

MEMO# 14747

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TREASURY PROPOSAL CONCERNING DUE DILIGENCE AML PROGRAMS FOR CERTAIN FOREIGN ACCOUNTS -- JUNE 6TH CONFERENCE CALL

URGENT/ACTION REQUESTED [14747] May 28, 2002 TO: INTERNATIONAL COMMITTEE No. 38-02 MONEY LAUNDERING RULES WORKING GROUP No. 26-02 RE: TREASURY PROPOSAL CONCERNING DUE DILIGENCE AML PROGRAMS FOR CERTAIN FOREIGN ACCOUNTS -- JUNE 6TH CONFERENCE CALL The Treasury Department and its Financial Crimes Enforcement Network ("FinCEN") have issued proposed rules to implement Section 312 of the USA PATRIOT Act (the "Act"), which requires financial institutions to establish due diligence policies, procedures, and controls reasonably designed to detect and report money laundering through correspondent accounts and private banking accounts that U.S. financial institutions establish or maintain for non-U.S. persons.¹ The proposed rules are very broad and would apply to all financial institutions, including mutual funds, that are required to implement anti-money laundering programs. The proposal is attached and is briefly summarized below. Comments on the proposal must be filed with FinCEN no later than 30 days after it is published in the Federal Register. We plan to hold a conference call of the Working Group on Thursday, June 6th at 3:00 p.m. Eastern time to discuss comments on the proposal. (A subsequent memorandum will provide details on how to join the call.) In the meantime, please provide any comments to me (202/326-5822 or frances@ici.org) or Bob Grohowski (202/371-5430 or rcg@ici.org). Due Diligence Programs for Correspondent Accounts for Foreign Financial Institutions The proposed rules set forth due diligence requirements for correspondent accounts maintained by covered financial institutions for foreign financial institutions. "Correspondent account" is defined as "an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution." The Proposing Release indicates that in the case of securities broker-dealers, futures commission merchants, and introducing brokers, a correspondent account would include any account that permits the foreign financial institution to engage in securities or futures transactions, funds transfers, or other types of financial transactions. "Covered financial institutions" are those entities required to establish anti-money laundering ("AML") compliance 1 Financial Crimes Enforcement Network; Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts ("Proposing Release"), available at www.treas.gov/fincen/proposedregulationsection312.pdf. 2 programs, including mutual funds. "Foreign financial institutions" are foreign banks and other persons organized under foreign law that, if organized in the United States, would be required to establish AML programs. Under the proposed rules, a covered financial institution would be required to

maintain a due diligence program that includes policies, procedures and controls reasonably designed to enable the financial institution to detect and report any known or suspected money laundering conducted through or involving any correspondent account maintained by such financial institution for a foreign financial institution. Although the Proposing Release states that the policies and procedures should be tailored to the covered financial institution's business and operations and the types of financial services it offers through correspondent accounts, the due diligence program would have to contain, at a minimum, the following five elements: (1) a determination whether the correspondent account is subject to the enhanced due diligence requirements discussed further below that apply to accounts maintained for certain foreign banks; (2) a risk assessment to determine whether the correspondent account poses a significant risk of money laundering activity; (3) consideration of any publicly available information from U.S. governmental agencies and multinational organizations with respect to regulation and supervision, if any, applicable to the foreign financial institution; (4) consideration of any guidance issued by Treasury or the covered financial institution's functional regulator regarding money laundering risks associated with particular foreign financial institutions and types of correspondent accounts; and (5) review of public information to ascertain whether the foreign financial institution has been the subject of any criminal action of any nature, or of any regulatory action relating to money laundering, to determine whether the circumstances of such action may reflect an increased risk of money laundering through the correspondent account. The proposed rules would impose additional due diligence requirements for correspondent accounts for certain foreign banks.⁴ The additional requirements are:

2 The Proposing Release states that in making such an assessment, covered financial institutions may consider "any relevant factors . . . , including the foreign financial institution's line or lines of business, size, customer base, location, products and services offered, the nature of the correspondent account, and the type of transaction activity for which it will be used."

3 According to the Proposing Release, covered financial institutions "should take steps to avail themselves of public information about jurisdictions in which their foreign financial institution customers are organized or licensed, to assist in determining whether particular correspondent accounts pose significant risks."

4 This includes all foreign banks operating under the following types of licenses: (1) an offshore banking license; (2) a banking license issued by a foreign country that is designated as noncooperative by an intergovernmental group or organization of which the United States is a member (e.g., the Financial Action Task Force on Money Laundering), with which designation the United States representative to the group or organization concurs; or (3) a banking license

3 (1) applying enhanced scrutiny to the correspondent account, including (a) performing due diligence on the foreign bank's AML program, and (b) "when appropriate," monitoring transactions through the correspondent account and obtaining information about persons that will have authority to direct those transactions; (2) taking reasonable steps to determine whether the foreign bank maintains correspondent accounts for other foreign banks and, if so, documenting the identity of these other foreign banks and establishing policies and procedures for assessing and minimizing risks associated with these accounts; and (3) in the case of foreign banks whose shares are not publicly traded, identifying each person who owns, controls or has voting power over 5 percent or more of any class of the foreign bank's securities and the nature and extent of each such person's ownership interest. Finally, due diligence programs for correspondent accounts for foreign financial institutions would have to include procedures to be followed when due diligence cannot be adequately performed, such as refusing to open an account, suspending transaction activity, filing suspicious activity reports, or closing the account.

Due Diligence Programs for Private Banking Accounts for Non-U.S. Persons The proposed rules also would require each covered financial institution to maintain a due diligence program that includes

policies, procedures and controls that are reasonably designed to detect and report any known or suspected money laundering conducted through or involving any private banking account that the financial institution maintains for or on behalf of a non-U.S. person. "Private banking account" is defined as an account (or any combination of accounts) that (1) requires a minimum aggregate amount of funds or other assets of not less than \$1,000,000; (2) is established on behalf of or for the benefit of one or more individuals who have a direct or beneficial ownership interest in the account; and (3) is assigned to, or is administered or managed by an officer, employee or agent of a covered financial institution acting as a liaison between the covered financial institution and the direct or beneficial owner of the account. As proposed, due diligence programs for private banking accounts, at a minimum, would have to ensure that the covered financial institution takes reasonable steps to: (1) ascertain the identity of all nominal holders and holders of any beneficial ownership interest in the private banking account, including the lines of business and source of wealth of such persons; (2) ascertain the source of funds deposited into the account; issued by a foreign country that has been designated by Treasury as warranting special measures due to money laundering concerns. 4 (3) ascertain whether any such holder may be a senior foreign political figure;⁵ and (4) report any known or suspected violation of law conducted through or involving the private banking account. The proposed rules would impose additional due diligence requirements in the case of any private banking account maintained for a senior foreign political figure, including a requirement to establish policies and procedures reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.⁶ Also, as in the case of correspondent accounts for foreign financial institutions, due diligence programs for private banking accounts would have to include procedures to be followed when due diligence cannot be adequately performed. Request for Comment Treasury invites comment on all aspects of the proposed rules and on certain specific issues. The specific questions generally relate to the scope of the rules and whether various key terms are appropriately defined, and to whether the overall approach of the rules should be either less or more prescriptive than proposed. Effective Date Section 312 of the Act takes effect on July 23, 2002, regardless of whether final regulations have been issued by that date. It applies to covered correspondent or private banking accounts opened before, on, or after the enactment of the Act. Frances M. Stadler Deputy Senior Counsel Attachment (in .pdf format) 5 "Senior foreign political figure" is defined in the proposed rules as "(i) A current or former senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not), a senior official of a major foreign political party, or a senior executive of a foreign government-owned commercial enterprise; (ii) A corporation, business or other entity that has been formed by, or for the benefit of, any such individual; (iii) an immediate family member [spouse, parent, sibling, child, or spouse's parent or sibling] of any such individual; and (iv) A person who is widely and publicly known (or is actually known by the relevant covered financial institution) to maintain a close personal or professional relationship with any such individual." 6 "Proceeds of foreign corruption" is defined to mean "assets or property that are acquired by, through, or on behalf of a senior foreign political figure through misappropriation, theft or embezzlement of public funds, or the unlawful conversion of property of a foreign government, or through acts of bribery or extortion, and shall include other property into which such assets have been transformed or converted."