.C. § 5311(b)(4)(D)).

[44] AMLA, § 6101(a) (adding 31 U.S.C. § 5311(b)(4)(E)).

[45] Blaine Luetkemeyer, Steve Pearce, *It's Time to Modernize the Bank Secrecy Act*, American Banker (June 13, 2018), https://www.americanbanker.com/opinion/its-time-to-modernize-the-bank-secrecy-act.

[46] FinCEN Report of Transactions in Currency, 85 Fed. Reg. 29,022, 29,023 (May 14, 2020), https://www.govinfo.gov/content/pkg/FR-2020-05-14/pdf/2020-10310.pdf.

[47] The Clearing House, A New Paradigm: Redesigning the U.S. AML/CFT Framework to Protect National Security and Aid Law Enforcement 13 (2017), here.

[48] *See* FinCEN Report of Reports by Financial Institutions of Suspicious Transactions, 85 Fed. Reg. 31,598, 31,599 (May 26, 2020), https://www.govinfo.gov/content/pkg/FR-2020-05-26/pdf/2020-11247.pdf.

[49] AMLA, § 6202 (adding 31 U.S.C. § 5318(g)(5)(D)).

[50] AMLA, §§ 6204, 6205.

[51] AMLA, § 6203(b).

[52] AMLA, § 6206 (adding 31 U.S.C. § 5318(g)(6)).

[53] Press Release, Fin. Crimes Enf't Network, *FinCEN Exchange in New York City Focuses on Virtual Currency*, https://www.fincen.gov/resources/financial-crime-enforcement-network-exchange.

[54] Press Release, Fin. Crimes Enf't Network, *FinCEN Launches "FinCEN Exchange" to Enhance Public-Private Information Sharing*, (Dec. 4, 2017), https://www.fincen.gov/news/news-releases/fincen-launches-fincen-exchange-enhance-public-private-information-sharing.

[55] AMLA, § 6103 (adding 31 U.S.C. § 310(d)(2), (3)).

[56] AMLA, § 6103 (adding 31 U.S.C. § 310(d)(4)(A), (4)(B), 5(B)).

[57] AMLA, § 6214.

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