WILMER, CUTLER & PICKERING

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THE MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING ACT OF 2001

Even before the terrorist attacks of September 11, efforts by the federal government to expand the reach of anti-money laundering laws were a high priority for regulators, legislators and law enforcement agencies.[1] Money laundering legislation had been introduced in both the House and the Senate, the Securities and Exchange Commission was about to begin its anti-money laundering compliance "sweeps" at broker-dealers, and the Bush Administration was signaling its intent to focus its prosecutorial and regulatory resources on major money laundering organizations and the professionals — e.g. bankers — who wittingly or not assisted these money launderers.

The terrorist strikes catapulted these efforts to the top of the agenda, as the Bush Administration and Congress quickly agreed that cracking down on international money laundering and terrorist financing would be a key element in the war on terrorism. One notable result is the prompt enactment of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("MLAA"), which the President signed into law on October 26, 2001 as Title III of the broader anti-terrorism package.[2] The MLAA arguably represents the most significant anti-money laundering legislation for financial institutions since the enactment of the original Bank Secrecy Act in 1970. It contains dozens of far-reaching law enforcement and regulatory provisions that will affect the business and daily operations of financial services firms.

The MLAA will require institutions like banks that have well-established anti-money laundering programs to make substantial modifications to those programs to comply with the law's new obligations. It will require all broker-dealers, among other things, to set up systems to track and report suspicious transactions. And it will require a whole new set of financial institutions, including insurance companies and investment companies, to establish anti-money laundering programs.

This Newsletter addresses the most significant requirements and prohibitions contained in the MLAA. First, we highlight those provisions that, as they phase in over the next year, will have a direct impact on financial institutions' anti-money laundering compliance efforts. (They are listed in chronological order, based on when the obligation takes effect.) We then describe the MLAA's key provisions in somewhat greater detail.

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[1] See Anti-Money Laundering High on the Radar Screen, Wilmer Cutler & Pickering Financial Institutions Group Newsletter (Aug. 13, 2001) (http://www.wilmer.com/docs/news_items/2001_08_03.pdf)

[2] The anti-terrorism package is entitled the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001." The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 is Title III of the USA PATRIOT Act.

Summary of New Compliance Obligations

- Identification of Beneficial Owners of Accounts Held by Foreigners: At any time, upon making a finding regarding money laundering concerns, the Secretary of the Treasury could issue an immediately effective order or regulation requiring financial institutions to take "reasonable and practicable steps" to identify the beneficial owner of accounts in the United States opened or maintained by a foreign person.

- Identification of Foreign Persons Whose Funds Travel Through Payable-Through or Correspondent Accounts: At any time, upon making a finding regarding money laundering concerns, the Secretary of the Treasury could issue an immediately effective order or regulation requiring financial institutions, as a condition of maintaining a payable-through or correspondent account with a specified financial institution or a financial institution in a specified jurisdiction, to identify each customer whose funds move through the accounts.

- Cut-Off of Payable-Through or Correspondent Accounts: At any time, upon making a finding regarding money laundering concerns, the Secretary of the Treasury could issue an immediately effective regulation prohibiting, or imposing conditions upon the opening or maintenance of, a payable-through or correspondent account with a specified financial institution or a financial institution in a specified jurisdiction.

- Cut-Off of Foreign Shell Banks: By December 25, 2001, financial institutions operating in the United States must sever correspondent banking relationships with foreign "shell banks" — that is, foreign banks that have no physical presence anywhere.

- 120-Hour Rule: By December 25, 2001, financial institutions must be prepared to respond within 120 hours to a request by a banking regulator for records relating to anti-money laundering compliance or a customer's transactions.

- Anti-Money Laundering Programs: By April 24, 2002, all financial institutions (unless specifically exempted by regulation) must have in place anti-money laundering programs that include (1) internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an employee-training program; and (4) an independent audit to test the implementation of the programs.

- Broker-Dealer SAR Reporting: By July 1, 2002, final regulations requiring broker-dealers to file SARs with FinCEN must be published. In order to comply with this rule, a broker-dealer will need to have in place a system for reporting transactions that it knows, suspects, or has reason to suspect (1) involve funds derived from illegal activity or are intended to hide funds or assets derived from illegal activity; (2) are designed to evade regulations promulgated under the BSA; or (3) serve no business or apparent lawful purpose, and the firm knows of no reasonable explanation for the transactions after examining the available facts.

- Special Due Diligence: By July 23, 2001, financial institutions must be prepared to apply "appropriate, specific, and, where necessary, enhanced, due diligence" for all foreign private banking customers and international correspondent accounts. Enhanced due diligence will be required for private banking relationships with senior foreign political figures and their immediate family or close associates. Enhanced due diligence will also be required for correspondent accounts with offshore banks

(banks that cannot legally conduct business with the citizens or currency of the jurisdictions in which they are licensed) and with banks from jurisdictions deemed non-cooperative in the international effort to combat money laundering.

- Customer Identification Procedures: By October 26, 2002, financial institutions must comply with a regulation to be issued by the Secretary of the Treasury setting out "reasonable procedures" for customer identification at account opening that include ascertaining the identity of the customer, maintaining records used to identify the customer, and consulting a government-provided list of known or suspected terrorists.

Analysis of Key Provisions

Sec. 311 Special measures for jurisdictions, financial institutions, or international transactions of primary money laundering concern.

The flagship provision of the MLAA is Section 311 (to be codified at 31 U.S.C. § 5318A). This provision empowers the Treasury Secretary to require domestic financial institutions, including U.S. operations of foreign financial institutions, to comply with a graduated set of five "special measures" if the Secretary determines that a foreign jurisdiction, a foreign financial institution, a type of international transaction or a type of account constitutes a "primary money laundering concern." The definition of "financial institution," codified at 31 U.S.C. § 5312, is extraordinarily broad. It includes not only institutions such as banks, broker-dealers, investment companies, and insurance companies, but also travel agencies, persons involved in real estate closings, businesses engaged in vehicle sales, and other institutions that people may not ordinarily associate with financial activities.

The special measures the Secretary may invoke include requiring financial institutions to:

(1) keep records and/or file reports on particular transactions, including the identities of the participants in the transaction and the beneficial owners of the funds involved;

(2) obtain information, to the extent "reasonable and practicable," on the beneficial ownership of any account opened or maintained in the U.S. by a foreign person or a foreign person's representative;

(3) identify and obtain information about customers permitted to use, or whose transactions are routed through, a foreign bank's "payable-through" account, which information is comparable to the kind of information obtained in the normal course of business on U.S. customers;[3]

(4) identify and obtain information about customers permitted to use, or whose transactions are routed through, a foreign bank's "correspondent" account, which information is comparable to the kind of information obtained in the normal course of business on U.S. customers;[4] or

(5) to abandon or curtail certain payable-through or correspondent accounts altogether

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[3] A payable-through account is one opened by a financial institution to allow its own customers to engage, directly or through a subaccount, in banking activities with another.

[4] A correspondent account is one established on behalf of a financial institution to receive deposits from, make payments on behalf of, or handle other transactions related to that institution.

Notably, none of these "special measures" is self-executing — they do not come into play unless the Secretary invokes one or more by issuing an order or regulation,[5] and he may issue an order or regulation only after engaging in extensive consultations and considering numerous potentially relevant factors.[6]

Section 311 requires the Secretary of the Treasury to promulgate two key regulatory definitions. First, the Secretary must define by regulation the term "beneficial ownership of an account," and the definition must address an individual's ability to fund, direct or manage the account and his or her material interest in the account's corpus or outcome, but must exclude individuals whose beneficial interest in the account is immaterial.[7] Second, the Secretary, in consultation with the appropriate federal functional regulator (as defined in the Gramm-Leach-Bliley Act), is required to issue a regulation defining the term "account" for non-bank financial institutions,[8] and to cover in that definition any arrangements analogous to payable-through or correspondent accounts. There is no deadline for either regulatory definition. Section 311, moreover, authorizes the Secretary to issue regulations that "further define" any term in the Special Measures provision.

Sec. 312 Special due diligence for correspondent accounts and private banking accounts involving foreign persons.

Drawing on Senator Levin's investigations of money laundering vulnerabilities in private and correspondent banking relationships,[9] Section 312 (to be codified at 31 U.S.C. § 5318(i)) requires all financial institutions to apply due diligence standards with regard to private banking accounts or correspondent accounts opened or maintained for a foreign person. In general, financial institutions are enjoined to establish "appropriate, specific, and, where necessary, enhanced, due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts" for all foreign private banking customers and international correspondent accounts. Note that the private banking provisions apply to non-bank financial institutions since "private banking account" is defined broadly in the MLAA.

Specifically for private banking accounts, due diligence requires reasonable steps to identify the nominal and beneficial owners of funds and

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[5] The first four special measures may be invoked by order, which may remain in effect for 120 days, and may then be extended by issuing a regulation. The Secretary may invoke the fifth special measure, banning or imposing conditions on payable-through or correspondent accounts, only by issuing a regulation to that effect. Note, however, that a regulation or order implementing any special measure may be immediately effective.

[6] Before naming a jurisdiction, financial institution, transaction or account as a "primary money laundering concern," the Secretary of the Treasury must consult with the Secretary of State and the Attorney General, and must consider (to the extent pertinent) a range of factors relating to the anti-money laundering record of the jurisdiction or institution involved. And before imposing any special measure, the Secretary of the Treasury consult with the Chairman of the Board of Governors of the Federal Reserve, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board, and any other agencies or interested parties the Secretary may find to be appropriate.

[7] The regulatory definition of "beneficial ownership of an account" is to apply both to this section on special measures and to section 312 on special due diligence and section 313 on shell banks.

[8] For banks, Section 311 defines the key terms "account," "correspondent account," and "payable through account."

[9] *See* Minority Staff Report for Senate Permanent Subcommittee on Investigations Hearing on Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities (1999); Minority Staff of the U.S. Senate Permanent Subcommittee on Investigations Report on Correspondent Banking and Money Laundering (2001).

the source of the funds. If the account is maintained by or on behalf of a senior foreign political figure or his immediate family or close associates, an enhanced level of due diligence is required.[10] Enhanced due diligence is also required with respect to correspondent accounts maintained for offshore banks or for foreign banks in certain designated problem countries. Such enhanced due diligence includes obtaining the identity of the owners of the foreign bank and the nature of their ownership interests, as well as obtaining due diligence information regarding any other correspondent banking relationship that the foreign bank may maintain.

The Secretary of the Treasury, after consultation with the appropriate federal functional regulators, is to promulgate regulations by April 24, 2002 to "further delineate" the due diligence policies, practices and controls required by this provision. But even if the Secretary misses this deadline, the special due diligence requirements become effective for all active accounts on July 23, 2002, regardless of whether they were opened before, on or after the date of the MLAA's enactment.

Sec. 313 Prohibition on United States correspondent accounts with foreign shell banks.

Section 313 (to be codified at 31 U.S.C. § 5318(j)) addresses the issue of correspondent banking relationships between U.S. financial institutions and "shell" banks that do not have a physical presence anywhere and thus are not subject to effective supervision. This provision prohibits U.S. banks from maintaining a correspondent account on behalf of a foreign bank with no physical presence in any country. It also requires a financial institution to take "reasonable steps" to ensure that it is not indirectly providing correspondent banking services to shell banks through foreign banks with which it maintains correspondent relationships. The Secretary of the Treasury is required to issue regulations that delineate the steps necessary to comply with this "reasonable steps" requirement, but no deadline is set for the issuance of these regulations.

There is an important exception to the prohibition: A financial institution may maintain a correspondent relationship with a bank that has no physical presence if it is an affiliate of a U.S. or foreign bank or credit union that is itself subject to bank supervision. This exception does not apply to affiliates of non-bank financial institutions.

Sec. 314 Cooperative efforts to deter money laundering.

The sharing of information between the government and the financial services industry has long been a sore issue. Financial services firms, which are on the front lines in efforts to combat money laundering, often complain that they are not provided useful feedback on the use made of the thousands of SARs, CTRs and other forms filed every year. The regulators and law enforcement, in turn, have been reluctant to share information with the industry for fear of compromising investigations, enforcement actions and prosecutions.

Section 314 is designed to address this problem. It directs the Secretary of the Treasury to adopt regulations by February 23, 2002 to

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[10] This essentially codifies the Guidance on Enhanced Scrutiny for Transactions that May Involve the Proceeds of Foreign Official Corruption that was issued by the Treasury and State Departments and the federal banking regulators in January 2001. The Enhanced Scrutiny Guidance encourages financial institutions, in their private banking and similar high dollar-value accounts and transactions, to apply enhanced scrutiny to transactions that may involve the proceeds of corruption by senior foreign political figures and their close family and associates. It also provides financial institutions with a set of suggested account establishment and maintenance procedures designed to help institutions obtain appropriate information on accounts held by senior foreign political figures and their immediate family and close associates, as well as a list of questionable or suspicious activities involving their transactions that, when present, often will warrant enhanced scrutiny of a particular transaction. The Guidance is available at http://www.treas.gov/press/releases/guidance.htm.

encourage greater cooperation among financial institutions, regulators and law enforcement, with the specific purpose of encouraging regulatory and law enforcement authorities to share information with financial institutions regarding individuals or entities engaged in terrorism or money laundering. It also authorizes financial institutions and associations of financial institutions (e.g., the American Bankers Association, the Financial Services Roundtable, the Securities Industry Association), to share information among themselves regarding individuals, entities, organizations, or countries suspected of possible terrorist or money laundering activities, providing they give notice to the Secretary regarding the information sharing arrangement. The provision includes an explicit safe harbor from civil liability and an exemption from the privacy protections in Title V of the Gramm-Leach-Bliley Act for information exchanged pursuant to this provision.

The regulations to be issued by the Secretary may (and likely will) require that each financial institution designate a point person to receive this information, and that each financial institution establish procedures for the protection of the shared information.

Sec. 319 Forfeiture of funds in United States interbank accounts.

Although the title of this section refers only to forfeitures from interbank accounts, the provision itself addresses both forfeitures and the production of domestic and foreign bank records related to anti-money laundering programs and money laundering activities of bank customers.

Forfeiture Provision

Subsection (a) of Section 319, the forfeiture provision (to be codified at 18 U.S.C. § 981(k)), states that if a foreign bank has a U.S. "interbank account" — defined as an account "held by one financial institution at another financial institution primarily for the purpose of facilitating consumer transactions" (which bears a striking resemblance to a correspondent account) — then funds deposited into the foreign bank shall be deemed funds deposited into the U.S. account. A restraining order, seizure warrant, or *in rem* arrest warrant regarding the funds may be served on the U.S. bank, and the depositor of funds into the foreign bank ordinarily will be deemed the "owner" of the funds in the U.S. interbank account, and therefore the only party permitted to contest any U.S. Government effort to forfeit the funds.

Although quite technical, this provision may create serious risks of double-payouts for foreign banks. If a foreign bank with an interbank account in a U.S. institution transfers funds into the U.S. account, and the U.S. Government seizes and forfeits the funds because they are related to a crime in the U.S.,[11] the foreign depositor may still have a valid claim for repayment of his deposit against the foreign bank. Consequently, banks operating outside the U.S. may be subjected to conflicting claims — one by the U.S. Government and one by its foreign depositor.

This provision is effective upon enactment of the MLAA.

Production of Bank Records

Subsection (b) of Section 319 (to be codified at 31 U.S.C. § 5318(k)) addresses the production of both domestic and foreign bank records.

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[11] The government does not need to "trace" the funds found in the interbank account back to the underlying criminal conduct that generated forfeitable proceeds, which were then deposited into the foreign bank. For example, if the government can establish that a crime generated $100 of illegal proceeds which were deposited into a foreign bank, it may seize $100 in funds in the foreign bank's domestic interbank account without demonstrating that the funds in the interbank account came from the depositor's criminal conduct.

For any account opened, maintained, administered or managed by a "covered financial institution"[12] in the United States, Section 319 requires the institution to produce information and account documentation within 120 hours in response to a request from an "appropriate federal banking agency"[13] for records relating to anti-money laundering compliance by the institution or a customer of such institution.

For foreign banks that maintain a correspondent relationship with a domestic institution, Section 319 authorizes U.S. law enforcement officials to issue a summons or subpoena to the foreign bank for records related to such correspondent accounts. This provision requires U.S. banks that maintain correspondent accounts for foreign banks to keep records identifying the owners of the foreign bank and the name and address of a person in the United States who is authorized to accept service of process for the foreign bank. This "know your bank owner" requirement applies with respect to all foreign banks with U.S. correspondent accounts, regardless of whether the foreign jurisdiction has been deemed noncooperative. This provision further requires a U.S. bank to close a foreign bank's correspondent account within 10 days of receiving notice from U.S. law enforcement officials that the foreign bank either has refused to comply with a summons or subpoena or has failed to contest the subpoena in a U.S. court.

Financial institutions have until December 25, 2001 to comply with the requirements concerning the maintenance and production of bank records.

Sec. 321 Financial institutions specified in subchapter II of chapter 53 of title 31, United States code.

The definition of financial institution in the Bank Secrecy Act includes an extremely broad array of firms, from banks and broker-dealers to travel agencies and pawnbrokers. To make certain that credit unions and CFTC-regulated entities are encompassed in the BSA's definition of financial institution, Section 321 amends 31 U.S.C. § 5312 to include credit unions and futures commission merchants, commodity trading advisors, and commodity pool operators registered, or required to register, under the Commodity Exchange Act.

This change in the law is effective upon enactment.

Sec. 325 Concentration accounts at financial institutions.

Concentration accounts, in which financial institutions commingle customer funds for short-term (often overnight) investment, have been cited in congressional hearings as a potential money laundering mechanism because of the possibility that information linking beneficial ownership to the funds may be lost in the process of aggregating and disaggregating the funds.

Section 325 (to be codified at 31 U.S.C. § 5318(h)(3)) authorizes the Secretary of the Treasury to issue regulations to address the use of concentration accounts as money laundering

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[12] A "covered financial institution" is limited to an FDIC insured bank; a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; a credit union; a thrift institution; and a registered a broker or dealer in securities.

[13] Section 319 defines "appropriate federal banking agency" to include only the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision. Notably, it does not include the Securities and Exchange Commission. It thus appears that the 120-day rule may not apply to financial institutions regulated solely by the SEC, but this isn't entirely clear, since "covered financial institution" explicitly includes broker-dealers.

vehicles. The regulations must (if issued) (1) prohibit financial institutions from (a) allowing customers to direct transactions that move their funds through the institution's concentration account, or (b) informing customers about the existence of, or the means of identifying, the institution's concentration accounts, and (2) require each financial institution to establish written procedures ensuring that whenever customer funds are commingled, the identity of, and specific amount belonging to, each customer is documented.

There is no deadline by which the Secretary must issue a concentration account regulation, if he chooses to do so.

Sec. 326 Verification of identification.

This section (to be codified at 31 U.S.C. § 5318(*l*)) directs the Secretary of the Treasury to issue a regulation that sets minimum standards for customer identification in the account opening process.[14] The regulation will apply to all accounts, not only accounts opened for foreign persons, and it will apply to all financial institutions not specifically exempted. Accordingly, the impact of the customer identification regulation could be quite broad.

At a minimum, the regulation must require firms to implement "reasonable procedures" to verify — to the extent reasonable and practicable — the identity of the customer opening an account, maintain records used to identify the customer, and consult a government-provided list of known or suspected terrorists. Importantly, the Secretary is directed not to issue a "one-size-fits-all" regulation, but rather to take into consideration the variety in account types, institution size, account opening methods and types of identifying information. Moreover, the Secretary may, by regulation or order, exempt any financial institution or type of account from the obligations of this "identify-your-customer" regulation.

This regulation must take effect not later than October 26, 2002.

Sec. 327 Consideration of anti-money laundering record.

This provision requires the federal bank regulatory agencies, when considering bank merger applications filed under the Bank Merger Act and bank acquisitions filed under section 3 of the Bank Holding Company Act, to consider the applicants' effectiveness in combating money laundering activities, including in their overseas branches.

Sec. 351 Amendments relating to reporting of suspicious activities.

Section 351 addresses two important issues relating to the filing of Suspicious Activity Reports by financial institutions — the scope of the "safe-harbor" from civil liability that firms filing SARs enjoy, and the operation of the "no-tipping" rule that prevents a firm filing a SAR from notifying the SAR's subject that a SAR has been filed.

Safe Harbor

Subsection (a) of Section 351 (to be codified at 31 U.S.C. § 5318(g)(3)) extends the existing "safe-harbor" to any potential liability allegedly arising out of arbitration agreements and other contracts (such as employment contracts), expands the safe-harbor to cover voluntary disclosures of possible violations to a government agency, and embraces not only the person who files the SAR but also anyone who requires another to make a disclosure. The subsection also makes clear, however, that making a disclosure does not confer any immunity against civil or criminal action brought by the government.

[14] With respect to certain non-bank financial activities, the Secretary is directed to set these standards jointly with the relevant functional regulator.

Prohibition on Notification

Subsection (b) (to be codified at 31 U.S.C. § 5318(g)(3)) first restates the existing rule that prohibits a financial institution (and any of its directors, officers, employees or agents) from notifying any person involved in reported transaction that a report has been filed.[15] It then contains a provision that clarifies a worrisome issue: The notification prohibition does not forbid a financial institution that filed a SAR from including the information that was contained in a SAR in a written employment reference provided to an insured depository institution, or in a termination notice (e.g., an NASD Form U-5) or an employment reference provided in accordance with the rules of the SEC, a self-regulatory organization or the CFTC. Thus, a financial institution may warn another institution of a former employee's potential wrongdoing without running afoul of the no-tipping rule, as long as the former employer does not mention that a SAR was filed. Note, however, that there is no shield from liability if an insured depository institution acts with "malicious intent" in making a disclosure of alleged unlawful activity by a former employee.[16]

Both of these provisions are effective upon enactment of the MLAA.

Sec. 352 Anti-money laundering programs.

For close to a decade, the Secretary of the Treasury has had the authority to require financial institutions to implement anti-money laundering programs, but this power has not been exercised. Although many financial institutions nevertheless have implemented programs, Section 352 of the MLAA (to be codified at 31 U.S.C. § 5318(h)) mandates that each financial institution establish anti-money laundering programs that include: (1) the development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an employee-training program; and (4) an independent audit to test the implementation of anti-money laundering programs. The Secretary of the Treasury, after consultation with the appropriate functional regulators, is authorized – but not required – to prescribe additional minimum standards for these anti-money laundering programs.

As noted above, the term "financial institution" is broadly defined to include many institutions that have not previously been called upon to focus much attention on anti-money laundering, such as investment companies and insurance companies. Unless the Secretary of the Treasury specifically exempts such institutions by regulation, they will need to put anti-money laundering programs in place.

This provision takes effect on April 24, 2002. Before that date, the Secretary is required to promulgate regulations that consider the extent to which the requirements to implement an anti-money laundering program "are commensurate with the size, location, and activities of the financial institutions to which such regulations apply." Thus, even if the Secretary does not issue regulations specifying minimum standards for required anti-money laundering programs, he must issue regulations that speak to the application of the statutory requirement to different classes of financial institutions.

Sec. 356 Reporting of suspicious activities by securities brokers and dealers; investment company study.

For several years, the Treasury Department has highlighted the need to extend the suspicious activity reporting regime beyond depository institutions and has promised to publish a rule requiring securities brokers and

[15] Interestingly, subsection (b) extends the "no-tipping" rule to any state or federal government official who learns of a report being made; any such official is similarly prohibited from notifying any person involved in the transaction that the transaction has been reported, except as necessary to fulfill the official duties of the federal or state officer or employee.

[16] This limitation on the immunity from the no-tipping rule is found in Section 355 of the MLAA, which amends Section 18(w) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(w).

dealers to file SARs. Section 356 now mandates that the Secretary of the Treasury issue a broker-dealer SAR rule. It imposes a deadline of January 1, 2002 for the Secretary of the Treasury — after consulting with the SEC and the Federal Reserve[17] — to publish proposed regulations requiring broker-dealers to file SARs. The rule must be published in final form by July 1, 2002, although it is not clear that the rule must be *effective* on that date. Section 356 also authorizes the Secretary, after consultation with the CFTC, to prescribe regulations requiring CFTC-regulated firms to file SARs.

In addition, Section 356 calls for the Secretary, the SEC and the Federal Reserve to study and make a joint recommendation to Congress within one year about applying SAR regulations to both registered investment companies and hedge funds. As part of their study and report, the agencies also are asked to consider the potential utility of requiring the disclosure of beneficial owners of personal investment companies ("PICs").

Sec. 363 Increase in civil and criminal penalties for money laundering.

The key components of the MLAA — the Special Measures, Special Due Diligence and Shell Bank provisions — have real teeth, both civil and criminal.

Section 363 amends the civil penalty provision of the BSA to include a special subsection (to be codified at 31 U.S.C. § 5321(a)(7)) that allows the Secretary of the Treasury to impose a monetary penalty of up to 2 times the amount of the transaction, not to exceed $1,000,000, on any financial institution that violates Section 5318A, 5318(i) or 5318(j).

On the criminal side, Section 363 makes a parallel amendment to the BSA's criminal enforcement section (to be codified at 31 U.S.C. § 5322(d)) that permits the government to impose a fine of up to two times the amount of the transaction, not to exceed $1,000,000, on any financial institution that violates Section 5318A, 5318(i) or 5318(j) or any regulation implementing any of those provisions.

Sec. 365 Reports relating to coins and currency received in nonfinancial trade or business.

This section requires non-financial trades or businesses[18] to file reports on currency transactions of over $10,000 — that is, CTRs — with FinCEN. These reports are to include the name and address of the person who engaged in the transaction, the amount of currency involved, and the date and "nature" of the transaction. Currently, those reports are filed with the Internal Revenue Service ("IRS") on Form 8300. The intent of the section appears to be to move the filing of these currency transaction reports from IRS to FinCEN, which would have the practical effect of making them more readily available throughout the government, since they would no longer be subject to the restrictions on dissemination imposed by Section 6103 of the Internal Revenue Code.

There is, however, some ambiguity in the section. First, while the section states that persons "shall file" reports on currency transactions of over $10,000, it also says that such reports shall be filed in the time and manner prescribed by the Secretary in regulations which the Secretary may, but is not required, to issue.

[17] In its 2001 National Money Laundering Strategy, the Bush Administration indicated that the Secretary of the Treasury had consulted with the SEC regarding the broker-dealer SAR rule but did not indicate that there had been similar consultations with the Federal Reserve.

[18] Section 365 defines "non-financial trade or business" as "any trade or business other than a financial institution that is subject to the reporting requirements of" 31 U.S.C. § 5313 — the statutory basis for the Currency Transaction Report rule, 31 C.F.R. § 103.22.

Such regulations as the Secretary determines to be necessary must be published by April 26, 2002. But whether the requirement to file a CTR with FinCEN would take effect in the event the Secretary did not issue regulations isn't clear.

Second, the section does not eliminate the requirement to make filings with the IRS on Form 8300. So it isn't clear what happens to the Form 8300 requirement under any scenario.

CHART OF EFFECTIVE DATES OF KEY PROVISIONS IN THE MONEY LAUNDERING ABATEMENT ACT[19]

Effective Date	Statutory or Regulatory Provision
October 26, 2001	Interbank Forfeiture provision, permitting U.S. law enforcement to forfeit foreign depositor funds held in U.S. interbank accounts, 18 U.S.C. § 981(k) (MLAA § 319(a))
	Financial institution definition provision, including credit unions and CFTC-regulated entities in the statutory definition of financial institution, 31 U.S.C. § 5312 (MLAA § 321)
	Modifications to the SAR "no-tipping" and "safe-harbor" provisions, 31 U.S.C. §§ 5318(g)(2) & (3) (MLAA § 351)
	Upon making a finding regarding money laundering concerns, the Secretary of the Treasury may, at any time, issue an order or regulation, effective immediately, requiring financial institutions to take "special measures" to combat money laundering, 31 U.S.C. § 5318A (MLAA § 311)
December 25, 2001	Shell Bank provision, prohibiting correspondent accounts with banks that have no physical presence anywhere, 31 U.S.C. § 5318(j) (MLAA § 313)
	Bank Records provision, which requires banks to maintain specified records and to produce records within 120 days of a request, and foreign correspondent banks either to produce subpoenaed records or lose their ability to maintain correspondent accounts with U.S. institutions, 31 U.S.C. § 5318(k) (MLAA 319(b))
December 31, 2001	Bank merger/acquisition provision, which requires bank regulatory agencies to consider applicants' money laundering record when considering merger and acquisition applications, 12 U.S.C. §§ 1842(c)(6) & 1828(c)(11) (MLAA § 327)
February 23, 2002	Mandatory regulation by the Secretary of the Treasury to implement the Public-Private Cooperation provision (MLAA § 314)
April 24, 2002	Mandatory regulation by the Secretary of the Treasury to "further delineate" the due diligence policies, practices and controls required by the Special Due Diligence provision, 31 U.S.C. § 5318(i) (MLAA § 312)
	Anti-Money Laundering Programs provision, requiring financial institutions to establish programs and procedures to guard against money laundering, 31 U.S.C. § 5318(h) (MLAA § 352)
	Mandatory regulation by the Secretary of the Treasury that considers the application of the anti-money laundering programs provision for different classes and types of financial institutions (MLAA § 352)

[19] This chart reflects several important "permissive regulations," which the MLAA specifically empowers, but does not require, the Secretary of the Treasury to issue. The Secretary obviously has authority, under the Bank Secrecy Act, to issue other regulations, but this chart reflects only those specifically mentioned in the MLAA.

April 26, 2002	Permissive regulation by the Secretary of the Treasury to implement non-financial business and trade CTR provision, requiring businesses and trades to file CTRs with FinCEN rather than on Form 8300, 31 U.S.C. § 5331 (MLAA § 365)
July 1, 2002	Mandatory regulation by the Secretary of the Treasury requiring broker-dealers to file SARs with FinCEN must be issued in final form, but will not necessarily take effect immediately (MLAA § 356)
July 23, 2002	Special Due Diligence policies, practices and controls must be observed for all accounts, whenever opened, and regardless of whether the regulations required to "further delineate" these procedures have been promulgated (MLAA § 312)
October 26, 2002	Mandatory regulation by the Secretary of the Treasury imposing an Identify Your Customer requirement, 31 U.S.C. § 5318(*l*) (MLAA § 326)
No Date Specified	Mandatory regulation by the Secretary of the Treasury defining "beneficial ownership of account" for the Special Measures provision, 31 U.S.C. § 5318A (MLAA § 311).
	Mandatory regulation by the Secretary of the Treasury, in consultation with the appropriate federal functional regulator, defining "account" for non-bank financial institutions for the Special Measures provision, 31 U.S.C. § 5318A (MLAA § 311)
	Mandatory regulation by the Secretary of the Treasury delineating the "reasonable steps" necessary to comply with the Shell Bank provision, 31 U.S.C. § 5318(j) (MLAA § 313).
	Permissive regulation by the Secretary of the Treasury prohibiting the use of concentration accounts to obscure the link between beneficial owners and their funds, 31 U.S.C. § 5318(h)(3) (MLAA § 325)
	Permissive regulation by the Secretary of the Treasury, after consultation with the appropriate functional regulators, to prescribe minimum standards for anti-money laundering programs required by 31 U.S.C. § 5318(h) (MLAA § 352)
	Permissive regulation by the Secretary of the Treasury, after consultation with the appropriate functional regulators, to prescribe SAR requirements for futures commission merchants, commodity trading advisors, and commodity pool operators registered under the Commodity Exchange Act, 31 U.S.C. § 5318(g) (MLAA § 356(b))

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other financial institutions matters, please contact one of the lawyers:

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