

# Arnold & Porter

July 28, 2022

## Update: Congress Seeks to Impose Some AML Obligations on CPAs, Law Firms, and Others

Advisory

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*On July 7, 2022, Arnold & Porter published an Advisory on the Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act (ENABLERS Act) that was attached to the National Defense Authorization Act (NDAA) on June 23, 2022. Since the previous Advisory, the House has made substantial amendments to the ENABLERS Act, particularly with respect to the categories of professions that would be subject to the due diligence and reporting obligations under the Bank Secrecy Act. This Advisory highlights the recent amendments.*

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Congress continues to push forward on the NDAA for Fiscal Year 2023. On June 23, 2022, the House Committee on Armed Services attached the Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act (ENABLERS Act or the Act) to the NDAA by voice vote.<sup>1</sup> The bipartisan bill, sponsored by Tom Malinowski (D-NJ) and Joe Wilson (R-SC), seeks to amend the Bank Secrecy Act and related anti-money laundering (AML) laws (collectively, the BSA) to expand the universe of professionals and entities that will be responsible for conducting due diligence on their clients.

On July 13, 2022, the House adopted amendments to the NDAA that substantially alter the proposed applicability of the ENABLERS Act.<sup>2</sup> Representative Maxine Waters (D-CA), Chairwoman of the House Financial Services Committee, suggested amending the language from the ENABLERS Act during the Rules Committee process. Her recommended amendment was adopted in en bloc voting with a vote of 277-150. The **amendment** made the following changes:

- The amendment removes persons who provide investment advice for compensation from the list of covered professions;
- The amendment removes persons who trade in works of art, antiques, or collectibles from the list of covered professions;
- The amendment broadens the coverage of professionals who provide, *with or without compensation*: corporate or other legal entity arrangement, association, or formation services; trust services; or third party payment services to include “any person, excluding any governmental entity, employee, or agent;”
- The amendment removes attorneys, law firms, or notaries involved in financial or related activity on behalf of another person, as well as certified public accountants, and public accounting firms from the list of covered professions;
- The amendment, instead, reaches “any person, excluding any governmental entity, employee, or agent” that engages in *legal or accounting services that involve financial activities*, with or without compensation, that facilitate:

- Corporate or other legal entity arrangement, association, or formation services;
- Trust services; or
- Third party payment services.

So long as the funds “are not direct payments or compensation for civil or criminal defense matters;” and

- The amendment removes from the list of covered professions, persons engaged in the business of public relations, marketing, communications, or other similar services in such a manner as to provide another person anonymity or deniability; and
- The amendment no longer requires FinCEN to impose suspicious activity reporting requirements on all “financial institutions” that are not currently subject to such requirements, such as pawnbrokers, travel agencies, auto dealerships, and other groups that FinCEN has had the authority to regulate but failed to create rules. 31 U.S.C. §§ 5312 (a)(2)(O), (a)(2)(Q), (a)(2)(T).

The key takeaway from the amendment is that the Act’s focus has shifted to the relevant services rather than professions as a whole. For example, rather than impose BSA requirements on any attorney or law firm involved in financial activity on behalf of another person (as proposed in the June 23, 2022, version of the ENABLERS Act), the amended Act would impose BSA requirements only on those attorneys or law firms providing legal entity arrangement, association, or formation services; trust services; or third-party payment services; that is, the types of services that potentially create the transparency concerns that the ENABLERS Act seeks to address. This shift avoids some of the concerning implications we raised in our previous Advisory.<sup>3</sup>

The amendment requires the Treasury Secretary to issue a rule to determine what persons will fall within the Act and to prescribe appropriate requirements within a year after the Act is enacted. The amendment directs Treasury to ensure the burden of the rule is minimal while still maximizing the intended outcome of the rule. The amendment also requires Treasury, in determining what persons fall within the covered professions, to include:

- Any person involved in the formation or acquisition of corporate entities, as well as other related services including the management of assets and wires;
- Any person involved in tax preparation or filing on behalf of a foreign individual, trust, or fiduciary in relation to a US investment, transaction, trade, or business;
- Any person acting as, or arranging for, a registered agent, trustee, or other similar rules; and
- Any person, wherever organized or doing business, that is owned or controlled by a person involved in the above services.

Finally, the amendment no longer requires Treasury to impose all five BSA pillars to the newly contemplated parties. Instead, the amended bill permits FinCEN to determine which of the five pillars must be complied with by a covered party.

On July 18, 2022, Senator Jack Reed (D-RI) introduced the Senate version of the NDAA. It is currently before the Senate Armed Services Committee and has been placed on the legislative calendar. The current Senate version of the NDAA does not include a similar bill to expand the applicability of BSA requirements.<sup>4</sup>

## Implications

The amendment to the Act makes numerous commonsense changes to the original bill and provides FinCEN with a degree of regulatory flexibility. Nonetheless, if the current amended language survives conference, passage of the Act with the NDAA

still will result in a significant expansion of AML obligations. How FinCEN will implement the statute also remains to be seen. We still anticipate significant attention and input from newly impacted groups that offer the covered services, and the rulemaking obligations under the Act would add to FinCEN's already full regulatory agenda. Two issues, in particular, highlight the complexity of FinCEN's task ahead if Congress passes the amended Act with the NDAA; namely: (1) extraterritoriality; and (2) enforcement.

First, an extraterritoriality provision has been added in Section 5337(d). This provision will require clarification from FinCEN on how it would apply to the covered services provided either by international actors with US clients or vice versa. Even with explicit extraterritorial jurisdiction, a number of issues may arise during enforcement, namely: due process challenges and international comity arguments. These challenges will be particularly relevant if the ENABLERS Act provisions are enforced against entities in countries where the United States has poor diplomatic relations or where corruption is a widespread issue. It is foreseeable that a number of the issues attendant with the USA PATRIOT Act and USA PATRIOT Act subpoenas could arise if the Act passes and is subsequently challenged when enforced, unless interested parties offer guidance on appropriate limiting language.

Second, the rule of construction provision provides that privilege, ethics, confidentiality, privacy, or related matters should not limit or impede the covered parties' obligation to comply with the Act. FinCEN would need to address how lawyers and certified public accountants could address AML program reporting obligations without jeopardizing their respective ethical duties of confidentiality and other professional conduct responsibilities to their clients. And with the extraterritoriality provision, the dilemma also would arise for foreign professional, who are subject to their own professional responsibility requirements. The implication of this provision is that compliance with federal obligations should win out over other territorial, state, and local laws when a conflict arises between a lawyer or accountant's obligations.

For additional information on BSA/AML reform, including FinCEN's efforts under the Anti-Money Laundering Act of 2020 (AML Act), please visit the Arnold & Porter's [BSA/AML Reform Resource Center](#), where we track the legal developments and rulemaking resulting from the AML Act and provide our insights on the impact on the financial services industry. Financial advisors, trust companies, accountants, lawyers, art dealers, and others interested in this proposed BSA/AML reform, related rulemaking, and the impact on their businesses may contact any of authors of this Advisory or their regular Arnold & Porter contact. The firm's Financial Services team would be pleased to assist with any questions about the proposed reform or BSA/AML compliance and enforcement more broadly.

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<sup>1</sup> See press release (Jun. 23, 2022).

<sup>2</sup> See H.R. 7900—National Defense Authorization Act for Fiscal Year 2023 | House of Representatives Committee on Rules.

<sup>3</sup> See Advisory.

<sup>4</sup> See S.4543 - 117th Congress (2021-2022): James M. Inhofe National Defense Authorization Act for Fiscal Year 2023.