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COMMENTARY

The Forthcoming ENABLERS Act: What's in Store for the World of Anti-Money Laundering

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In today's society, "it's like the more money we come across, the more problems we see."¹ The world is interconnected like never before, and U.S. regulators have taken the position that the free flow of money presents risks to financial systems and public safety.² Congress first attempted to regulate the flow of money through anti-money laundering ("AML") regulation in 1970, beginning with the Bank Secrecy Act ("BSA").³ Since the BSA, Congress has enacted seven additional major regulations to enhance AML controls.⁴ Despite this, global AML systems are viewed by many industry experts as a failure.⁵ Congress is back at it again with a new AML progeny in its sights: the ENABLERS Act.⁶

The regulation boasts itself as modernizing the list of parties with diligence obligations in order to close loopholes that render existing AML tools largely ineffective.⁷

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¹ The Notorious B.I.G., *Mo' Money Mo' Problems* (Bad Boy Records 1997).

² *History of Anti-Money Laundering Laws*, FIN. CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/history-anti-money-laundering-laws> (last visited Sept. 14, 2022).

³ *Id.*

⁴ *Id.*

⁵ *The War Against Money-Laundering Is Being Lost*, ECONOMIST (Apr. 12, 2021), <https://www.economist.com/finance-and-economics/2021/04/12/the-war-against-money-laundering-is-being-lost>. See also Ronald F. Pol, *The Global War on Money Laundering is a Failed Experiment*, CONVERSATION (OCT. 20, 2019), <https://theconversation.com/the-global-war-on-money-laundering-is-a-failed-experiment-125143>.

⁶ ENABLERS Act, H.R.5525, 117th Cong. (2021); later included as an amendment within National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117th Cong. (2022).

⁷ Rep. Malinowski & Rep. Salazar, *ENABLERS ACT: Confronting the "Enablers" of International Money Laundering & Putin's Kleptocrats*, <https://malinowski.house.gov/sites/evo-subsites/malinowski.house.gov/files/evo-media-document/ENABLERS%20Summary%20Docs%20%20RUSSIA%20Update2.pdf> (last visited Sept. 14, 2022).

The current scope of BSA-regulated parties is narrow: any foreign or domestic financial institution or individual, so long as it facilitates a banking transaction through the United States.⁸ The Act, as written, expands BSA obligations to nearly every type of business imaginable, including accountants, payment service providers, trust companies, and in some instances, lawyers.⁹ The goal in doing so is to entangle all possible “gatekeepers” to financial activities—categories of businesses that have had an increased spotlight in the wake of various financial document leaks.¹⁰ Even the world art market finds itself in the crosshairs of the Act,¹¹ despite the government’s own study that failed to find a nexus between art markets and terrorism financing risk.¹² This represents a drastic expansion of government oversight, namely because of AML’s enforcement through audit power given to the Department of the Treasury.¹³

For most Americans, the most prominent aspect of the Act is the expansion of regulated payment processors. Previously, the payment-processing industry was largely unaffected by the BSA.¹⁴ Non-bank entities that fell under BSA did so for obvious reasons. Western Union, for example, was a tool for sending money to persons abroad and was therefore classified as a regulated Money Service Business (“MSB”).¹⁵ Now, ordinary transactions through services such as PayPal, Venmo, and Cash App will fall within the realm of the BSA.¹⁶

From a business perspective, much of the Act’s weight falls on the real estate industry. Due to the size and volume of real estate transactions involving foreign funding, they are often scrutinized as a potential store of wealth for proceeds of global corruption or

⁸ *Who Is Subject to US AML Laws?*, WILLKIE COMPLIANCE, <https://complianceconcourse.willkie.com/resources/anti-money-laundering-us-who-is-subject-to-us-aml-laws> (last visited Sept. 14, 2022).

⁹ Sam Skolnik, *Lawyers Fight Bill Forcing Them to Report Suspicious Client Acts*, BLOOMBERG LAW (Aug. 29, 2022), <https://news.bloomberglaw.com/business-and-practice/lawyers-fight-bill-forcing-them-to-report-suspicious-client-acts>.

¹⁰ Will Fitzgibbon, *House Committee Advances ‘Once in a Generation’ Crackdown on Enablers of Financial Crime*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (June 23, 2022), <https://www.icij.org/investigations/pandora-papers/congress-advances-once-in-a-generation-crackdown-on-enablers-of-financial-crime/>.

¹¹ Nicholas O’Donnell, *“ENABLERS Act” Pursues Art Market but Threatens Longstanding Protections Against Government Intrusion*, JD SUPRA (July 21, 2022), <https://www.jdsupra.com/legalnews/enablers-act-pursues-art-market-but-3546971/>.

¹² *Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art*, U.S. DEP’T TREASURY (Feb. 2022), https://home.treasury.gov/system/files/136/Treasury_Study_WoA.pdf.

¹³ *Id.*

¹⁴ Peter D. Hardy & James Mangiaracina, *Closing the Gate: House Adopts ENABLERS Act Amendment to 2023 NDAA*, ONPRACTICE (July 21, 2022), <https://onpractice.law.com/4053650/closing-gate-house-adopts-enablers-act-amendment-2023-ndaa>.

¹⁵ *Money Services Business Definition*, FIN. CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/money-services-business-definition> (last visited Sept. 14, 2022).

¹⁶ ENABLERS Act, *supra* note 6.

a means to avoid sanctions.¹⁷ The Act erodes the discreet nature of many real estate transactions, imposing BSA requirements upon anybody involved in the financing or legal entity arrangement of a transaction.¹⁸

On its face, the ENABLERS Act stands to become the most modern and agile tool in the fight against money laundering. Time will tell whether it accomplishes this goal, or, like its predecessors, falls short of preventing the illicit flow of funds and creates administrative burdens in many industries.

¹⁷ Malinowski & Salazar, *supra* note 7.

¹⁸ *AML Takeaways From Watchdog's Real Estate Guidance*, LAW360 (Aug. 29, 2022), <https://plus.lexis.com/api/permalink/c392566f-1527-4dfd-a29b-a71ed01597d6/?context=1530671>.