

BSA/AML Update: Significant New Requirements Ahead

By James M. Kane, James W. Morrissey, Daniel C. McKay, II, Jennifer Durham King, Juan M. Arciniegas and Mark C. Svalina

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Effective January 1, 2021, the National Defense Authorization Act for Fiscal Year 2021 (the “Act”) became law. Among other provisions, the Act contains the most significant changes to the Bank Secrecy Act (the “BSA”) since 2001. Most significantly, the Act requires the Department of the Treasury, through the Financial Crimes Enforcement Network (“FinCEN”), to adopt regulations within one year that will establish a framework by which smaller, closely held businesses, regardless of the type of enterprise (e.g., corporation, limited liability company or partnership) will be required to disclose their beneficial ownership to FinCEN.

What are the new BSA/AML requirements for U.S. corporate entities?

- Each “reporting company” that is formed/registered after the effective date of the forthcoming regulations must, at the time of formation or registration, submit to FinCEN a report that identifies the beneficial owners of the company.
- Each “reporting company” that has been formed/registered before the effective date of the forthcoming regulations must submit to FinCEN a report that identifies the beneficial owners of the company within two years after the effective date.

Will reporting companies be required to update previously reported beneficial ownership information?

Yes. A reporting company will be required to file, no later than one year after the date on which there is a change to any information submitted to FinCEN, a report that updates the company’s beneficial ownership information.

Who is a “reporting company”?

A “reporting company” is defined as meaning any corporation, limited liability company or other similar entity that was either (i) created by the filing of a document with a secretary of state or a similar office or (ii) formed under the law of a foreign country and was registered to do business in the United States by the filing of a document with a secretary of state or a similar office.

Are certain entities exempted from the “reporting company” definition?

Yes. In general, the below entities are exempted from the new registration requirements.

- Any entity that (i) employs more than 20 employees on a full-time basis in the United States, (ii) filed in the previous year federal income tax returns in the United States demonstrating more than \$5 million in gross receipts or sales in the aggregate, including the receipts or sales of (a) other entities owned by the entity; and (b) other entities through which the entity operates; and (iii) has an operating presence at a physical office within the United States.
- Any corporation, limited liability company or other similar entity (i) in existence for over one year; (ii) that is not engaged in active business; (iii) that is not owned, directly or indirectly, by a foreign person; (iv) that has not, in the preceding 12-month period, experienced a change in ownership or sent or received funds in an amount greater than \$1,000 (including all funds sent to or received from any source through a financial account or

accounts in which the entity, or an affiliate of the entity, maintains an interest); and (v) that does not otherwise hold any kind or type of assets, including an ownership interest in any corporation, limited liability company or other similar entity.

- Federal and state chartered banks and credit unions.
- Bank holding companies.
- Money transmitting businesses registered with FinCEN.
- Brokers and dealers registered with the Securities and Exchange Commission (the “SEC”).
- Investment companies and investment advisers registered with the SEC.
- Insurance companies.
- Any registered entity under the Commodity Exchange Act.
- Public utilities.
- Pooled investment vehicles.
- Entities described under Section 501(c) of the Internal Revenue Code (the “IRC”) and exempted from taxation under Section 501(a) of the IRC.
- Federal, state and local government entities.
- Any corporation, limited liability company or other similar entity of which the ownership interests are owned or controlled, directly or indirectly, by one or more entities described above.

In addition, the Department of the Treasury with the concurrence of the Department of Justice and the Department of Homeland Security may exempt any entities from the new registration requirements pursuant to regulation. While the Act gives the Department of the Treasury one year to adopt rules, financial institutions should anticipate that they will be obligated to obtain proof of compliance with the Act as part of their customer due diligence account opening procedures.

Who is a “beneficial owner”?

A “beneficial owner” is defined as meaning an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25% of the ownership interests of the entity.

A beneficial owner does not include the following persons: (i) a minor child, if the information of the parent or guardian of the minor child is reported; (ii) an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual; (iii) an individual acting solely as an employee of an entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person; (iv) an individual whose only interest is through a right of inheritance; or (v) a creditor of an entity, unless the creditor exercises substantial control over the entity through any contract, arrangement, understanding or relationship.

How will the newly reportable information be used?

According to the Act, FinCEN will place the information into a “secure, nonpublic database, using information security methods and techniques that are appropriate to protect nonclassified information systems.” Government authorities, including law enforcement and bank regulators, will have access to the system. A financial institution that is subject to the customer due diligence rules of the BSA will, with the consent of a reporting company, have access to that reporting company’s registration. **Once final rules are in place, it seems likely that upon the opening of any account for a business, a financial institution will be required as part of its due diligence to ascertain that the business is registered with FinCEN or that it is entitled to an exemption from the definition of a reporting company.**

To view the full text of the Act, [click here](#).

If you have any questions regarding the topics discussed in this article, please contact **James M. Kane** at +1 (312) 609 7533, **James W. Morrissey** at +1 (312) 609 7717, **Daniel C. McKay, II** at +1 (312) 609 7762, **Jennifer Durham King** at +1 (312) 609 7835, **Juan M. Arciniegas** at +1 (312) 609 7655, **Mark C. Svalina** at +1 (312) 609 7741, or any Vedder Price attorney with whom you have worked.