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M E M O R A N D U M

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To Our Clients and Friends

Re: USA Patriot Act: FinCEN's New Rules on
International Correspondent and Private Banking

The Financial Crimes Enforcement Network ("FinCEN") has issued a final regulation implementing section 312 of the USA Patriot Act relating to due diligence programs for international correspondent and private banking relationships. The new regulation supersedes FinCEN's interim rule adopted in July 2002.[1] The regulation generally takes effect in 90 days for new accounts and 270 days for existing accounts. FinCEN is also requesting public comment regarding enhanced due diligence for accounts maintained for certain foreign banks.

THE USA PATRIOT ACT

Section 312 of the USA Patriot Act is intended to help prevent money laundering by requiring U.S. financial institutions to establish due diligence programs reasonably designed to detect and report money laundering through correspondent and private banking accounts established for non-U.S. persons. Additional enhanced due diligence standards are required if the accountholder is a foreign bank operating under an offshore banking license[2] or under a banking license from a country that has been designated as non-cooperative with international anti-money laundering principles, or if the private banking account is maintained by senior foreign political figures, their immediate families and close associates.

FINAL RULE

The final rule applies to federally regulated depository institutions and trust companies, U.S. branches and agencies of foreign banks, Edge Act corporations, securities

[1] 67 *Fed. Reg.* 48348 (July 23, 2002).
[2] An offshore banking license is a license that prohibits the entity from conducting banking activities with the citizens or local currency of the country issuing the license.

broker-dealers, futures commission merchants, introducing brokers and mutual funds.[3] It provides the following:

- Correspondent accounts are defined broadly as accounts established for foreign financial institutions to receive deposits, make payments or other disbursements or handle other financial transactions.
- Accounts established for foreign branches of U.S. banks are regarded as correspondent accounts; accounts established for U.S. branches of foreign banks are not correspondent accounts.
- Accounts covered by the rule include those of foreign banks, foreign offices of U.S. financial institutions, and foreign securities broker-dealers, futures commission merchants, mutual funds currency dealers and exchangers and money transmitters.
- U.S. financial institutions covered by the rules must establish a due diligence program that includes appropriate, specific risk-based policies, procedures and controls reasonably designed to enable the detection and reporting of known or suspected money laundering or suspicious activity conducted through the correspondent account.
- Covered financial institutions must conduct periodic reviews of correspondent account activity to determine consistency with anticipated account activity.

PRIVATE BANKING ACCOUNTS

Due diligence programs for private banking accounts are to include the following:

- Include policies, procedures and controls reasonably designed to enable the detection and reporting of known or suspected money laundering or suspicious activity involving the account.
- Determine the identity of all owners of the account.
- Ascertain whether an owner is a senior foreign political figure.
- Determine the source of funds in the account as well as the purpose and expected use of the account.
- Review account activity.
- Conduct enhanced scrutiny designed to reasonably detect transactions involving proceeds of foreign corruption if a senior foreign political figure holds the private banking account.

If appropriate due diligence cannot be performed, the institution must consider whether to refuse to open the account, suspend transaction activity, close the account, or file a suspicious activity report.

[3] The rule does not apply to foreign branches of U.S. banks, money services businesses, casinos and operators of credit card systems.

The rule is effective 90 days after publication in the *Federal Register* for new correspondent and private banking accounts and 270 days after publication for existing accounts.

PROPOSED RULE FOR CORRESPONDENT BANK ACCOUNTS

FinCEN is requesting public comment on a revised approach for implementing the enhanced due diligence procedures for correspondent accounts established, maintained, managed or administered for certain categories of foreign banks.[4] Until a new rule is adopted, banking organizations will be required to continue to apply the enhanced due diligence requirements set forth in FinCEN's 2002 interim rule. Those not subject to the interim rule, such as securities firms, will continue to be exempt from the enhanced due diligence requirements of the interim rule.

The proposed rule adopts a risk-based approach to determining the nature and extent of the money laundering risk posed by a foreign bank's account and what level of enhanced due diligence is appropriate. The proposed rule sets out the additional measures financial institutions will be expected to include in their assessments. These include a review of the bank's anti-money laundering program, monitoring transactions through the account to detect money laundering or suspicious activity and additional scrutiny of persons who may direct transactions through payable-through accounts. Financial institutions must also determine whether the foreign bank maintains correspondent accounts for foreign banks for which the U.S. account is used to process transactions. Comments on the proposal are due in mid-March.

A copy of FinCEN's final and proposed regulations can be found on our web site at http://www.schwartzandballen.com/whats_new.html.

If you have any questions, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.

[4] These categories are foreign banks operating (1) under an offshore banking license, (2) under a license issued by a country designated as being non-cooperative with international anti-money laundering principles or procedures by an international group or organization of which the U.S. is a member (currently The Financial Action Task Force) and with which designation the U.S. concurs, or (3) under a license issued by a country designated by the Secretary of Treasury as warranting special measures due to money laundering concerns.