THE ANTI-MONEY LAUNDERING AND CORPORATE TRANSPARENCY ACTS OF 2020:

Overview and Brief Summary

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Executive Summary

- National Defense Authorization Act for 2021 ("NDAA") enacted January 1, 2021

  - Includes the **Anti-Money Laundering Act ("AMLA")** and the **Corporate Transparency Act ("CTA")**

  - Most significant revisions to U.S. anti-money laundering / countering the financing of terrorism ("AML/CFT") laws since USA PATRIOT Act of 2001

- CTA introduces broad **beneficial ownership disclosure requirements** that will affect U.S. companies across industries and sectors

  - Response to longstanding criticism of U.S. for insufficient corporate transparency

- Other key features of AMLA:

  - **Foreign bank subpoena power │ Whistleblower program │ Digital asset/cryptocurrency provisions**

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Three Key Takeaways

1. **Immediate impacts of the AMLA and CTA are limited**; numerous rulemakings are required to implement

   » Statute calls for action in next 12-18 months

   » Early indications suggest Treasury will act sooner, though effective dates likely to be deferred

   » Important provisions are self-executing (*e.g.*, foreign bank subpoena power, whistleblower program)

2. Biden **administration appointees will have substantial influence** over ultimate regulations

   » Designee for key position not yet confirmed: Treasury Undersecretary for Terrorism and Financial Intelligence

3. More **significant impacts on AML programs** forthcoming

   » AML program will need to accommodate national priorities

   » CDD rule revisions to address new national registry

CREATION OF NATIONAL CORPORATE REGISTRY

- CTA requires "**reporting companies**" to disclose beneficial ownership information either:
  - at formation, for new entities; or
  - two years after implementing regulations, for existing companies
  - Information is to be stored and retained in a FinCEN database pursuant to "appropriate protocols" to protect "the **security and confidentiality of information provided**"
    - Reporting mechanics and database design subject to future rulemaking

- "Beneficial owners" are individual(s) :
  - "exercis(ing] **substantial control**" or
  - owning **25% or more of the ownership interests** of an entity

H. R. 6395—1217

TITLE LXIV—ESTABLISHING BENE-FICIAL OWNERSHIP INFORMATION REPORTING REQUIREMENTS

Sec. 6401. Short title.
Sec. 6402. Sense of Congress.
Sec. 6403. Beneficial ownership information reporting requirements.

SEC. 6401. SHORT TITLE.

This title may be cited as the "Corporate Transparency Act".

SEC. 6402. SENSE OF CONGRESS.
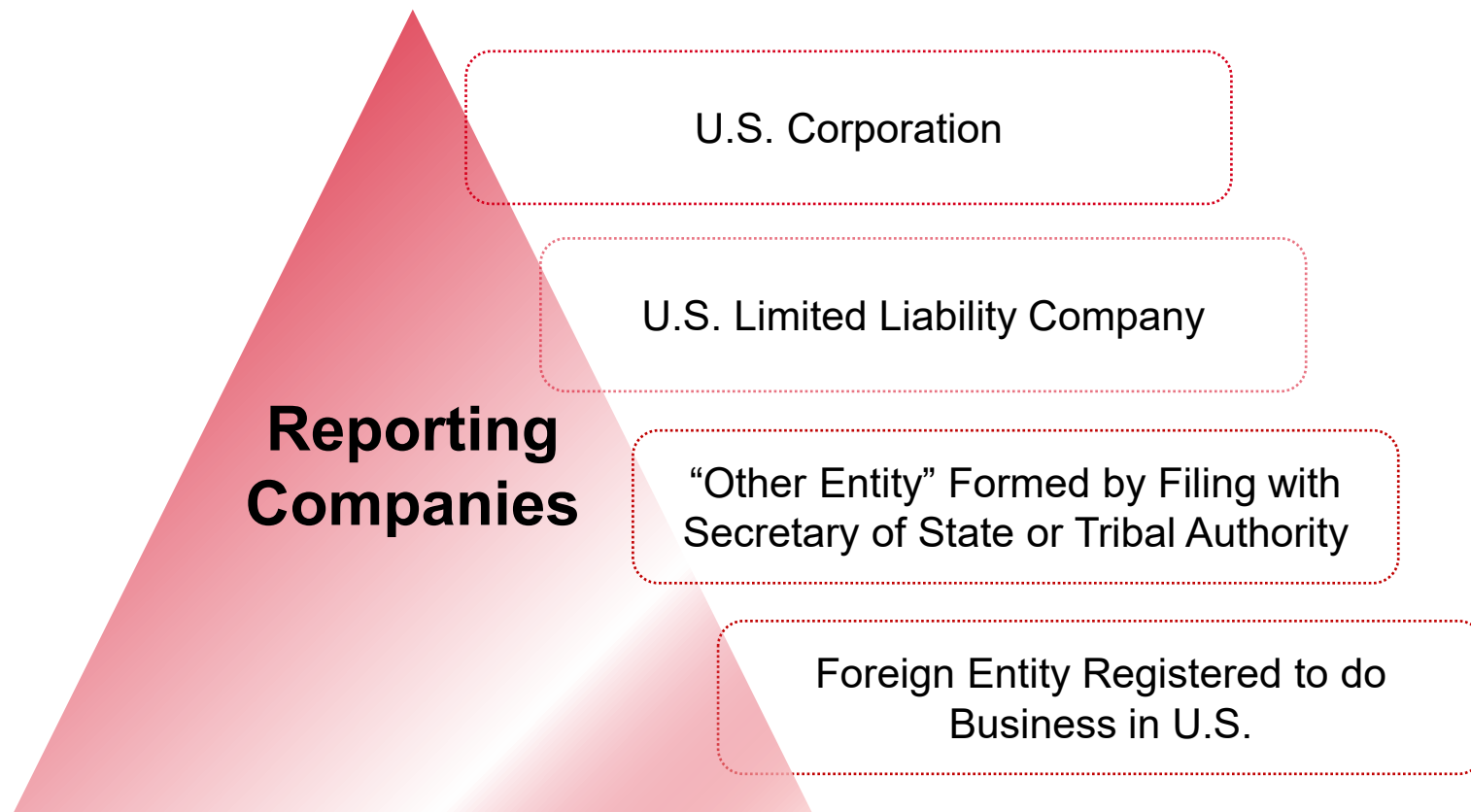
It is the sense of Congress that—
(1) more than 2,000,000 corporations and limited liability companies are being formed under the laws of the States each year;
(2) most or all States do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities formed under the laws of the State;
(3) malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in

National Corporate Registry

WHAT ARE "REPORTING COMPANIES"?

Reporting Companies

- U.S. Corporation
- U.S. Limited Liability Company
- "Other Entity" Formed by Filing with Secretary of State or Tribal Authority
- Foreign Entity Registered to do Business in U.S.

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National Corporate Registry (cont'd)

REPORTING EXEMPTIONS

- The CTA exempts **24 entity types** from the definition of "reporting company"
  - Beneficial ownership information need not be submitted to FinCEN for these
  - FinCEN may impose a process to claim exemptions and/or provide additional exemptions
   - Standard for reliance on exemption and liability for misrepresenting eligibility not clear

Select Examples:

- issuers of securities registered under Exchange Act Section 12 or required to file information under Section 15(d)
- banks, bank holding companies or money transmitters
- broker-dealers, investment advisers, exchanges and clearing agencies or other SEC/CFTC registered entities
  - *e.g.*, futures commission merchants, introducing brokers, swap dealers, FX dealers

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Foreign Bank Subpoena Power

EXPANSIVE AUTHORITY TO SEEK FOREIGN BANK RECORDS

- AMLA empowers the Treasury Secretary or Attorney General to seek production of "**any records**" relating to "**any account**" of a foreign bank that maintains a correspondent account in the United States
  - Records located abroad are susceptible to subpoena
  - No nexus to the bank's U.S. correspondent account is required
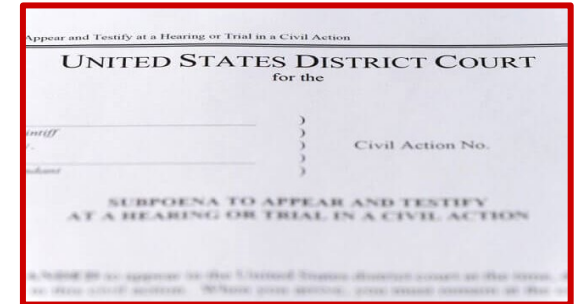
- Failure to comply carries various penalties, including loss of access to banking services in the U.S.

- Objections based on conflict with local data privacy or other laws are prohibited
  - A Hobson's choice for foreign banks?

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Whistleblower Provisions

BSA WHISTLEBLOWER PROGRAM

- Includes substantial financial incentives:

Previous Program	New Program
Discretionary award capped at <u>lesser</u> of 25% of the resulting financial penalty or $150,000.	Mandatory award of up to 30% of funds collected

- Statute also provides:
  - Expanded definition of eligible whistleblowers, including employees (e.g., internal compliance) who report misconduct internally; and
  - Enhanced protections from employer retaliation for whistleblowing complaints

- SEC whistleblower program established under Dodd-Frank was model for these provisions

> RISK & COMPLIANCE JOURNAL
>
> **Potential for Monetary Award in Anti-Money Laundering Whistleblower Program Draws Concerns**
>
> Some companies say prospect of inancial bene it to compliance professionals for reporting possible violations could weaken compliance programs
>
> By _Mengqi Sun_
> Dec. 18, 2020 3:08 pm ET
>
> A new anti-money-laundering whistleblower award program may allow individuals with internal compliance or audit responsibilities to report possible violations to the regulators for bounties, raising concerns among some companies.

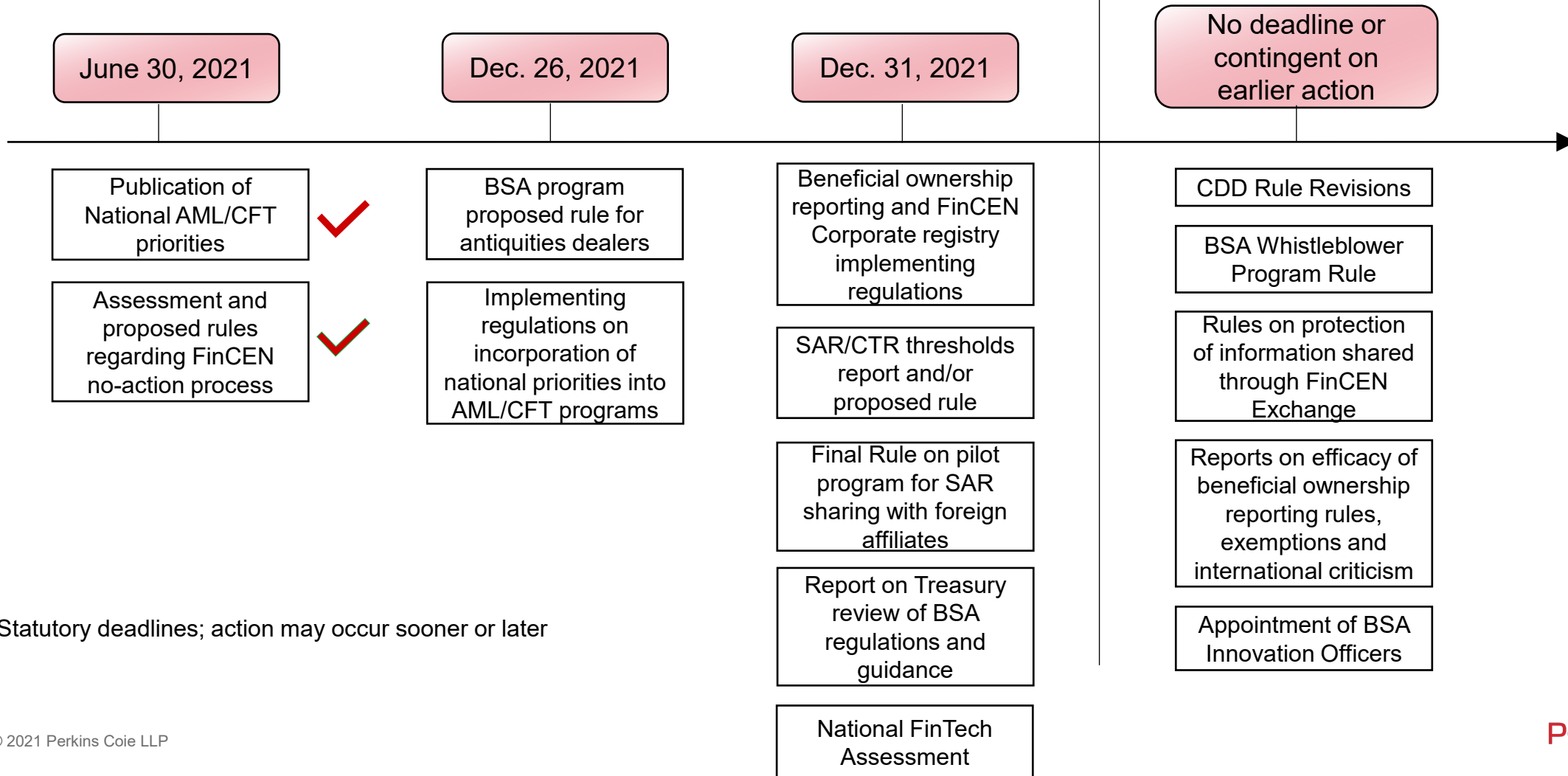PERKINSCOIE

Digital Asset and Cryptocurrency Provisions

MODERNIZING THE BSA TO INCORPORATE DIGITAL ASSETS

- AMLA broadens and updates the Bank Secrecy Act and the U.S. AML/CFT framework by:
  - Codifying FinCEN guidance related to digital currencies
  - Expanding and modifying BSA definitions to encompass "**value that substitutes for currency**."
    - Potentially removes ambiguity as to whether certain market participants must register with FinCEN as money services business
    - Supports reporting and recordkeeping requirements for transactions involving certain types of digital currencies as proposed by FinCEN earlier in 2020

Implementation: What to Expect

TIMELINE OF KEY AGENCY ACTIONS*

June 30, 2021	Dec. 26, 2021	Dec. 31, 2021	No deadline or contingent on earlier action
Publication of National AML/CFT priorities ✓	BSA program proposed rule for antiquities dealers	Beneficial ownership reporting and FinCEN Corporate registry implementing regulations	CDD Rule Revisions
Assessment and proposed rules regarding FinCEN no-action process ✓	Implementing regulations on incorporation of national priorities into AML/CFT programs	SAR/CTR thresholds report and/or proposed rule	BSA Whistleblower Program Rule
		Final Rule on pilot program for SAR sharing with foreign affiliates	Rules on protection of information shared through FinCEN Exchange
		Report on Treasury review of BSA regulations and guidance	Reports on efficacy of beneficial ownership reporting rules, exemptions and international criticism
		National FinTech Assessment	Appointment of BSA Innovation Officers

* Statutory deadlines; action may occur sooner or later

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David Sewell advises banks, nonbank financial institutions, and fintech companies regarding federal banking law and regulation, with particular emphasis on anti-money laundering (AML), sanctions, and financial crimes compliance matters. As a routine part of his practice, he: counsels clients on investments, activities, supervisory examinations, and formal and informal enforcement actions; provides regulatory advice on charter and licensing matters as well as voluntary self-disclosures and requests for interpretive relief; and assists financial institutions with developing and refining compliance policies and procedures.

David deals on a regular basis with federal and state bank regulatory and law enforcement agencies—for example, the Federal Reserve Board and Federal Reserve Banks, Office of the Comptroller of the Currency (OCC), Consumer Financial Protection Bureau (CFPB), Financial Deposit Insurance Corporation (FDIC), Financial Crimes Enforcement Network (FinCEN), Office of Foreign Assets Control (OFAC), and New York Department of Financial Services (NYDFS). He also leads internal fact investigations for financial institutions and briefs senior business decisionmakers and boards of directors.

Earlier in his career, David served as counsel and assistant vice president at the Federal Reserve Bank of New York (FRBNY), where he handled a wide variety of bank regulatory issues, supervisory matters, and enforcement actions, including acting as a lead counsel on significant actions the FRBNY brought against bank holding companies and foreign banking organizations with respect to Bank Secrecy Act (BSA)/AML and U.S. sanctions violations and compliance deficiencies. He also worked in a senior role within the regulatory relations organization of JPMorgan Chase, where he was the chief point of contact for key U.S. banking and securities regulators, including the Federal Reserve, OCC, and U.S. Securities and Exchange Commission (SEC). Before attending law school, David served in a variety of roles in the federal government, including as a senior congressional aide and, during the Clinton administration, on the White House Domestic Policy Council.

An active member of his professional community, David served a three-year term as secretary of the New York City Bar Association Committee on Banking Law.

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Dana Syracuse concentrates his practice in the blockchain, fintech, e-commerce and financial services sectors, working with clients on regulatory, business and product counseling, cyber and data security and enforcement concerns. Dana serves as firmwide co-chair of the Fintech industry group, and the co-lead of the Blockchain, Digital Assets, and Custody vertical of the Fintech industry group. Dana is the former associate general counsel for the New York Department of Financial Services (NYDFS) and a leading figure in the development of the country's first comprehensive digital currency regulation. He works with a range of fintech and digital business clients on federal and state regulatory, compliance and enforcement matters, complex bank regulatory issues, including, privacy, data and cyber security, anti-money laundering, Bank Secrecy Act and Know-Your-Customer matters, consumer protection as well as contract drafting and negotiations. Dana frequently interacts with lawmakers at the state and federal level on many of these issues, including testifying before the United States House of Representatives on the future of virtual currency and blockchain regulation, training state bank examiners on blockchain related compliance issues through the Conference of State Bank Supervisors and participating in the Uniform Law Commission's efforts to draft a model legal code for virtual currencies.

While at the NYDFS, Dana helped oversee the Department's strategy regarding emerging payment systems, virtual currency and blockchain technology, the drafting of New York State's BitLicense virtual currency regulation and the chartering of New York state based virtual currency exchanges. He also worked extensively with other states, through organizations such as the Conference of State Bank Supervisors, on the development of state and federal regulations and standards governing cybersecurity, money transmitters, emerging payment systems and virtual currency market participants. Dana helped develop the NYDFS strategy for the review of the cyber security standards of its regulated institutions, oversaw the revamp of the NYDFS cyber security examination process, helped implement targeted risk assessments of its regulated institutions' cyber preparedness and took steps to assess the cyber security risks presented to the banking and insurance industries and those posed by third-party vendors.

Prior to serving with NYDFS, Dana was an assistant attorney general in the Taxpayer Protection Bureau of the Office of the New York State Attorney General. He has worked in private practice as a litigator as well as having directed his own consultancy for financial institutions, emerging payment providers, technology companies and law firms. He advised on implement services, banking and insurance regulations, money transmission, emerging payment systems, virtual currency regulation and cybersecurity practices of regulated industries.

Dana is a frequent media commentator, speaker and author on virtual and crypto currencies, money laundering, financial services regulations, data security privacy and the balance between innovation and regulation in the financial sector.