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MBNA AMERICA

July 1, 2002

Judith R. Starr
Chief Counsel
Office of the Chief Counsel
Financial Crimes Enforcement Network (FinCEN)
Department of Treasury
P.O.Box 39
Vienna, VA 22183

Attention: Section 312 Regulations

Dear Ms.Starr:

This letter is in response to your agency's invitation to comment in the Federal Register, Volume 67; Number 104 dated Thursday, May 30, 2002. The Department of Treasury's Financial Crimes Enforcement Network (FinCEN) is seeking comment on proposed regulations to amend the Bank Secrecy Act (BSA), 31 U.S.C. 5311 et seq. The proposed amendment is added by Section 312 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the Act). The proposed rule adds a new subsection (i) to 31 U.S.C. 5318. The amendment requires each U.S. financial institution that establishes, maintains, administers, or manages a private banking account or a correspondent account in the United States for a non-U.S. person to take certain anti-money laundering measures with respect to such accounts. In particular, financial institutions must establish appropriate, specific, and, where necessary, enhanced, due diligence policies, procedures and controls that are reasonably designed to enable the financial institution to detect and report instances of money laundering through those accounts.

MBNA America Bank, N.A., (MBNA) a national bank with $100 billion in managed loans, is the largest independent credit card lender in the world. It also provides consumer deposits, consumer loans, small business loans, insurance, debt cancellation and travel products. MBNA is the recognized industry leader in affinity marketing with endorsements from thousands of membership organizations and financial institutions around the world. Our products and services are sold and serviced almost entirely over the telephone, through the mail, and the Internet.

MBNA is committed to the efforts of the U.S. Treasury Department and other agencies to fight terrorist financing and money laundering. We are eager to assist the Treasury Department in developing rules and regulations for "correspondent accounts" and "private banking accounts" that assist in those efforts. Our comments demonstrate that MBNA firmly believes in a risk based approach to due diligence under Section 312 as the most effective, practical and efficient means to implement the Final Rule. We have provided comments on a risk based approach, the definitions under the Final Rule, due diligence for correspondent accounts, identification requirements, due diligence for private banker accounts and implementation dates.

I. Risk Based Approach

MBNA strongly endorses a risk-based approach to the due diligence requirements of Section 312. Such an approach for Section 312 is consistent with Treasury's interim final rules implementing Section 352 of the Act, which requires financial institutions to follow a risk-based approach in establishing anti-money laundering programs. Section 103.176(a)(2) explicitly states that a covered financial institution shall maintain a due diligence program that assesses whether the foreign financial institution presents a significant risk of money laundering based on relevant factors.

We believe a risk based approach enables a financial institution to focus its attention and resources on those customers, accounts, and transactions that are most vulnerable to money laundering and terrorist financing. We respectfully submit that any unilaterally applied approach will result in a less effective program to combat money laundering and terrorist financing. Due diligence that is not focused on the money laundering risk presented will be unfocused, overly diffuse and ultimately unproductive.

We recommend that Treasury consider two key components of an effective risk-based due diligence program in the Proposed Rule. The first is reliance on intermediaries with regard to their own anti-money laundering due diligence programs as applied to "beneficial owner" and other clients. If the intermediary has been a long-time customer of the covered financial institution and is located in a jurisdiction with a robust anti-money laundering regime, the covered financial institution should be allowed to rely on the intermediary's due diligence. The second key component provides for a distinction between proprietary accounts of foreign financial institutions and accounts maintained by such institutions on behalf of, or to provide services to, third parties. The later type of account involves higher risk because it is used to conduct transactions for multiple persons and the covered financial institution's capacity to conduct due diligence on those persons is limited. We believe the addition of these two components will create a more effective risk-based due diligence under the Proposed Rule.

II. § 103.175 Definitions

"Correspondent Accounts"

The proposed definition of "correspondent account" will include most types of relationships between a covered financial institution and a foreign financial institution.
We recommend that Treasury define the term "correspondent account" on a more focused risk-oriented basis consistent with the provisions under Section 103.176 referenced above. We respectfully submit that an attempt is made to define "correspondent account" in terms that apply only to those accounts and transactions where the risk of money laundering is meaningful. This will enable financial institutions to focus their attention and resources where they are most needed.
We believe that the risk of money laundering and terrorist financing is not meaningful in the following situations involving accounts on transactions with foreign financial institutions:
(i) Where a foreign financial institution (either a client or a counterparty) is acting as principal (e.g., foreign exchange, derivatives and other capital markets transactions, and extensions of credit);
(ii) Where the covered financial institution's relationship or account with the foreign financial institution is established for a specific purpose and funds are received or disbursed under limited,

defined circumstances to identified third parties, as set forth in an agreement with the foreign financial institution (e.g., escrow, corporate trust, paying agency and custody);
(iii) Where the account is for investment of funds that are subject to a regulatory scheme (e.g., investment of funds of regulated pension or retirement plans); and
(iv) Where the account is held by a foreign financial institution that is itself subject to and complies with a robust anti-money laundering regime.

We therefore urge the Department to refine the definition of “correspondent account” to achieve an approach that is truly risk-based. This could be accomplished by focusing on types of transactions and, as discussed in the following paragraphs, the role of the client. At the very least, a risk-based approach should be explicitly recognized as a fundamental element of covered financial institutions’ due diligence efforts.

“Covered Financial Institution”

The proposed definition of “covered financial institution” is broader than the definition of “covered financial institution” in Section 313 and Section 319 of the Act. We are concerned that this new broader definition of “covered financial institution” will now include foreign branches of insured depository institutions. We believe that the extended definition creates both legal and policy issues.

Section 312’s due diligence requirements are explicitly limited to correspondent accounts and private banking accounts established or maintained “in the United States.” Accounts at foreign branches of U.S. banks are therefore not included within the definition. As a matter of law, the application of Section 312 to foreign branches is beyond the scope of that Section.

As a policy matter, foreign financial institutions and private bank clients are likely to shift their accounts to foreign financial institutions, rather than experience the difficulties involved in responding to the mandated due diligence requirements of U.S. bank branches. The foreign financial institutions are not subject to the due diligence requirements of the Proposed Rule. These foreign financial institutions, in turn, will transmit the payment to a covered financial institution, but often without information about the actual originator of the transaction. The requirement that foreign branches of U.S. banks comply with the Proposed Rule will not prevent foreign financial institutions and private banking clients from engaging in transactions that will eventually flow through covered financial institutions in the United States. As a result, not only covered financial institutions, but also ultimately the U.S. government, will be deprived of access to information about sources of funds.

We believe that, as a practical matter, such a gap will not exist because financial institutions apply a high standard of anti-money laundering programs across their organizations globally. In fact, a foreign branch or foreign affiliate of a covered financial institution is normally subject to both the anti-money laundering policies and procedures of its head office and the anti-money laundering regime of the jurisdiction in which it operates. We believe this dual oversight should mitigate any concerns that sufficient anti-money laundering controls are in place.

“Foreign Financial Institution”

In the Proposed Rule, the definition of “foreign financial institution” is tied to the definition of “covered financial institution” which creates two problems. The first problem is that it will be extremely difficult to apply a definitional concept tailored for U.S. financial institutions to foreign entities where there is different terminology, different methods of conducting business and different licensing and regulatory schemes. At a minimum, additional definitional guidance is necessary. We strongly recommend that Treasury define "foreign financial institution" by a list of enumerated categories of financial institutions that are regulated or licensed in a foreign country and other institutions that perform the same functions. We recommend that this list be comprised of banks, securities broker-dealers, mutual funds (or some other term such as "publicly offered investment funds" that has the same connotation), currency exchanges and money transmitters.

The second problem is the wide variety of risk involved because under the Proposed Rule the definition of financial transactions and foreign financial institutions covers a broad gamut of activities and entities. Consistent with a risk-based approach as outlined in Section 103.176, we recommend that Treasury allow covered financial institutions to use a risk-based system in applying the requirements of the Proposed Rule to foreign financial institutions, as defined in the Proposed Rule, and in identifying specific transactions with those institutions. Covered financial institutions should be permitted to assess the risks of money laundering and terrorist financing presented by various foreign financial institutions and transactions with them and apply due diligence or enhanced due diligence to those institutions and transactions, as appropriate.

"Private Banking Account"

We believe the definition of "private banking account" is overly broad and inconsistent. It should not be defined to capture every account held for a foreign individual that contains a large amount of funds or other assets. Section 312 of the Act and the preamble to the proposed rule clearly states that the definition applies only to accounts that require a "deposit" of $1,000,000 or more. We respectfully submit that Treasury revise the language of the Proposed Rule to be consistent with that of the Act and the preamble.

III. § 103.176 Due Diligence Programs for Correspondent Accounts for Foreign Financial Institutions

In some cases, foreign banks will be precluded by the laws of their home country jurisdictions from providing the enhanced due diligence information regarding their customers required under the Proposed Rule. In other cases, they may simply refuse to provide this information because it may be deemed to be too sensitive competitively. And even if the information is provided, covered financial institutions will be at substantial risk if they continue to conduct business with the foreign bank because of the difficulty of conducting adequate due diligence on such information.

We recommend a risk-based approach, under which covered financial institutions would perform a risk assessment of each foreign bank for the purpose of evaluating the degree to which the covered financial institution could justifiably rely on the due diligence performed by the foreign bank on its foreign bank customers. These factors could include:
(i) the extent to which the foreign bank has due diligence policies and procedures that are consistent with the recommendations of an intergovernmental group or organization on international money laundering principles or procedures to which the United States subscribes;
(ii) the reputation of the foreign bank;
(iii) official pronouncements by intergovernmental groups or organizations and the United States Government regarding efforts by the relevant jurisdiction to improve its anti-money laundering regime.

Based on this risk assessment, the covered financial institution will determine whether it can rely exclusively on the foreign respondent bank's due diligence of its foreign bank customers or should obtain additional information about the identities of those customers. Such information might include, depending on the relevant risk-related circumstances, a list of names and addresses of the customers, representations about the general character of those customers, or specific due diligence information regarding those customers. The risk-based approach will focus the attention and resources of the covered financial institution on the accounts and transactions that create the greatest risk.

IV. § 103.176 (b)(1)(ii) Requirement to Identify Persons With the Authority to Direct Transaction Through the Correspondent Account

We assume that this requirement is directed at so-called payable through accounts or other accounts of foreign banks where the foreign bank's customers have direct access to the account. If our assumption is correct, the requirement is understandable and it does not create a serious compliance issue.

If, however, this requirement is directed at accounts for which there is no direct access by the foreign bank's customer (*e.g.*, traditional correspondent accounts in the banking industry and omnibus accounts in the futures and the securities industries), the requirement is less understandable and quite probably impossible to implement. There will be many thousands of persons covered by the identification requirement and they will change frequently. Moreover, both the foreign bank and its customers may object to the disclosure of the information, and local privacy laws may be violated. In addition, even if covered financial institutions received the names, in most cases it will be impossible to conduct meaningful due diligence with regard to those names.

V. § 103.176(b)(2) Requirement That a Covered Financial Institution Identify Its Foreign Respondent Bank's Bank Customer

Financial institutions may be legally precluded from providing information on their bank's bank customer because it might violate foreign privacy or data protection laws. Even absent any legal prohibition, foreign banks will be highly reluctant, for competitive reasons, to provide the names of all their respondent banks.

We believe that Treasury can take several steps in the final rule to reduce this possibility. Treasury should adopt the risk-based approach described above. Treasury should define "correspondent account" for these purposes in a way that excludes transactions on behalf of third parties, for example, where a foreign bank is trading for its own account using proprietary funds. In addition, the final rule should clarify that the identification requirement does not constitute a continuous obligation, but that information should be updated periodically, for example every two years.

Even if foreign banks are prepared to identify all their bank customers, a significant issue remains. The Proposed Rule requires a covered financial institution's due diligence program to provide for policies, procedures and controls to assess and minimize risks associated with the foreign bank's correspondent account for other foreign financial institutions. This requirement can be read as containing an implicit obligation upon covered financial institutions to conduct due diligence with regard to their foreign respondent bank's bank customers. Covered financial institutions cannot practically conduct due diligence on all the bank customers of the foreign bank, which, in some cases, may number in the thousands. We believe that it is essential that the final rule clarify that covered financial institutions do not have any due diligence obligations with respect to their foreign respondent bank's bank customers.

VI. § 103.178 Due Diligence Programs for Private Banking Accounts for Non-U.S. Persons

The phrase, "on behalf of", as used in Section 103.178(a) to describe private banking accounts, is inherently ambiguous. We recognize the need to prevent evasion through the use of nominees for individuals. Nonetheless, this phrase is so broad that it potentially encompasses a wide variety of accounts that do not create meaningful risk of money laundering and terrorist financing. We urge Treasury to reduce this ambiguity and apply the private banking account requirement to only those accounts with a meaningful risk of money laundering and terrorist financing. As an example we assume that "private banking account" does not apply to a retail foreign mutual fund or a publicly held company, even if one or more individuals owns stock in the fund or company with a value exceeding $1 million. The breadth and public nature of ownership should preclude any argument that the foreign mutual fund or company has established an account on behalf of an individual.

Our principal concern on Section 103.178 relates to the absence of any recognition of reliance on intermediaries as part of a risk-based due diligence approach. We believe that, consistent with a risk based approach above, covered financial institutions can rely, in appropriate circumstances, on intermediaries with respect to due diligence on the beneficial owners of private banking accounts. In determining whether reliance is appropriate, a distinction can be drawn between active intermediaries and traditional private banking vehicles that are typically passive. Traditional private banking vehicles, such as trusts, private holding companies and certain unincorporated associations, function as instruments of a limited number of underlying beneficial owners. In contrast, intermediaries such as banks, broker-dealers, mutual funds and hedge funds, are generally operating, autonomous entities, although account holders or investors can instruct the intermediary, on a limited basis, to perform a limited set of functions on their behalf. Although it may normally be appropriate to look through traditional private banking vehicles to the beneficial owners, it may be appropriate to rely on the due diligence performed by active intermediaries, particularly if the intermediary is subject to a robust anti-money laundering regime.

We are not advocating that foreign individuals should have access to the U.S. financial system without sufficient due diligence being performed. The question is whether that due diligence must in all cases be performed by a covered financial institution, or whether some other regulated and responsible party can be relied upon to perform that due diligence. Where an intermediary is not itself subject to a robust anti-money laundering regime, however, we recognize the responsibility to conduct due diligence with regard to the underlying foreign individuals who have a beneficial ownership interest in the account. We ask Treasury to consider the risk-based due diligence approach in the Final Rule.

VI. Timing for Implementing the Proposed Rule

MBNA, like all financial institutions, will make every effort to conform our current due diligence practices to the new rule as promptly as feasible. We believe, however, it is simply impossible, as a practical matter, for all financial institutions to comply with the comprehensive and detailed requirements of the Proposed Rule by the July 23 statutory date. There are a number of reasons, each of which alone may be preclusive, and which in combination render full compliance impossible.

First, there is likely to be very close proximity between the July 23 statutory date and the promulgation of the final rule. Under the best of circumstances, the final rule is unlikely to be published until days before July 23, 2002. Once published, the final rule will have to be reviewed and analyzed by covered financial institutions, and responsive due diligence and enhanced due diligence procedures put in place. Although covered financial institutions have been attempting to conduct due diligence based upon their present understanding of the requirements of the Proposed Rule, anti-money laundering compliance systems cannot be finalized until the final terms of the rule are known.

Second, as discussed below, unless there are substantial changes in the proposed definitions of "correspondent account" and "foreign financial institution," financial institutions will be required to conduct enhanced due diligence with respect to all business relationships with foreign banks subject to that regime. Financial institutions have been conducting due diligence on traditional correspondent accounts and enhanced due diligence on certain correspondent accounts and other accounts viewed as creating a special risk of money laundering. Financial institutions have not conducted a similar level of due diligence in connection with their entire range of dealings with all foreign financial institutions. To comply with the Proposed Rule, numerous additional accounts and transactions must be identified, and substantial new systems and procedures must be developed and implemented.

Third, unless the Proposed Rule is revised to recognize reliance on due diligence performed by intermediaries, many financial institutions may need to obtain beneficial ownership and source of funds information for accounts held by intermediaries on behalf of non-U.S. persons. Most institutions have not required this information in the past from all intermediaries. Due to conflicting legal standards and other considerations, it may be very difficult to obtain in some cases going forward.

Fourth, some of the elements of the proposed enhanced due diligence requirements applicable to certain correspondent accounts do not currently form part of the anti-money laundering programs in place at most covered financial institutions. For example, covered financial institutions do not presently ask their foreign respondent banks to identify all the other foreign financial institutions for which accounts are maintained.

In order to deal with these timing difficulties, we urge the Treasury to adopt a bifurcated approach to implementation that distinguishes between new accounts (prospective application) and existing accounts (retrospective application). This approach is designed to achieve implementation as soon as feasibly, as opposed to theoretically, possible.
With respect to new accounts, we recommend that the Proposed Rule should utilize a risk-based approach under which the requirements would become effective in two stages. First, the effective date with regard to correspondent accounts that are subject to enhanced due diligence and private banking accounts should be 30 days after publication of the final rule in the *Federal Register*. These accounts are recognized in the Act as presenting a higher risk of money laundering and terrorist financing. Second, the effective date with regard to all other correspondent accounts should be no earlier than 90 days after publication of the final rule.

Retrospective application of the Proposed Rule with regard to existing accounts presents a significant additional problem. Many covered financial institutions have not previously identified and classified foreign financial institutions, as defined in the Proposed Rule, for due diligence purposes. Nor have many identified and classified all business relationships with foreign financial institutions for due diligence purposes. In addition, the member institutions have not previously obtained information about all the "beneficial owners" of private banking accounts or their foreign respondent banks' bank customers as provided in the Proposed Rule. These additional requirements will involve a lengthy process that must be performed by human beings rather than computers, because covered financial institutions' computer systems are not currently coded to identify and classify foreign financial institutions and business relationships according to the requirements of the Proposed Rule. Also, the full scope of these requirements will only be known once the final rule is promulgated.

Accordingly, we recommend that the Proposed Rule become effective with respect to existing correspondent and private banking accounts no earlier than 180 days after publication of the final rule in the *Federal Register*. On the effective date, covered financial institutions would be required to: (i) have programs in place to address the new requirements; and (ii) have made a good faith effort to apply the new requirements to existing accounts. As part of this process, covered financial institutions would be instructed to review existing accounts on a risk-focused basis, with priority accorded to those accounts believed to create meaningful risk of money laundering or the financing of terrorist activities.

Conclusion

MBNA America supports the Treasury Department's fight against money laundering and terrorism. We support the provisions of the USA PATRIOT Act under Section 312 and believe the Final Rule to implement the due diligence and enhanced due diligence for correspondent accounts with foreign banks and private banking accounts should be risk based . It is our belief that the changes outlined above, will create regulations that maintain the intentions of Congress to provide financial institutions and the federal enforcement agencies with the tools to fight money laundering and terrorism. The recommended changes will also provide enhancements that will enable financial institutions to implement the regulations more effectively and with fewer burdens. We appreciate the opportunity to comment.

Sincerely,

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