



ICLG

The International Comparative Legal Guide to:

Anti-Money Laundering 2019

2nd Edition

A practical cross-border insight into anti-money laundering law

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PREFACE

We hope that you will find this second edition of *The International Comparative Legal Guide to: Anti-Money Laundering* useful and informative.

Money laundering is a persistent and very complex issue. Money laundering has been said to be the lifeblood of all financial crime, including public corruption and the financing of terrorism. Over the last 30 years, governments around the world have come to recognise the importance of strengthening enforcement and harmonising their approaches to ensure that money launderers do not take advantage of weaknesses in the anti-money laundering (AML) controls. Governments have criminalised money laundering and imposed regulatory requirements on financial institutions and other businesses to prevent and detect money laundering. The requirements are continually being refined and interpreted by government authorities. Because of the often international nature of the money laundering process, there are many cross-border issues. Financial institutions and other businesses that fail to comply with legal requirements and evolve their controls to address laundering risk can be subject to significant legal liability and reputational damage.

Gibson, Dunn & Crutcher LLP is pleased to join a group of distinguished colleagues to present several articles we hope you will find of interest on AML topics. This guide also has included chapters written by select law firms in 31 countries discussing the local AML legal and regulatory/administrative requirements and enforcement requirements. Gibson Dunn is pleased to present the chapter on the United States AML regime.

As with all ICLG guides, this guide is organised to help the reader understand the AML landscape globally and in specific countries. ICLG, the editors, and the contributors intend this guide to be a reliable first source when approaching AML requirements and considerations. We encourage you to reach out to the contributors if we can be of further assistance.

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1 The Crime of Money Laundering and Criminal Enforcement

1.1 What is the legal authority to prosecute money laundering at national level?

Money laundering has been a crime in the United States since 1986, making the United States one of the first countries to criminalise money laundering conduct. There are two money laundering criminal provisions, 18 United States Code, sections 1956 and 1957 (18 U.S.C. §§ 1956 and 1957).

1.2 What must be proven by the government to establish money laundering as a criminal offence? What money laundering predicate offences are included? Is tax evasion a predicate offence for money laundering?

Generally, it is a crime to engage in virtually any type of financial transaction if a person conducted the transaction with knowledge that the funds were the proceeds of “criminal activity” and if the government can prove the proceeds were derived from a “specified unlawful activity”. Criminal activity can be a violation of any criminal law – federal, state, local, or foreign. Specified unlawful activities are set forth in the statute and include over 200 types of U.S. crimes, from drug trafficking, terrorism, and fraud, to crimes traditionally associated with organised crime, and certain foreign crimes, as discussed below in question 1.3.

The government does not need to prove that the person conducting the money laundering transaction knew that the proceeds were from a specified form of illegal activity.

Knowledge can be based on wilful blindness or conscious indifference – failure to inquire when faced with red flags for illegal activity. Additionally, knowledge can be based on a government “sting” or subterfuge where government agents represent that funds are the proceeds of illegal activity.

Under Section 1956, the transaction can be: (1) with the intent to promote the carrying on of the specified unlawful activity; (2) with the intent to engage in U.S. tax evasion or to file a false tax return; (3) knowing the transaction is in whole or in part to disguise the nature, location, source, ownership or control of the proceeds of a specified unlawful activity; or (4) with the intent to avoid a transaction reporting requirement under federal or state law.

Section 1956 also criminalises the transportation or transmission of funds or monetary instruments (cash or negotiable instruments or securities in bearer form): (1) with the intent to promote the carrying

out of a specific unlawful activity; or (2) knowing the funds or monetary instruments represent the proceeds of a specified unlawful activity and the transmission or transportation is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of the specified unlawful activity.

Under Section 1957, it is a crime to knowingly engage in a financial transaction in property derived from specified unlawful activity through a U.S. bank or other “financial institution” or a foreign bank (in an amount greater than \$10,000). Financial institution is broadly defined with reference to the Bank Secrecy Act (“BSA”) statutory definition of financial institution (31 U.S.C. § 5312(a)(2)) and includes not just banks, but a wide range of other financial businesses, including securities broker-dealers, insurance companies, non-bank finance companies, and casinos.

Tax evasion is not itself a predicate offence, but, as noted, conducting a transaction with the proceeds of another specified unlawful activity with the intent to evade federal tax or file a false tax return is subject to prosecution under Section 1956. Also, wire fraud (18 U.S.C. § 1343) is a specified unlawful activity. Wire fraud to promote tax evasion, even foreign tax evasion, can be a money laundering predicate offence. *See U.S. v. Pasquantino*, 544 U.S. 349 (2005) (wire fraud to defraud a foreign government of tax revenue can be a basis for money laundering).

1.3 Is there extraterritorial jurisdiction for the crime of money laundering? Is money laundering of the proceeds of foreign crimes punishable?

There is extensive extraterritorial jurisdiction under the money laundering criminal provisions. Under Section 1956, there is extraterritorial jurisdiction over money laundering conduct (over \$10,000) by a U.S. citizen anywhere in the world or over a non-U.S. citizen if the conduct occurs at least “in part” in the United States. “In part” can be a funds transfer to a U.S. bank.

Under Section 1957, there is jurisdiction over offences that take place outside the United States by U.S. persons (citizens, residents, and legal persons) and by non-U.S. persons as long as the transaction occurs in whole or in part in the United States.

Certain foreign crimes are specified unlawful activities, including drug crimes, murder for hire, arson, foreign public corruption, foreign bank fraud, arms smuggling, human trafficking, and any crime subject to a multilateral extradition treaty with the United States.

Generally, there is no extraterritorial jurisdiction under the BSA, discussed below in section 2. The BSA requirements for Money Services Businesses (“MSBs”) can apply, however, even if the MSB

has no physical presence in the United States if the business conducts business “wholly or in substantial part within the United States”, *i.e.*, if a substantial number of U.S. customers or recipients of funds transfers are in the United States. 31 C.F.R. § 1010.100(ff) (BSA definition of MSB).

1.4 Which government authorities are responsible for investigating and prosecuting money laundering criminal offences?

Prosecution of money laundering crimes is the responsibility of the U.S. Department of Justice. There is a special unit in the Criminal Division of the Department of Justice, the Money Laundering and Asset Recovery Section (“MLARS”), that is responsible for money laundering prosecution and related forfeiture actions. The 94 U.S. Attorney’s Offices across the United States and its territories also may prosecute the crime of money laundering alone or with MLARS. MLARS must approve any prosecution of a financial institution by a U.S. Attorney’s Office.

As required in Section 1956(e), there is a (non-public) memorandum of understanding among the Secretary of the Treasury, the Secretary of Homeland Security, the Attorney General, and the Postal Service setting forth investigative responsibilities of the various federal law enforcement agencies that have investigative jurisdiction over Sections 1956 and 1957. Jurisdiction is generally along the lines of the responsibility for the underlying specified unlawful activity. The various federal agencies frequently work together on cases, sometimes along with state and local authorities, where jurisdiction overlaps.

The Federal Bureau of Investigation, the Drug Enforcement Administration, the U.S. Secret Service, U.S. Immigration and Customs Enforcement, the Internal Revenue Service Criminal Division, and the Postal Inspection Service frequently conduct money laundering investigations. An investigation unit of the Environmental Protection Agency can investigate money laundering crimes relating to environmental crimes.

1.5 Is there corporate criminal liability or only liability for natural persons?

There is criminal liability for natural and legal persons.

1.6 What are the maximum penalties applicable to individuals and legal entities convicted of money laundering?

The maximum penalties are fines up to \$500,000 or double the amount of property involved, whichever is greater, for each violation, and for individuals, imprisonment up to 20 years for each violation.

1.7 What is the statute of limitations for money laundering crimes?

That statute of limitations is five years. 18 U.S.C. § 3282(a).

1.8 Is enforcement only at national level? Are there parallel state or provincial criminal offences?

Section 1956(d) specifically provides that it does not supersede any provisions in federal, state or other local laws imposing additional criminal or civil (administrative) penalties.

Many states, including New York and California, have parallel money laundering criminal provisions under state law. *See, e.g.*, New York Penal Law Article 470.

1.9 Are there related forfeiture/confiscation authorities? What property is subject to confiscation? Under what circumstances can there be confiscation against funds or property if there has been no criminal conviction, i.e., non-criminal confiscation or civil forfeiture?

There is both criminal forfeiture following a conviction for money laundering, and civil forfeiture against the assets involved in, or traceable to, money laundering criminal conduct.

Under 18 U.S.C. § 982, if a person has been convicted of money laundering, any property, real or personal, involved in the offence, or any property traceable to the offence, is subject to forfeiture.

Under 18 U.S.C. § 981, a civil forfeiture action can be brought against property involved in or is traceable to the money laundering conduct even if no one has been convicted of money laundering. Because this is a civil action, the standard of proof for the government is lower than if there were a criminal prosecution for the money laundering conduct (preponderance of the evidence versus beyond a reasonable doubt). There is no need to establish that the person alleged to have committed money laundering is dead or otherwise unavailable.

1.10 Have banks or other regulated financial institutions or their directors, officers or employees been convicted of money laundering?

Absent established collusion with money launderers or other criminals, very few directors, officers, or employees have been convicted of money laundering. Where there have been criminal settlements with banks and other financial institutions related to money laundering, in all but one case, the settlements have been based on alleged violations of the Bank Secrecy Act (“BSA”), not violations of the money laundering criminal offenses.

1.11 How are criminal actions resolved or settled if not through the judicial process? Are records of the fact and terms of such settlements public?

Since 2002, 34 regulated financial institutions (25 banks) have pled guilty or have reached criminal settlements with the Department of Justice, generally, as noted, based on alleged violations of the anti-money laundering regulatory requirements under the BSA (either failure to maintain an adequate anti-money laundering program and/or failure to file required Suspicious Activity Reports). In one of these cases, a casino entered a settlement based on alleged violations of the money laundering criminal offenses.

A few of these settlements with foreign-owned banks have been based on alleged sanctions violations in addition to BSA violations. Substantial fines or forfeitures were paid as part of these settlements. There also were two other BSA prosecutions of banks in the late 1980s relating to currency transaction reporting and Bank of Credit and Commerce International (“BCCI”) pled guilty to money laundering in 1990.

In connection with many of the criminal dispositions, civil (administrative) sanctions based on the same or related misconduct have been imposed at the same time by federal and/or state regulators and the Financial Crimes Enforcement Network (“FinCEN”) in a coordinated settlement. *See* questions 2.8–2.11.

One reason criminal settlements with banks may not be based on the money laundering statute may be the severe potential legal

consequences or “death penalty” for a bank if it is convicted of money laundering. If a bank is convicted of money laundering, subject to a required regulatory (administrative) hearing, the bank could lose its federal deposit insurance, *i.e.*, be forced to cease operations. Such a review is discretionary if a bank is convicted of BSA violations and, in practice, not conducted. *See, e.g.*, 12 U.S.C. § 1818(w) (process for state-licensed, federally-insured banks).

Records relating to the criminal settlements are publicly available, including, in most cases, lengthy statements by the government about underlying facts that led to the criminal disposition. To our knowledge, there have been no non-public criminal settlements with financial institutions.

2 Anti-Money Laundering Regulatory/ Administrative Requirements and Enforcement

2.1 What are the legal or administrative authorities for imposing anti-money laundering requirements on financial institutions and other businesses? Please provide the details of such anti-money laundering requirements.

Authorities

In the United States, the main anti-money laundering (“AML”) legal authority is the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, 12 U.S.C. §§ 1829b and 1951–1959 (the “BSA statute”), and the Bank Secrecy Act implementing regulations, 31 C.F.R. Chapter X (the “BSA regulations”). (The BSA statute and regulations collectively will be referred to as “the BSA”.) The BSA statute was originally enacted in 1970 and has been amended several times, including significantly in 2001 by the USA PATRIOT Act (“PATRIOT Act”). The BSA gives the Secretary of the Treasury the authority to implement reporting, recordkeeping, and anti-money laundering program requirements by regulation for financial institutions and other businesses listed in the statute. 31 U.S.C. § 5312(a)(2). The Secretary of the Treasury has delegated the authority to administer and enforce the BSA to a Department of the Treasury bureau, FinCEN. FinCEN also is the U.S. Financial Intelligence Unit. *See* question 2.6. Because FinCEN has no examination staff, it has further delegated BSA examination authority for various categories of financial institutions to their federal functional regulators (federal bank, securities, and futures regulators). Examination authorities for financial institutions and businesses without a federal functional regulator is discussed in question 2.5.

The federal banking regulators (the Office of the Comptroller of the Currency (the “OCC”), the Board of Governors of the Federal Reserve (“Federal Reserve”), the Federal Deposit Insurance Corporation (“FDIC”), and the National Credit Union Administration (“NCUA”)) have parallel regulatory authority to require BSA compliance programs and suspicious activity reporting for the institutions for which they are responsible. *See, e.g.*, 12 C.F.R. §§ 21.21 (OCC BSA program requirement), 21.12 (OCC suspicious activity reporting requirement). Consequently, the bank regulators have both delegated examination authority from FinCEN, as federal functional regulators, and independent regulatory enforcement authority.

BSA examination authority for broker-dealers has been delegated to the Securities and Exchange Commission (“SEC”), as the federal functional regulator for broker-dealers. The SEC has further delegated authority to the Financial Industry Regulatory Authority (“FINRA”), the self-regulatory organization (“SRO”) for broker-

dealers. The SEC also has incorporated compliance with the BSA requirements for broker-dealers into SEC regulations and, consequently, has independent authority to enforce the BSA. 17 C.F.R. §§ 240.17a-8, 405.4.

Similarly, BSA examination authority for futures commission merchants (“FCMs”) and introducing brokers in commodities (“IB-Cs”), which are financial institutions under the BSA, has been delegated by FinCEN to the Commodities Futures Trading Commission (“CFTC”), as their federal functional regulator. The CFTC also has incorporated BSA compliance in its regulations. 17 C.F.R. § 42.2. The CFTC has delegated authority to the National Futures Authority (“NFA”) as that industry’s SRO.

AML Requirements

For the United States, the response to the question of what requirements apply is complicated. The BSA statute generally is not self-executing and must be implemented by regulation. The scope and details of regulatory requirements for each category of financial institutions and financial businesses subject to BSA vary. To further complicate the issue, all these businesses are defined as financial institutions under the BSA statute, but only certain ones are designated as financial institutions under the BSA regulations, *i.e.*, banks, broker-dealers, FCMs, IB-Cs, mutual funds, MSBs, casinos, and card clubs. Some BSA requirements only apply to businesses that come within the BSA definition of financial institution.

There also are three BSA requirements that apply to all persons subject to U.S. jurisdiction or to all U.S. trades businesses, not just to financial institutions or other businesses subject to specific BSA regulatory requirements. *See* question 3.13.

Main Requirements

These are the main requirements that apply under the BSA regulations, most of which are discussed in more detail in Part 3, as cross-referenced below.

AML Programs: All financial institutions and financial businesses subject to the BSA regulations are required to maintain risk-based AML Programs with certain minimum requirements to guard against money laundering. *See* questions 3.1, 3.2 and 3.3.

Currency Transaction Reporting: “Financial institutions” as defined under the BSA regulations must file Currency Transaction Reports (“CTRs”). *See* question 3.4.

Cash Reporting or Form 8300 Reporting: This requirement applies to all other businesses that are subject to the AML Program requirement, but not defined as financial institutions under the BSA regulations, and all other U.S. trades and businesses. *See* questions 3.4 and 3.13.

Suspicious Transaction Reporting: Financial institutions and other businesses subject to the AML Program requirement (except Check Cashers, Operators of Credit Card Systems, and Dealers in Precious Metals, Precious Stones, or Jewels) must file Suspicious Activity Reports (“SARs”). *See* question 3.9.

Customer Due Diligence (CDD) Programs: Banks, broker-dealers, FCMs, IB-Cs, and mutual funds are required to maintain CDD programs. *See* question 3.7.

Customer Identification Program (“CIP”): Certain BSA financial institutions (banks, broker-dealers, FCMs, IB-Cs, and mutual funds) are required to maintain CIP programs as part of their CDD and AML Programs. *See* question 3.7.

Customer Due Diligence Programs for Non-U.S. Private Banking Clients and Foreign Correspondents: This requirement is applicable to banks, broker-dealers, FCMs, IB-Cs, and mutual funds. *See* question 3.7.

Recordkeeping: There are BSA general recordkeeping requirements applicable to all BSA financial institutions, specific recordkeeping

requirements for specific types of BSA financial institutions, and requirements to maintain records related to BSA compliance for all financial institutions and financial businesses subject to the BSA. Generally, records are required to be maintained for five years. 31 C.F.R. § 1010.400 (general recordkeeping requirements for financial institutions); *see, e.g.*, 31 C.F.R. § 1023.410 (recordkeeping requirements for broker-dealers).

Cash Sale of Monetary Instruments: There are special recordkeeping and identification requirements relating to the cash sale of monetary instruments in amounts of \$3,000 to \$10,000 inclusive (bank checks or drafts, cashier's checks, travellers' cheques, and money orders) by banks and other financial institutions under the BSA regulations. 31 C.F.R. § 1010.415.

Funds Transfer Recordkeeping and the Travel Rule: This is applicable to banks and other financial institutions under the BSA regulations. *See* question 3.11.

Money Services Business Registration: MSBs must register (and re-register every two years) with FinCEN. MSBs that are only MSBs because they are agents of another MSB are not required to register. MSBs must maintain lists of their agents with certain information and provide the lists to FinCEN upon request. Sellers of prepaid access (unless MSBs by virtue of other business activities) are exempted from registration. 31 C.F.R. § 1022.380.

Government Information Sharing or Section 314(a) Sharing: Periodically and on an *ad hoc* basis, banks, broker-dealers, and certain large MSBs receive lists from FinCEN of persons suspected of terrorist activity or money laundering by law enforcement agencies. The financial institutions must respond with information about accounts maintained for the persons and certain transactions conducted by them in accordance with guidance from FinCEN that is not public. The request and response are sent and received via a secure network. Strict confidentiality is required about the process. 31 C.F.R. § 1010.520.

Voluntary Financial Institution Information Sharing or Section 314(b) Sharing: Financial institutions or other businesses required to maintain AML Programs under the BSA regulations may voluntarily register with FinCEN to participate in sharing information with each other. The request can only be made for the purpose of identifying and/or reporting activity that the requestor suspects may be involved in terrorist activity or money laundering. The information received may only be used for SAR filing, to determine whether to open or maintain an account or conduct a transaction, or for use in BSA compliance. Strict confidentiality about the process must be maintained by participants. If all requirements are satisfied, there is a safe harbour from civil liability based on the disclosure. 31 C.F.R. § 1010.540.

Section 311 Special Measures: Under Section 311 of the PATRIOT Act, FinCEN can impose a range of special measures against a foreign jurisdiction or foreign financial institution that is designated as posing primary money laundering concern. One of the measures frequently imposed is to prohibit U.S.-covered financial institutions (banks, broker-dealers, FCMs, IB-Cs, and mutual funds) from providing correspondent accounts directly or indirectly to the financial institutions subject to special measures and to notify their correspondent account holders that they cannot offer services to the designated financial institutions through their correspondent account with the U.S. institution.

2.2 Are there any anti-money laundering requirements imposed by self-regulatory organisations or professional associations?

As discussed in question 2.1, the SROs for the securities and futures industries have imposed requirements on their members and share

examination and enforcement authority with the federal functional regulators, the SEC and CFTC, respectively.

With the approval of the SEC, FINRA has issued AML Program requirements for broker-dealers, under FINRA Rule 3310, and the NFA has issued AML Program requirements, under NFA Compliance Rule 2-9(c) for FCMs and IB-Cs. *See* question 2.1.

2.3 Are self-regulatory organisations or professional associations responsible for anti-money laundering compliance and enforcement against their members?

FINRA examines broker-dealers for compliance with AML Program requirements and, more frequently than any regulatory agency, brings enforcement actions against its members, which can include civil penalties against firms and individual officers and employees (including AML compliance officers), compliance undertakings, and in some cases, termination of firms and suspension or revocation of licences of officers and employees. The NFA also has brought similar enforcement actions based on examinations of FCMs and IB-Cs.

2.4 Are there requirements only at national level?

Many states impose parallel requirements on state-licensed financial institutions, *e.g.*, state-licensed banks and money services businesses, such as check cashers and money transmitters. Coverage and requirements vary by state.

The New York Department of Financial Services ("DFS") is the most active state regulator in AML and sanctions enforcement. In some recent cases, it has brought enforcement actions with large civil monetary penalties against New York branches and subsidiaries of foreign banks even where no federal regulator has imposed a penalty. The actions are based on the banks' failures to maintain books and records under New York law relating to their alleged BSA and sanctions failures. New York Banking Law §§ 39 (books and records provision), 44 (penalty provisions). In connection with one enforcement action, DFS also required a foreign bank to surrender the license of its branch to do business in New York.

New York also requires suspicious activity reporting by New York-licensed financial institutions, which has been interpreted to include reporting of potential money laundering activity. 3 N.Y.C.R.R. Part 300.

New York has implemented a unique requirement in Part 504 of the Banking Superintendent's Regulations, which is applicable to New York-licensed banks, check cashers, and money transmitters. Part 504 requires annual compliance statements, *i.e.*, certifications, by a resolution of the Board of Directors or a "compliance finding" by a senior officer confirming that: (1) the financial institution maintains a risk-based transaction monitoring system to identify potential suspicious activity for purposes of compliance with the BSA suspicious activity reporting requirement (and a risk-based sanctions filtering system to comply with sanctions requirements); and (2) certain facts relating to the maintenance, design, and implementation of those systems. The first annual board resolution or senior officer compliance finding under Rule 504 was due on April 15, 2018. NYDFS Superintendent's Regulations § 504.1-6. There are concerns about the potential liability for those making the certifications or confirming statements if subsequent compliance issues are identified.

2.5 Which government agencies/competent authorities are responsible for examination for compliance and enforcement of anti-money laundering requirements? If so, are the criteria for examination publicly available?

Responsible Authorities

As discussed in question 2.1, FinCEN does not have examination staff and has delegated an examination authority to the federal functional regulators for the financial institutions for which they are responsible. The federal functional regulators are: the OCC; Federal Reserve; FDIC; NCUA; SEC (broker-dealers and mutual funds); and CFTC (FCMs and IB-Cs). The SEC and CFTC retain authority, but also have delegated authority to the SROs, FINRA and NFA.

Examination responsibility for the housing government-sponsored enterprises (the Federal Home Loan Mortgage Corporation (“Freddie Mac”) and the Federal National Mortgage Association (“Fannie Mae”)) is with the Federal Housing Finance Agency, the conservator for these entities.

For all other financial institutions and businesses subject to AML Program requirements, the examination authority has been delegated to the Internal Revenue Service (“IRS”). This includes money services businesses, casinos, card clubs, insurance companies (with respect to certain products), dealers in precious metals, precious stones, and jewels, operators of credit card systems and non-bank residential mortgage originators and lenders.

FinCEN has entered a number of agreements with state insurance commissioners providing for BSA examinations of insurance companies by state insurance examiners.

Examination Criteria

The most useful public guidance is the *Federal Financial Institutions Examination Council, Bank Secrecy Act/Anti-Money Laundering Examination Manual* for banks (“FFIEC Manual”), available at https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm.

This manual was originally compiled by FinCEN and other federal banking agencies in 2006 and, with the exception of two chapters (the CDD chapter and a new chapter on beneficial ownership) updated in 2018, was last updated in 2014. The next comprehensive update is expected in 2019.

FinCEN and the IRS published a *Bank Secrecy Act/Anti-Money Laundering Examination Manual* for Money Services Businesses in 2008, which has not been updated, available at https://www.fincen.gov/sites/default/files/shared/MSB_Exam_Manual.pdf.

There are no analogous published examination criteria for the other sectors subject to the BSA.

2.6 Is there a government Financial Intelligence Unit (“FIU”) responsible for analysing information reported by financial institutions and businesses subject to anti-money laundering requirements?

FinCEN is the U.S. FIU responsible for analysing and disseminating information reported under the BSA in addition to interpreting the BSA, promulgating BSA regulatory requirements, and exercising civil (administrative) BSA enforcement authority.

2.7 What is the applicable statute of limitations for competent authorities to bring enforcement actions?

The federal functional regulators have a five-year statute of limitations for BSA-related enforcement actions. There is a six-year statute of limitations for civil actions, and there is a five-year statute

of limitations for criminal violations of the BSA. 31 U.S.C. § 5321(b) (civil) and 18 U.S.C § 3282(a) (criminal).

2.8 What are the maximum penalties for failure to comply with the regulatory/administrative anti-money laundering requirements and what failures are subject to the penalty provisions?

BSA civil and/or criminal penalties may be imposed against financial institutions and other businesses subject to the BSA and/or their officers, directors, and employees. The penalties vary for different types of violations. Both civil and criminal penalties can be imposed on the same violation, or just civil penalties, or, in a few cases, just criminal penalties. 31 U.S.C. § 5321; 31 C.F.R. § 1010.820. See question 2.10.

For instance, if there is a willful failure to report a transaction, the maximum BSA civil penalty is generally \$25,000 or the amount of funds involved in the transaction, not to exceed \$100,000, whichever is greater, for each transaction involved. 31 C.F.R. § 1010.820.

BSA violations of the AML Program requirement are punished separately for each day the violation continues.

The federal functional regulators and SROs have separate civil money penalty authorities. For instance, the federal banking regulators have a general civil money penalty authority that applies to all violations of laws or regulations, including BSA violations. The maximum penalty depends on the financial institution or employee’s intent. Maximum penalties range from \$5,000 per violation to \$1,000,000, or 1% of the assets of the institution, whichever is greater, per day that the violation continues. 12 U.S.C. § 1818(i).

Penalties generally are assessed for deficiencies in one or more of the required elements of the AML Program requirements, for failure to file Suspicious Activity Reports, or in combination with other BSA violations.

2.9 What other types of sanction can be imposed on individuals and legal entities besides monetary fines and penalties?

FinCEN or the federal functional regulators may impose a wide range of undertakings in addition to imposing civil money penalties depending on the alleged deficiencies. For instance, a financial institution could be required to hire a competent BSA/AML Officer, hire qualified independent third parties acceptable to the regulators to perform certain functions, conduct “look-backs” to review transactions to identify previously unreported suspicious activity, or conduct Know Your Customer “look-backs” to upgrade customer files.

In the most egregious cases, individuals can be suspended, restricted, or barred from future employment in the sector, or in the case of FinCEN, from employment at any BSA financial institution.

2.10 Are the penalties only administrative/civil? Are violations of anti-money laundering obligations also subject to criminal sanctions?

As noted, both criminal and civil money penalties can be imposed for the same violation. In general, the maximum BSA criminal penalty is \$250,000 and five years’ imprisonment for individuals for each violation, or if part of a pattern involving more than \$100,000 in a 12-month period while violating another U.S. criminal law, \$500,000 and 10 years’ imprisonment for individuals. 31 U.S.C. § 5322.

2.11 What is the process for assessment and collection of sanctions and appeal of administrative decisions? a) Are all resolutions of penalty actions by competent authorities public? b) Have financial institutions challenged penalty assessments in judicial or administrative proceedings?

The process varies depending on the regulator or SRO. There are formal administrative appeals processes by all competent authorities except FinCEN. While FinCEN provides an opportunity to be heard when an enforcement action is proposed, the process is informal and not required by law or regulation.

All actions that include civil money penalties are public. Bank regulators may take “informal” enforcement actions for less serious deficiencies without imposing monetary penalties, which are not public. In theory, if a party failed to comply with the terms of an enforcement action or refused to pay a civil money penalty, there could be a judicial action, but that does not happen in practice because financial institutions have generally not challenged assessments.

3 Anti-Money Laundering Requirements for Financial Institutions and Other Designated Businesses

3.1 What financial institutions and other businesses are subject to anti-money laundering requirements? Describe which professional activities are subject to such requirements and the obligations of the financial institutions and other businesses.

The following are subject to the requirement to maintain risk-based AML Programs:

- Banks, including savings associations, trust companies, credit unions, branches and subsidiaries of foreign banks in the United States, and Edge corporations.
- Broker-dealers in securities.
- Mutual funds.
- Futures Commission Merchants and Introducing Brokers in Commodities.
- Money Services Businesses.
 - i. Dealers in foreign exchange.
 - ii. Cheque cashers.
 - iii. Money transmitters
 - iv. Issuers and sellers of travellers’ cheques and money orders.
 - v. Providers and sellers of prepaid access.
- Insurance companies (only with respect to life insurance and insurance products with investment features).
- Casinos and Card Clubs.
- Operators of Credit Card Systems.
- Non-bank Mortgage Lenders and Originators.
- Dealers in Precious Metals, Precious Stones, or Jewels.
- Housing Government-Sponsored Enterprises.

As discussed in question 2.1, all of the above are subject to either CTR reporting or Form 8300 cash reporting. All but Cheque Cashers, Dealers in Precious Metals, Precious Stones, or Jewels, and Operators of Credit Card Systems are required to file SARs. All have recordkeeping requirements and can participate in Section 314(b) information sharing.

As discussed in question 2.1, certain requirements only apply to banks, broker-dealers, FCM, IB-Cs, and mutual funds:

- CIP.
- Section 312 due diligence programs for private banking accounts for non-U.S. persons and foreign correspondent accounts.
- Prohibition on shell banks.
- New CDD Program requirements.

Certain requirements only apply to those within the BSA definition of financial institution, i.e., banks, broker-dealers, FCMs, IB-Cs, mutual funds, MSBs, casinos, and card clubs:

- CTR reporting.
- Funds transfer recordkeeping and the Travel Rule.
- Recordkeeping for cash sales of monetary instruments.

Companies that offer new payment technologies or alternative currencies may be subject to BSA requirements as MSBs, including the requirement to register with FinCEN, if their activities come under the definition of MSB as a money transmitter or provider of prepaid access. These companies can apply to FinCEN for an administrative ruling to determine their status under the BSA if it is not clear under the regulations. As discussed in question 3.2, FinCEN considers administrators and exchangers of virtual currency to be MSBs.

Currently, investment funds other than mutual funds are not subject to AML requirements. There are pending BSA regulations that will require SEC-registered investment advisers to maintain AML Programmes and file Suspicious Activity Reports. Most investment funds will then be subject to AML requirements indirectly because of the obligations of their investment advisers. Proposed Requirements for Investment Advisers, 80 Federal Register 52680 (Sept. 1, 2015).

Non-bank finance companies, other than residential mortgage lenders and originators, and pawnbrokers are not subject to BSA regulatory requirements although the BSA statute provides authority to apply BSA requirements to them.

Gatekeepers – lawyers, accountants, company formation agents – are not subject to any BSA requirements.

Title insurance companies and other persons involved in real estate closings and settlements are not subject to routine BSA requirements, although the BSA statute provides authority to apply BSA requirements to them. However, as discussed in question 3.13 below, on a temporary basis, title insurance companies in seven U.S. metropolitan areas have been subject to certain reporting requirements. FinCEN also encourages real estate agents, escrow agents, title companies, and others involved in real estate transactions to file SARs voluntarily.

3.2 To what extent have anti-money laundering requirements been applied to the cryptocurrency industry?

In 2013, FinCEN issued guidance that administrators and exchangers of virtual currency are money transmitters under the BSA and consequently, are subject to the BSA MSB requirements for AML programs, suspicious activity reporting, and FinCEN registration. FIN-2013-G001, *Application of FinCEN’s Regulations to Persons Administering, Exchanging or Using Virtual Currencies* (Mar. 18, 2013), <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>.

3.3 Are certain financial institutions or designated businesses required to maintain compliance programmes? What are the required elements of the programmes?

All the financial institutions and financial businesses subject to the BSA (listed in question 3.1) are required to maintain risk-based AML Programs to guard against money laundering with four minimum requirements, sometimes referred to as the four pillars of a program: (1) policies, procedures and internal controls; (2) designation of a compliance officer; (3) training; and (4) periodic independent testing of the program. For financial institutions subject to the CIP requirements (banks, broker-dealers, FCMs and IB-Cs, and mutual funds), the financial institution's CIP must be part of the AML Program. Similarly, for these same financial institutions, new CDD Program requirements and due diligence programs under Section 312 must be part of their AML Programs.

There is a regulatory expectation that the program be executed in accordance with a formal risk assessment. As noted, the authority for specific program requirements may be found in the BSA regulations, the regulations of the federal functional regulator or a rule of the SRO. 31 U.S.C. § 5318(h) (statutory requirement for AML Programs); *see, e.g.*, 31 C.F.R. § 1022.210 (AML Program requirements for MSBs).

3.4 What are the requirements for recordkeeping or reporting large currency transactions? When must reports be filed and at what thresholds?

Currency Transaction Reporting:

Financial institutions (defined as financial institutions under the BSA regulations) must file CTRs with FinCEN on all transactions in (physical) currency in excess of \$10,000 (or the foreign equivalent) conducted by, through, or to the financial institution, by or on behalf of the same person, on the same day. 31 C.F.R. § 1010.310–315.

It is prohibited to “structure” transactions to cause a financial institution not to file a CTR or to file an inaccurate CTR by breaking down transactions into smaller amounts at one or more financial institutions over one or more days. 31 C.F.R. § 1010.314.

Banks (and only banks) may exempt the transactions of certain customers from CTR reporting if BSA requirements relating to exemptions are followed. 31 C.F.R. § 1020.315.

Cash Reporting or Form 8300 Reporting:

Other businesses subject to the AML Program requirements, but not defined as financial institutions under the BSA regulations, are subject to the requirement to report on cash *received* in excess of \$10,000 (or the foreign equivalent) by the same person on the same day or in one or a series of related transactions on one or more days. Under some circumstances, cash can include cash-equivalent monetary instruments (bank cheques or drafts, cashier's cheques, money orders, and travellers' cheques) for reporting purposes. Insurance companies, operators of credit card systems, dealers in precious metals, precious stones, or jewels, non-bank mortgage lenders and originators, and housing government-sponsored enterprises are subject to Form 8300 reporting, and not to CTR reporting, to the extent they receive currency.

Under the BSA and parallel requirements under the Internal Revenue Code, the same cash reporting requirements apply to all trades or businesses in the United States without respect to whether other BSA requirements apply to them. 31 C.F.R. § 1010.330.

3.5 Are there any requirements to report routinely transactions other than large cash transactions? If so, please describe the types of transactions, where reports should be filed and at what thresholds, and any exceptions.

No, with the exception of requirements imposed on a temporary basis under BSA Geographic Targeting Orders. *See* question 3.14.

3.6 Are there cross-border transactions reporting requirements? Who is subject to the requirements and what must be reported under what circumstances?

With some exceptions for financial institutions, all persons who transport, mail, or ship (or cause to be transported, mailed, or shipped) currency and/or other “monetary instruments” into or out of the United States in the amount of \$10,000 or more (or the foreign equivalent) must file a Currency and Other Monetary Instrument Report (“CMIR”) with U.S. Customs and Border Protection.

Monetary instruments in this context include travellers' cheques in any form, checks signed with the payee name blank, negotiable instruments, and securities in bearer form, in addition to currency. 31 C.F.R. §§ 1010.340 (CMIR requirement), 1010.100(dd) (definition of monetary instrument).

3.7 Describe the customer identification and due diligence requirements for financial institutions and other businesses subject to the anti-money laundering requirements. Are there any special or enhanced due diligence requirements for certain types of customers?

Customer Due Diligence:

Pursuant to regulatory requirements, which became effective May 11, 2018, as part of their AML Programmes, certain financial institutions (banks, broker-dealers, mutual funds, FCMs and IB-Cs) must implement formal risk-based CDD programs that include certain minimum elements, including customer identification and verification (under a Customer Identification Program), obtaining information about the nature and purpose of a customer's account, ongoing monitoring of customer accounts, obtaining beneficial ownership information at a 25% threshold for legal entity customers and identifying a control person for legal entity customers (with certain exceptions). *See, e.g.*, 31 C.F.R. § 1020.210 (AML Program requirements for banks); 31 C.F.R. § 1010.230 (beneficial ownership requirements).

There also is a specific BSA requirement to maintain CDD programs for non-U.S. persons' private banking accounts and foreign correspondent accounts. The same covered financial institutions as for CDD programs (banks, broker-dealers, mutual funds, FCMs and IB-Cs) must maintain a CDD program for non-U.S. private banking accounts established on behalf of, or for the benefit of, a non-U.S. person and foreign correspondent customers and an enhanced due diligence (“EDD”) program for those relationships posing a higher risk. These programs must be designed to detect and report suspicious activity with certain minimum standards. These requirements are based on Section 312 of the PATRIOT Act and are often referred to as Section 312 requirements. 31 C.F.R. §§ 1010.610 (due diligence for foreign correspondent accounts), 1010.620 (due diligence for private banking for non-U.S. persons).

Even before the new CDD requirements, for many years, FinCEN and the federal functional regulators expected risk-based CDD to be a core component of AML Programs, with EDD expected for higher risk customers. The FFIEC Manual is a useful reference for which customers should be considered higher risk, *e.g.*, MSBs, non-government organisations, and Politically-Exposed Persons (“PEPs”).

Customer Identification Program:

The same financial institutions subject to the CDD requirements, (banks, broker-dealers, mutual funds, and FCMs and IB-Cs) are required to maintain CIPs setting forth how they will comply with the CIP regulatory requirements. The CIP regulations require financial institutions to obtain and record basic identification information (name, street address, date of birth, and identification number for an individual), and verify the identity of the customer through reliable documentary or non-documentary means. *See, e.g.*, 31 C.F.R. § 1020.220 (CIP requirements for banks).

3.8 Are financial institution accounts for foreign shell banks (banks with no physical presence in the countries where they are licensed and no effective supervision) prohibited? Which types of financial institutions are subject to the prohibition?

Banks, broker-dealers, mutual funds, FCMs and IB-Cs are prohibited from establishing, maintaining, administering, or managing accounts for foreign shell banks, which are entities effectively unregulated by any prudential supervisor. Shell banks are banks with offshore licences and no physical presence in the country where they are licensed (no offices, employees, or records). Shell banks do not include affiliates of regulated financial institutions (banks that have physical locations and are regulated by a supervisor in the licensing jurisdiction) with offshore licences. 31 C.F.R. § 1010.630.

3.9 What is the criteria for reporting suspicious activity?

Financial institutions and other businesses subject to the AML Program requirement (except Check Cashers, Operators of Credit Card Systems, and Dealers in Precious Metals, Precious Stones, or Jewels) are required to file SARs with FinCEN under the BSA (and for banks, under parallel requirements of their federal functional regulators). SARs are required where the filer “knows, suspects, or has reason to suspect” a transaction conducted or attempted by, at or through the financial institution: (1) involves money laundering; (2) is designed to evade any BSA regulation or requirement; (3) has no business or apparent lawful purpose or is not the sort in which a particular customer would engage; or (4) involves the use of the financial institution to facilitate criminal activity or involves any known or suspected violation of federal criminal law. *See, e.g.*, 31 C.F.R. § 1023.320(c) (SAR requirements for broker-dealers).

Generally, the reporting threshold is \$5,000 or more. For banks, if the suspect is unknown, it is \$25,000 or more. For MSBs, generally, it is \$2,000 or more.

There are very few exceptions to the SAR requirements. For instance, securities broker-dealers and FCMs and IB-Cs are not required to file SARs on violations of securities or future laws by their employees unless they otherwise involve BSA violations, if the information is filed with the SEC, CFTC or their SRO. *See, e.g.*, 31 C.F.R. § 1023.330(c) (SAR exceptions for broker-dealers).

SARs generally must be filed within 30 calendar days after the date of initial detection of the facts that may constitute a basis for filing.

Where there are back-end monitoring systems, a reasonable time is allowed to investigate alerts before the 30-day “clock” begins to run. With very few exceptions, there are strict confidentiality requirements pertaining to SARs and the fact that a SAR was or was not filed. *See, e.g.*, 31 C.F.R. § 1020.320(e) (SAR confidentiality for banks). Tipping off would be a crime under the BSA.

There is a safe harbour protection for any business under the BSA statute and their officers, directors, and employees from civil liability for disclosures by filing a SAR. 31 C.F.R. § 1020.320(f); 31 U.S.C. § 5318(g)(3). There is no safe harbour from criminal liability. If a financial institution identified potential suspicious activity, it must decide whether to terminate the customer relationship if further dealing could lead to liability for money laundering. With very rare exceptions, regulators will not direct a financial institution to terminate a customer relationship.

Generally, there is no requirement to notify any government agency that a SAR is being filed. However, FinCEN has issued guidance recommending that prior to closing an account when the financial institution is aware of an ongoing government investigation of the customer, there should be notification to the investigating agency. The agency may request that the financial institution retain the relationship for a period of time to facilitate the investigation.

3.10 Does the government maintain current and adequate information about legal entities and their management and ownership, i.e., corporate registries to assist financial institutions with their anti-money laundering customer due diligence responsibilities, including obtaining current beneficial ownership information about legal entity customers?

The requirements vary by state. In many, if not most states, the answer is no. Federal legislation to rectify the situation has been proposed several times, but has not been enacted mainly because of the cost and complexity of building a reliable corporate registry with accurate and current ownership information and harmonising state practices.

3.11 Is it a requirement that accurate information about originators and beneficiaries be included in payment orders for a funds transfer? Should such information also be included in payment instructions to other financial institutions?

Banks and other financial institutions under the BSA must maintain accurate records relating to funds transfers of \$3,000 or more originated by customers and non-customers and verify the identity of non-customers originating funds transfers. The information required to be maintained depends on the role of the financial institution in the payment chain, *i.e.*, originator, intermediary, or beneficiary institution. Financial institutions acting as originator or intermediary financial institutions must cause the information to “travel” to the next financial institution under the BSA Travel Rule. 31 C.F.R. §§ 1010.410 (e) (funds transfer recordkeeping for BSA financial institution and other banks) and 1010.410(f) (the Travel Rule).

3.12 Is ownership of legal entities in the form of bearer shares permitted?

Ownership in the form of bearer shares is not permitted for legal entities organized under the laws of the states of the US. There is no prohibition on providing financial services to entities whose share

are held or authorized to be held in bearer form, but as an AML practice many financial institutions prohibit or restrict relationships with legal entities whose shares are held in bearer form.

3.13 Are there specific anti-money laundering requirements applied to non-financial institution businesses, e.g., currency reporting?

There are three requirements with general applicability. As noted, all trades or businesses in the United States, unless designated as financial institutions under the BSA, are subject to cash reporting (Form 8300 reporting). *See* question 3.3. In addition, all persons (individuals and legal persons) are subject to cross-border (CMIR) reporting. *See* question 3.5. Also, under the BSA, all U.S. persons (individuals and legal persons) must report annually all foreign financial accounts valued at \$10,000 or more in the aggregate at any point in the previous calendar year if they have an ownership interest in, or (with some exceptions) signatory authority over, the account. This is referred to as the FBAR requirement (Foreign Bank and Financial Accounts Report). 31 C.F.R. § 1010.350.

3.14 Are there anti-money laundering requirements applicable to certain business sectors, such as persons engaged in international trade or persons in certain geographic areas such as free trade zones?

Not routinely. Under the BSA, however, if there is a demonstrated law enforcement need, FinCEN can impose “geographic targeting” – temporary regulatory requirements for financial institutions or other trades or businesses to file reports or keep records with certain characteristics for a set period of time. 31 C.F.R. § 1010.370. For instance, most recently, there has been a requirement for title insurance companies in certain geographic areas to report cash sales (non-financed sales) of residential real estate purchased by legal entities at given threshold amounts.

4 General

4.1 If not outlined above, what additional anti-money laundering measures are proposed or under consideration?

As noted, FinCEN has proposed (but not finalised) regulations that would impose AML Program and SAR requirements on investment advisers registered with the SEC. This would ensure that there would be due diligence on an investor in funds, such as hedge funds and private equity funds, and that the funds transactions would be monitored to detect suspicious activity. 80 Fed. Reg. 52860 (Sept. 1, 2015).

On April 4, 2016, FinCEN issued a Notice of Proposed Rulemaking that proposed amending the definition of broker-dealers under the BSA to include persons registered with the SEC as a “funding portal” to offer or sell crowdfunding. This proposal also has not been finalized.

4.2 Are there any significant ways in which the anti-money laundering regime of your country fails to meet the recommendations of the Financial Action Task Force (“FATF”)? What are the impediments to compliance?

As discussed in detail in the most recent FATF mutual evaluation of the United States, there remain a few areas where the United States is not compliant, or is not *fully* in compliance with the FATF recommendations. As noted in question 3.9, the lack of reliable corporate registries is an impediment to financial institutions being able to confirm true beneficial ownership information provided by a customer. The U.S. has not imposed AML requirements on “gatekeepers” consistent with FATF guidance, has not finalised proposed requirements for investment advisers, and has not imposed requirements on real estate agents and trust and company service providers. There has been significant opposition by the legal community to imposing requirements on lawyers as gatekeepers. FinCEN and the federal functional regulators have not specifically addressed the issues of domestic PEPs.

On several occasions since 2008, bills have been introduced in Congress that would require development of a reliable corporate registry with current beneficial ownership information, but the proposals have not been enacted.

4.3 Has your country’s anti-money laundering regime been subject to evaluation by an outside organisation, such as the FATF, regional FATFs, Council of Europe (Moneyval) or IMF? If so, when was the last review?

The United States was last evaluated by the Financial Action Task Force in 2016. The FATF report is available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

4.4 Please provide information for how to obtain relevant anti-money laundering laws, regulations, administrative decrees and guidance from the Internet. Are the materials publicly available in English?

The state and federal statutes cited are available from a number of internet sources. The federal regulations (“C.F.R.”) are available at www.ecfr.gov. FinCEN, the federal functional regulators, and SROs all provide access to guidance, advisories, and public enforcement actions through their websites. The FinCEN website is particularly useful with links to statutes, regulations, and Federal Register notices, which provide helpful explanations of proposed and final regulations. *See, e.g.*, FinCEN, www.FINCEN.gov. As noted in question 2.5, the FFIEC manual sets forth extensive guidance for banks.

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Ms. Noonan joined the firm from the U.S. Department of the Treasury, Office of General Counsel, where she had been Senior Counsel for Financial Enforcement. In that capacity, she was the principal legal advisor to Treasury officials on domestic and international money laundering and related financial enforcement issues. During her tenure, she drafted legislation and participated in all major Bank Secrecy Act rulemakings and interpretations and negotiated numerous Bank Secrecy Act civil money penalty cases. She acted as one of the key U.S. delegates to the Financial Action Task Force ("FATF") on money laundering in FATF's early years.

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