BURR FORMAN LLP

A "Clean" Start to 2021: Changes to Federal Anti-Money Laundering Laws

Articles / Publications
02.12.2021

In a surprise bout of bipartisanship, and overriding a presidential veto, both chambers of Congress signaled a new priority for 2021—the strengthening of federal anti-money laundering provisions, albeit by an unexpected vehicle. That vehicle was the 2021 National Defense Authorization Act (NDAA), a bill that usually funds the military for the coming year but—this year—also codified the Anti-Money Laundering Act of 2020.

The Anti-Money Laundering Act is a significant legislative effort to curb illegal financial transactions, and Congress passed it with six goals in mind: (1) to improve coordination and information sharing among agencies tasked with anti-money laundering and terrorism financing enforcement; (2) to modernize anti-money laundering laws; (3) to encourage the advancement in technological innovation by financial institutions to counter money laundering and terrorism financing; (4) to reinforce current anti-money laundering and terrorism financing policies; (5) to establish uniform beneficial ownership requirements; and (6) to establish a database at the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN) for beneficial ownership information. None of these changes are small.

Although there are multiple amendments to anti-money laundering laws in this legislation, there are a handful of specific provisions which are of particular importance to banks and other companies in the financial services sector. Section 6314 of the NDAA amends incentives for whistleblowers—a term not currently defined under 31 U.S.C. § 5323, but which receives a statutory definition under the legislation. In addition, the NDAA increases the potential award for

RELATED PROFESSIONALS

Alex Little

G. Wade Leach

RELATED CAPABILITIES

Commercial Litigation

A "Clean" Start to 2021: Changes to Federal Anti-Money Laundering Laws

whistleblowers to up to 30 percent of the monetary penalties imposed against their employer. This is a marked increase over the past law, which stipulated that the maximum reward for an individual was the lesser of 25 percent of any penalty or $150,000. Also of note, the new whistleblower provision establishes that a group of individuals can act as a whistleblower, whereas the past law restricts any reward to "an individual."

A second, unrelated provision of the 2021 NDAA, but which also appears geared towards the fight against money laundering and the financing of terrorism, is the Corporate Transparency Act, which increases ownership disclosure requirements for corporations, limited liability companies (LLCs), or other similar business entities. Specifically, the Corporate Transparency Act targets the disclosure of an entity's "beneficial owner"—which is generally defined as an individual that, directly or indirectly, exercises "substantial control" over the company or owns or controls at least 25 percent of the ownership interests of the entity. Although many entities are exempt from the new reporting and disclosure requirements, entities subject to the proposed legislation will have to submit a report to FinCEN detailing the beneficial owner's full name, date of birth, address, and ID number. In addition to myriad other requirements, Congress has also signaled its intent that it is serious about improving transparency of ownership—and to crack down on the illegitimate use of shell companies—by establishing criminal penalties for a willful violation of these rules, such as heavy fines and imprisonment.

What are the key takeaways from these changes? For banks and other financial institutions, Congress expects a higher standard when it comes to the enforcement of anti-money laundering and similar laws. But this will come with headaches. With respect to the whistleblower provisions, there is already concern that the new language would allow internal compliance officers or others in similar positions to serve as whistleblowers, thereby creating an apparent conflict of interest. (In essence, the same individuals tasked with protecting against the violation of anti-money laundering laws could be the same people who are incentivized to report such activity to the federal government and receive a significant financial windfall for doing so.) This fear, while real, is mitigated by two realities of the banking world. First, the bank's compliance or other corporate officer's duty of loyalty and duty of care to the employer does not go away or dissipate even in light of increased incentives and protection for whistleblowers. Second, and equally, as important, a continued commitment to internal procedures and policies can proactively prevent situations on which to blow the whistle in the first place—and saving companies hundreds of thousands, if not millions, of dollars.

Banks are not the only subjects of the new rules. For companies already in existence that are subject to new beneficial ownership disclosure requirements, the good news is that there is a proposed two-year grace period before they will have to disclose ownership. It also means that companies will need to maintain awareness as to who the players owning or exercising control over the company are and will be—continuing compliance provisions will require this. Most importantly, all business entities should periodically consult with counsel to ensure that they are in compliance with these rules, lest they subject themselves to significant financial penalties or even jail time. A good rule of thumb is if you are concerned enough to question whether the rules apply, it's probably worth asking a lawyer.

A "Clean" Start to 2021: Changes to Federal Anti-Money Laundering Laws

While the long-term extent of these provisions remains unclear, it is certain that banks and other financial institutions need to have a thorough understanding of new statutory and subsequent regulatory requirements in this ever-changing landscape. Just as preventative maintenance goes a long way in preserving a home or a car, the creation of and commitment to policies and procedures that are designed in light of new anti-money laundering laws can prevent unwelcome and burdensome investigations. For those that do find themselves under investigation, it is critical to have counsel experienced in such matters and who actively monitors changes in the law.

At Burr & Forman, we are committed to thinking proactively as our clients navigate their way through never-changing statutory regulatory schemes, and we are prepared to guide individuals and businesses through profitable and smart business transactions. At the same time, when clients are subjected to investigation, we zealously represent their interests.

Just as 2021 brings a newfound hope for a return to normalcy while maintaining a prudent approach, businesses and companies should look forward to a continued economic recovery while also remaining vigilant about compliance with new laws and regulations.