

# BSA, OFAC, and The USA Patriot Act

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# CTR Exemptions

- Depository institutions are encouraged to exempt all eligible customers
- Phase I exempt person - one time filing
- Phase II exempt person - filing every two years

# Exemption Issues

- A financial institution is not liable for failure to file a CTR with respect to a currency transaction by an exempted customer
- Exempt person designation must be made within 30 days after the first reportable transaction has been exempted

# Exemptions Issues (Continued)

- A BHC or bank subsidiary may make a single exemption on behalf of all of the BHC bank and thrift subsidiaries, as long as each subsidiary to which the designation applies is listed
- The obligation of identify and report suspicious or criminal activity remains

# Office of Foreign Assets Control

- Block accounts and rejected transactions
- Near misses as well as clean hits
- Compare against all customer files and transactions
- By, to or through (due diligence of third party servicers and written and written agreements)
- Blocked loan payments
- Third party processing

# USA PATRIOT ACT: October 26, 2001

- Title III - International Money Laundering Abatement and Anti-Terrorism Act of 2001
- Amendments to the BSA
- Generally, relationships with foreign banks and persons who reside outside U.S.
- Some provisions self-executing, some require regulations
- Sunset Provision - September 30, 2004

# Required to Implement AML Programs

- Credit card companies
- MSBs
- Securities brokers and dealers registered with the SEC
- Mutual Funds
- Futures commission merchants and introducing brokers registered with the Commodity Futures Trading Commission

# Temporarily Not Required to Implement AML Programs

- Private Bankers
- Insurance Companies
- Loan or finance companies
- Dealers in precious metals, stones or jewels
- Persons engaged in real estate closings and settlements
- “Certain investment companies” including hedge, private equity and venture capital funds



# Temporarily Not Required To Implement AML Programs (Continued)

- Commodity pool operators and trading advisors
- Sellers and dealers of automobiles, boats, and airplane
- Travel agencies
- Pawnbrokers
- Telegraph companies

# Know Your Customer

- Although not a required by regulation, it is the cornerstone of an effective BSA program

# Section 352

- Every financial institution is required to establish an anti-money laundering program that includes, at minimum:
  - the development of internal policies, procedures, and controls
  - the designation of a compliance officer
  - an ongoing employee training program
  - an independent audit function

# Policies, Procedures and Internal Controls

- Written policies should set forth the details of the program, including the responsibilities of individuals and departments
- Should not be limited to achieving compliance with the provisions of the BSA

# Policies, Procedures, and Internal Controls (Continued)

- Should be designed to prevent the institution from being used to launder money or finance terrorist activities
- Identify internal vulnerabilities to money laundering and terrorist financing, and design preventative and detective controls

# Policies, Procedures and Internal Controls (Continued)

- Responsibility for BSA operations may be delegated to service providers but cannot delegate responsibility for assuring compliance
  - Perform due diligence of service provider operations
  - Obtain a written agreement of responsibilities
  - Ensure independent testing and access to reported results

# Independent Testing for Compliance

- On an ongoing basis by employees not involved in the operation or oversight of the program
- At least annually by independent internal/external auditors

# Independent Testing for Compliance (Continued)

- Reviews should result in a written assessment or report
- Resulting recommendations should receive prompt consideration and implementation



# Oversight Responsibility

- Designate an individual, competent and knowledgeable with BSA requirements, issues and risks, with program oversight responsibility.
- This individual or a committee should be empowered to develop and enforce appropriate policies and procedures throughout the institution.

# Ongoing Training

- Training should include both general awareness of overall BSA requirements and job-specific guidance
- Include possible signs of money laundering that could arise in the course of their duties

# Ongoing Training (Continued)

- Ideally, requisite training should occur prior to an employee assuming his/her duties
- Employees should receive periodic updates and refreshers regarding the anti-money laundering program

# Section 311 - Special Measures

- Special measures for jurisdictions, financial institutions, or international transactions of primary money laundering concern
- Implemented by regulation or order
- Congress must be notified within 10 days of imposition
- Possible measures on domestic institutions include enhanced reporting, recordkeeping or prohibition.

# Section 313

- Effective December 25, 2001
- Prohibition of “shell bank” accounts
  - Regulated affiliate exception
  - “Reasonable Steps” to identify indirect services, nested accounts
  - Certification process
  - Time frames for account closings

# Section 319

- Effective December 25, 2001
- Secretary of the Treasury/Attorney General may issue subpoenas to foreign banks for records relating to correspondent accounts
- Forfeiture of funds in U.S. interbank accounts

# Section 319 (Continued)

- Recordkeeping Requirement
  - U.S. Banks must identify owners of foreign banks
  - U.S. Banks must obtain name and address of person in U.S. to accept service of legal process

# Section 319 (Continued)

- Availability of bank records
  - 120 hours to respond to regulators for information related to anti-money laundering compliance by the institution or a customer of the institution
  - 7 days to respond to a written request from law enforcement for required records
  - 10 days to close an account after written notice is received from Secretary of Treasury or Attorney General



## Section 319 (Continued)

- A financial institution is not liable to any person for terminating a correspondent relationship in accordance with this subsection
- Failure to terminate carry civil penalties of up to \$10,000 per day

# Section 312

- Effective on July 23, 2002
- Due diligence for correspondent accounts of foreign banks
- Due diligence for private banking accounts for non-U.S. persons

# Section 312 (Continued)

- General requirement
  - Establish appropriate specific and, where necessary, enhanced due diligence policies and procedures and controls designed to detect and report money laundering through these accounts

# Section 312 (Continued)

- Standards for certain correspondent accounts
  - operating under an offshore license
  - operating under a license granted by a jurisdiction designated as being of concern for money laundering

# Section 312 (Continued)

- Reasonable steps to identify the owners of the foreign bank
- Conduct enhanced scrutiny of the account
- Ascertain whether correspondent accounts are provided to other foreign banks, and if so, conduct related due diligence

# Section 312 (Continued)

- Five elements of a due diligence program for foreign correspondent accounts - minimum standards
  - determine whether the correspondent account is subject to enhanced due diligence requirements
  - perform a risk assessment to determine if the account poses a significant money laundering risk

# Section 312 (Continued)

- Consider any publicly available information from U.S. governmental agencies and multinational organizations relative to regulation and supervision
- consider any guidance issued by the Treasury or functional regulator regarding money laundering risks associated with particular foreign FIs and types of correspondent accounts

# Section 312 (Continued)

- Review public information to ascertain whether the foreign FI has been the subject of any criminal action or regulatory action relative to money laundering



# Section 312 (Continued)

- Additional standards for correspondent banks operating under certain types of licenses
  - Enhanced scrutiny to guard against money laundering and to detect and report suspicious activity
    - Obtain and review documentation from the foreign bank about its money laundering program

# Section 312 (Continued)

- Monitor transactions
- Obtain information about the sources and beneficial ownership funds in the correspondent account, as well as information about the identity of any persons who will have authority to direct transaction activity of the correspondent account
- Reasonable steps to determine whether the foreign bank itself maintains correspondent accounts for foreign banks

# Section 312 (Continued)

- Reasonable steps to determine ownership of any foreign bank whose shares are not publicly traded
  - Direct or indirect ownership, control, or power to vote 5% or more of any class of security
- Procedures should address what is to be done if due diligence cannot be adequately performed

# Section 312 (Continued)

- Refuse to open the account
- suspend transaction activity
- file suspicious activity reports
- close the account

# Section 312 (Continued)

- Minimum due diligence for a private banking account of a non-U.S. person
- Reasonable steps to:
  - identify the source of wealth and funds deposited into the account
  - guard against money laundering

# Section 312 (Continued)

- Risk based approach
- Conduct enhanced scrutiny of private banking accounts requested or maintained by or on behalf of senior foreign political figures, their family members, or close associates
- Enhanced scrutiny should be designed to detect and report transactions that may involve proceeds of foreign corruption

# Section 312 (Continued)

- Enhanced scrutiny should take all risk factors into consideration
  - Purpose and use of the account
  - Location of account holders
  - Source of funds in the account
  - Type of transactions engaged through the account
  - Jurisdiction involved in such transactions

# Section 314(a) Information Sharing Between Government and FIs

- Proposed February 26, 2002
- Request made on behalf of law enforcement through FinCEN
- Law enforcement must certify “credible evidence”
- Intended to replace control list



# Section 314(a) Information Sharing Between Government and FIs (Continued)

- FinCEN sends requests to FI to search its records (current and past)
- FI designates a POC and responds back to FinCEN with specific information
- FI must still file a SAR, if appropriate

# Section 314(a) Information Sharing Between Government and FIs (Continued)

- FI is not prohibited from transactions with named entities
- FI should not “tip off” customer
- Restrictions on the use of information

# Section 314(a) Information Sharing Between Government and FIs (Continued)

- FIs must maintain adequate procedures to protect security and confidentiality of such requests (third party agreements)
- Several basis are provided on which responsive disclosure of information are exempt from the requirements of RFPA (not everyone is convinced)

# Section 314(b) Information Sharing Between FIs and Associations

- Interim Rule February 26, 2002
- Voluntary information sharing among FIs and their associations
- FIs are those subject to SAR reporting that are not MSBs, broker/dealers among others

# Section 314(b) Information Sharing Between FIs and Their Associations (Continued)

- Information may only be used to identify and report suspected terrorist or money laundering activities
- FIs must maintain adequate procedures to protect security and confidentiality of requests

# Section 314 (b) Information Sharing Between FIs and Their Associations (Continued)

- Safe harbor from liability if the rules are followed
- Certification may be revoked by regulators or FinCEN
- FIs must file SAR, if appropriate

# Section 327

- The BHC Act of 1956 is amended to indicate that “in every case” the Board of Governors of the Federal Reserve System shall take into consideration the effectiveness of the company or companies in combating money laundering activities, including overseas branches, with respect to any application submitted to the Board.

# Section 326

- Joint regulations to be effective by October 24, 2002
- Verification of Customer Identification
  - Account opening standards
  - Comparison of identification with government lists of terrorists



# Other Issues To Be Addressed

- Filing of BSA reports on a FinCEN “highly secured network” - due July 26, 2002
- Efficient Use of CTRs
- Clarification of Safe Harbor
- Written Employment References
- Restrictions on concentration accounts
- Forfeiture of U.S. interbank accounts
- Many definitional and implementation questions