Legislation / Anti-Money Laundering Act

The Anti-Money Laundering Act of 2020 creates new criminal offenses in title 31 relating to transactions involving politically exposed persons and entities designated as "primary money laundering concerns."

It also creates reporting requirements regarding the beneficial ownership of assets, imposes criminal penalties for filing false or incomplete reports, and expands the Government's authority to subpoena foreign bank records.

Anti-Money Laundering Act of 2020

Legislation * The Anti-Money Laundering Act of 2020 – which Congress has passed and sent to the President – contains the most comprehensive revisions to the Bank Secrecy Act (31 U.S.C. § 5311, *et seq.*) since the enactment of the USA Patriot Act in 2001.

Most of the provisions of the Act relate to the powers and duties of FinCEN and the details of the anti-money laundering compliance programs that financial and non-financial institutions are required to implement. There are no amendments to the criminal money laundering statutes in title 18 or to the related asset forfeiture provisions. Thus, prosecutors and law enforcement officials may view the Act as a missed opportunity to update the criminal money laundering laws. Nevertheless, the Act does contain some changes to the criminal provisions of the Bank Secrecy Act that will be of interest to law enforcement.

Section 6313 of the Act creates a new criminal offense at 31 U.S.C. § 5335 involving the assets of "politically exposed persons" or "PEPs". It makes it an offense for any person to conceal, falsify, or misrepresent a material fact "concerning the ownership or control of assets involved in a monetary transaction" if the assets are owned or controlled by a PEP and comprise more than $1,000,000. It also makes it an offense to conceal, falsify, or misrepresent facts concerning the source of funds in a transaction involving an entity that the Secretary of the Treasury has found to be a "primary money laundering concern," as that term is defined in 31 U.S.C. § 5318A.

The new Section 5335 has its own penalty section with a maximum period of incarceration of 10 years, and its own civil and criminal forfeiture provisions authorizing the forfeiture of all "property involved" in a violation of the statute. The forfeiture language mirrors the language in 31 U.S.C. § 5317, which provides the forfeiture authority for most of the Bank Secrecy Act.

Section 6403 of the Act also creates a new statute at 31 U.S.C. § 5336 that requires financial institutions and others to identify the beneficial owners of assets and file certain reports with FinCEN. To many, this provision is the centerpiece of the Act, in that it responds to years of appeals for regulations requiring greater transparency regarding the ownership of assets in or moving through the United States.

The sanction for failing to comply with the new disclosure requirements is set forth in Section 5336(h), which makes it an offense to provide false or fraudulent beneficial ownership information, or to fail to report complete or updated information. Unfortunately, the penalty for this offense is unclear.

Section 5336(h)(3) says that the maximum penalty for a violation of the statute is two years imprisonment and a $10,000 fine. Another part of the Act, however, amends the general penalty provision in 31 U.S.C. § 5322 to include Section 5336 in the list of offenses for which the maximum penalty is five years and a $250,000 fine, or double those amounts if the offense involves more than $100,000 in a 12-month period.

The Act does not make a parallel amendment to Section 5317, however, so there is no forfeiture provision for Section 5336. Both of the new statutes will be RICO predicates, but because offenses codified in title 31 are excluded from the list of RICO predicates that are incorporated in the money laundering statute, neither of the new offenses will be a money laundering predicate.

Otherwise, the parts of the Act that will be of the most interest to prosecutors will be the revisions to the process for issuing subpoenas to foreign banks in 31 U.S.C. § 5318(k). That statute, originally enacted as part of the USA Patriot Act, creates a procedure whereby a foreign financial institution doing business in the United States may be subject to sanctions, including the loss of the ability to maintain a correspondent bank account in the U.S., if it fails to respond to a subpoena for foreign bank records.

Section 6308 of the Act clarifies and expands the ability of U.S. law enforcement to use this authority, and it amends the obstruction of justice statute, 18 U.S.C. § 1510, to include the obstruction of a Section 5318(k) subpoena as a criminal offense. It also expands the list of subpoenas covered by the obstruction of justice statute to include subpoenas relating to violations of 18 U.S.C. § 1960, to foreign crimes that constitute money laundering predicates, and to foreign crimes for which a foreign forfeiture judgment may be enforced under 28 U.S.C. § 2467.

Finally, the Act creates a “pilot program” in the Treasury Department for the payment of rewards in connection with the recovery of assets in kleptocracy cases (Section 9703), and mandates a large number of studies and reports including a five-year study of the efficacy of currency transaction reports (Section 6504), a one-year study on whether the threshold reporting amount should be raised (Section 6205), and a study of trade-based money laundering (Section 6506). *SDC*