

**TO:** Interested Parties

**From:** Transparency International U.S.

**Date:** September 30, 2022

**Re:** How the ENABLERS Act Would Be Implemented and Enforced

The U.S. Congress is currently considering legislation known as the ENABLERS Act (the “Act”)<sup>1</sup> that would empower the U.S. Department of the Treasury (“Treasury”) to require people who provide certain discrete financial services to their clients to adopt at least one anti-money laundering (“AML”) procedure that can help detect, flag, and prevent the laundering of corrupt and other criminal money into the United States. The Act accomplishes this by amending the definition of “financial institution” in the federal Bank Secrecy Act (“BSA”).<sup>2</sup> This memo explains how the bureau within Treasury responsible for implementing and enforcing the BSA, the Financial Crimes Enforcement Network (“FinCEN”), currently applies the BSA to financial institutions—such as brokers and dealers, casinos, jewelers, currency exchanges, and pawnbrokers, among many others—and discusses how the Act complements and enhances this approach in applying the BSA to the service providers listed in the Act. Writ large, the memo illustrates how the Act would be implemented and enforced, in practice, were it to become law.

**A. The ENABLERS Act builds upon FinCEN’s existing implementation and enforcement practices under the BSA.**

The BSA empowers Treasury to ensure that financial institutions comply with the law’s requirements. In particular, it authorizes the Secretary of the Treasury to “examine any books, papers, records, or other data . . . relevant to . . . recordkeeping or reporting requirements.”<sup>3</sup> And within Treasury, FinCEN is the bureau that is vested with “overall authority for enforcement.”<sup>4</sup> FinCEN, in turn, has delegated the authority to examine BSA-covered institutions to determine compliance to a long list of federal agencies.<sup>5</sup>

For example, the Internal Revenue Service (“IRS”) is responsible for examining a wide range of BSA-covered institutions, including casinos and jewelers.<sup>6</sup> Other federal agencies listed include the Securities and Exchange Commission and the Federal Home Loan Bank Board. Big

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117<sup>th</sup> Cong. §5401(12) (2021-2022).

<sup>2</sup> See 31 USC §5312(a)(2).

<sup>3</sup> 31 USC §5318(a)(3).

<sup>4</sup> 31 CFR §1010.810(a)

<sup>5</sup> See 31 CFR §1010.810(b) (outlining the existing delegations of examination powers). See also 31 USC §5318(a)(1); Federal Financial Institutions Examination Council, *Interagency Statement on Enforcement of Bank Secrecy Act/Anti-Money Laundering Requirements* (Jul. 19, 2007) available at <https://www.occ.gov/news-issuances/news-releases/2007/pub-other-state-2007-76.pdf>. “The federal banking agencies may use their authority, as granted under section 8 of the FDIA or section 206 of the FCUA, to enforce compliance with appropriate banking rules and regulations, including compliance with the BSA.” (Federal Financial Institutions Examination Council, *Bank Secrecy Act/Anti-Money Laundering Manual* (Feb. 27, 2015) available at [https://bsaaml.ffiec.gov/docs/manual/01\\_Introduction/01.pdf](https://bsaaml.ffiec.gov/docs/manual/01_Introduction/01.pdf)).

<sup>6</sup> 31 CFR §1010.810(b)(8). See also Memorandum of Understanding and Delegation of Authority to Examine Nonfinancial Trades and Businesses (Apr 21, 2015), available at [https://www.irs.gov/irm/part4/irm\\_04-026-001](https://www.irs.gov/irm/part4/irm_04-026-001)

picture, each of these agencies submit periodic compliance reports to FinCEN, and may immediately refer to FinCEN violations of the BSA that they come across during their examinations.<sup>7</sup>

There are several examples from this past year alone where such interagency cooperation featured prominently in FinCEN enforcement actions. In one action, for example, the IRS commenced an examination of a company that owned and operated a predominantly cash-based perfume store that was operating in violation of a Geographic Targeting Order (an order issued by Treasury requiring any financial institutions that exist within a geographic area to report on transactions greater than a specified value).<sup>8</sup> FinCEN conducted a civil enforcement investigation and ultimately imposed a \$275,000 penalty.

The Act retains, builds upon, and, importantly, provides new funding for this existing enforcement structure.<sup>9</sup> As the Act amends the BSA, FinCEN would retain the ability to delegate its examination authority over ENABLERS-covered entities to a separate federal agency, or multiple federal agencies. Given the diversity of covered entities, however, it could also choose to keep this authority in-house. The relevant point is that this available option permits FinCEN to more efficiently and cost-effectively ensure compliance.

At the same time, the Act also expressly empowers the Secretary of the Treasury to “conduct random audits”<sup>10</sup> of ENABLERS-covered entities. This separate authority is designed to further ensure effective enforcement and compliance with the Act and is a natural extension of the authority that Treasury and FinCEN already have vis-a-vis other financial institutions under the BSA, as discussed above. Just as FinCEN can do with its examination authority, the Secretary could choose to delegate this auditing authority to one or more federal agencies in order to maximize efficiency and cost-effectiveness, and to better ensure compliance. The Secretary could also vest this authority with FinCEN, or keep it in-house. These options will help the Secretary effectuate Congress’s intent to “adequately protect the U.S. financial system, identify funds and assets that are the proceeds of corruption” and “support foreign states in their efforts to combat corruption and promote good governance.”

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<sup>7</sup> 31 CFR §1010.810(e).

<sup>8</sup> A&S World Trading Incorporated (FinCEN Feb. 2022), *available at* [https://www.fincen.gov/sites/default/files/enforcement\\_action/2022-04-01/AS%20World%20Trading%20Consent%20Order%20FINAL.pdf](https://www.fincen.gov/sites/default/files/enforcement_action/2022-04-01/AS%20World%20Trading%20Consent%20Order%20FINAL.pdf) (A&S World Trading Incorporated was a “nonfinancial trade or business” under 31 U.S.C. §5312(a)(4) subject to the currency reporting requirements under 31 U.S.C. §5313. A&S owned and operated a predominantly cash-based perfume store operating in violation of a GTO.)

<sup>9</sup> National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117<sup>th</sup> Cong. §5337(e) (2021-2022). *See also* §5337(f) ‘Authorization of Appropriations’.

<sup>10</sup> *Id.* at §5337(e)(1). Note that while 31 USC §5318(a)(3), for example, authorizes the Secretary of the Treasury to “examine any books, papers, records, or other data . . . relevant to . . . recordkeeping or reporting requirements,” the BSA has heretofore referred to “auditing” primarily in the context of covered entities self-monitoring to ensure compliance. 31 USC §5318(h)(1)(d), for example, instructs financial institutions to “guard against money laundering and the financing of terrorism” by operating, amongst other things, “an independent audit function to test programs.”

**B. To ensure successful implementation and enforcement, the Act builds upon Treasury and FinCEN’s state, local, territorial, and tribal engagement—and provides resources to support that relationship.**

In practice, FinCEN’s current BSA implementation, enforcement, and compliance efforts are furthered by coordination and engagement activities focused on information sharing.<sup>11</sup> For example:

- The order establishing FinCEN in 1990 instructed the bureau to furnish “research, analytical, and informational services to . . . Federal, State, local, and foreign law enforcement”;
- FinCEN partners with “state, local, and U.S. Government colleagues . . . [to] direct [its] operational information sharing and engagement with domestic and international stakeholders”;<sup>12</sup>
- The 1992 Annunzio-Wylie Anti-Money Laundering Act established a BSA Advisory Group chaired by the Director of FinCEN and composed of a diverse array of members, including “non-federal regulators and law enforcement agencies.”<sup>13</sup> Such engagement with federal and state authorities is complemented by FinCEN’s interaction with industry groups.<sup>14</sup>

First, the Act builds upon this robust practice of engagement and information sharing in order to ensure proper implementation.<sup>15</sup> Specifically, it authorizes Treasury to “establish relationships with State, local, territorial, and Tribal governmental agencies”<sup>16</sup> and work collaboratively with them to “implement . . . the [AML] regulations prescribed.”<sup>17</sup> The Act also specifically empowers the Treasury to provide “[advice] on necessary revisions to . . . relevant professional licensure [standards].”<sup>18</sup> These provisions will allow FinCEN to collaborate with

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<sup>11</sup> This approach is baked into the BSA itself. 31 USC §5311(5), for example, states that one of the BSA’s main goals is to “establish appropriate frameworks for information sharing among financial institutions . . . regulatory authorities, associations of financial institutions, the Department of the Treasury, and law enforcement . . .” 31 USC §5334(b) authorizes the Secretary of the Treasury to issue training materials “in consultation with . . . Federal, State, Tribal, and local law enforcement agencies.”

<sup>12</sup> FinCEN, FinCEN Realigns Division to Increase Strategic Capabilities (Nov. 25, 2019), *available at* <https://www.fincen.gov/news/news-releases/fincen-realigns-division-increase-strategic-capabilities>. In 2017, The FinCEN Exchange Program convenes “regular briefings with financial institutions to exchange information on priority illicit finance threats . . . in close coordination with law enforcement.” (FinCEN, FinCEN Launches “FinCEN Exchange” to Enhance Public-Private Information Sharing (Dec. 4, 2017), *available at* <https://www.fincen.gov/news/news-releases/fincen-launches-fincen-exchange-enhance-public-privateinformation-sharing>).

<sup>13</sup> Bank Secrecy Act Advisory Group; Solicitation of Application for Membership, 86 Fed. Reg. 73090 (Dec. 23, 2021).

<sup>14</sup> *See ex. Joint Fact Sheet on Bank Secrecy Act Due Diligence Requirements for Charities and Non-Profit Organizations* (Nov. 19, 2020), *available at* <https://home.treasury.gov/system/files/266/2020-11-19-Charities-Fact-Sheet-FINAL.pdf>. Since 2019, FinCEN has held monthly “Innovation Hours” where “financial institutions, technology providers, venture capitalists, and other firms . . . [can] showcase their innovative products, services, investments, and business processes or approaches designed to enhance AML.” (FinCEN, *FinCEN’s Innovation Initiative*, <https://www.fincen.gov/resources/fincens-innovation-initiative> (last visited Sept. 13, 2022)).

<sup>15</sup> National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117<sup>th</sup> Cong. §5337(e)(2)(a) (2021-2022).

<sup>16</sup> *Id.* at §5337(e)(1).

<sup>17</sup> *Id.* at §5337(e)(2).

<sup>18</sup> *Id.* at §5337(e)(2)(B).

and work alongside a wide range of sub-national entities, including regulators of legal and accounting professionals. Ensuring up-to-date professional licensing and a robust relationship with the entities in charge of those processes will help garner buy-in from regulated communities and ensure that they are aware of their new obligations.

The Act also builds upon a practice of engagement and information sharing in order to ensure proper enforcement of the Act. For example, the BSA already authorizes Treasury to “rely on examinations conducted by a State supervisory agency”<sup>19</sup> in support of FinCEN’s enforcement actions, and requires Treasury to work with “State bank supervisors, State credit union supervisors, and the Federal functional regulators”<sup>20</sup> when imposing obligations to report suspicious transactions. The Act complements these enforcement approaches by, again, authorizing Treasury to “establish relationships with State, local, territorial, and Tribal governmental agencies”<sup>21</sup> and work collaboratively with them to “enforce the [AML] regulations prescribed.”<sup>22</sup> Yet it also authorizes Treasury to “[work] with State, local, territorial, and Tribal governmental agencies to levy professional sanctions on persons who facilitate corruption, money laundering, the financing of terrorist activities, and other related crimes.”<sup>23</sup>

Perhaps most importantly, the Act authorizes Congress to provide Treasury with the resources and funding needed for it to partner with state, local, territorial, and tribal authorities effectively. This would include funds for Treasury to establish relationships with these agencies and to work collaboratively with them to implement and enforce the Act, as well as funds to “pay reasonable costs relating to compliance with or enforcement of” the Act—therefore not neglecting the costs incurred by state, local, territorial, and tribal law enforcement whose investigations, information sharing, and other assistance will further BSA compliance.<sup>24</sup>

Altogether, the authorities and approaches provided by the Act all reflect, build upon, and further what the bureau has been doing for decades to combat illicit finance and corruption with regard to the financial institutions already included in the BSA.

*For any questions or additional discussion, please do not hesitate to contact Scott Greytak, Director of Advocacy for Transparency International U.S., at [sgreytak@transparency.org](mailto:sgreytak@transparency.org).*

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<sup>19</sup> 31 USC §5318(a)(6).

<sup>20</sup> 31 USC §5318(g)(5)(b). The BSA adopts the definitions of ‘state bank supervisor’ and ‘state credit union supervisor’ that are found in §6003 of the Anti-Money Laundering Act of 2020. That section in turn uses the definitions in the Federal Deposit Insurance Act (12 U.S.C. §1813(r)(1)) for the former and the Federal Credit Union Act (12 U.S.C. §1757(a)(e)) for the latter. A ‘state bank supervisor’, for example, is “any officer, agency, or other entity of any State which has primary regulatory authority over State banks or State savings associations in such State.”

<sup>21</sup> *Id.* at §5337(e)(1).

<sup>22</sup> *Id.* at §5337(e)(2).

<sup>23</sup> National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117<sup>th</sup> Cong. §5337(e)(2)(D) (2021-2022).

<sup>24</sup> *Id.* at §5337(f). This funding will likely also assist state and local law enforcement with existing BSA compliance efforts.