A NEW FRAMEWORK FOR PARTNERSHIP

Recommendations for Bank Secrecy Act / Anti-Money Laundering Reform

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Executive Summary

In July 2007, the American Bankers Association (ABA) formed a special Chairman’s Committee on Bank Secrecy Act (BSA)/ Anti-Money Laundering (AML) Reform. The Committee’s task was to take a “fresh look” at the history and current status of BSA legislation, regulation and enforcement and to make appropriate recommendations for possible changes and enhancements.

The Bank Secrecy Act was originally passed in 1970 with the requirement that banks file currency transaction reports and maintain other BSA-related records, with the goal of making financial information more readily available to law enforcement without generating undue burden. From this modest start and understandable goal, legislative and regulatory developments reflecting evolving law enforcement and national security policy and legislative intent have expanded the scope of BSA compliance exponentially. Banks are now expected to comprehensively and proactively search for and report suspicious activity in support of our nation’s fight against criminal activity, including organized crime, money laundering and terrorist acts. Stepping up to the new role requested of them, banks have developed increasingly comprehensive BSA programs and systems, based on the continuing passage of new BSA legislation and regulations and the evolving guidance provided by the Financial Crimes Enforcement Network (“FinCEN”) and the bank regulatory agencies. This investment in BSA compliance is reflected in the estimated increase of industry costs of 66% between 2001 and 2004 and another 71% between 2004 and 2007.

In light of the extensive commitment of the banking industry in responding to date to the challenges of our nation’s fight against crime and terrorism, it is now time to enhance and to make more effective and cooperative the partnership between the private sector and the government in the fight against our common foes who would abuse our financial system for illegitimate ends. Accordingly, the ABA makes the following five recommendations to improve the BSA regime.

Recommendation 1: Create an independent BSA Gatekeeper to oversee and coordinate the BSA regime and to promote system integrity and efficiency.

A BSA Gatekeeper positioned within the financial system and independent from law enforcement should be created to oversee and coordinate the BSA regime. Such positioning and independence will facilitate a more cooperative balance between law enforcement/ intelligence agencies and the banking industry, and will foster BSA efficiency through priority-focused, risk-based regulation. The BSA Gatekeeper should be empowered to ensure a consistent application of the BSA regime and to promote the integrity and efficiency of the American banking system while also encouraging the detection of banking system abuse in the areas of financial crime, money laundering and terrorist financing.

Recommendation 2: Take a priority-focused approach to compliance.

The bank regulatory agencies should explicitly endorse a priority-focused, risk-based approach to BSA regulation, coupled with deference to a bank’s risk assessment and assignment of priorities for its BSA compliance program. Each bank, understanding its particular operations and customers, is uniquely positioned to design a BSA program that focuses resources where there is the greatest opportunity for addressing and mitigating the risk posed by potential money laundering and terrorist financing. Applied across the banking industry, a priority-focused, risk-based approach should create a more powerful and efficient regime for detecting illegal financial activity.
Recommendation 3: Increase the quality of feedback and transparency.

Although there has been improvement in agency-initiated communication of BSA feedback, greater feedback is needed on the law enforcement cases attributable to bank reporting. The ability of banks to design and implement effective BSA programs will be enhanced if banks have a more tangible understanding of how their BSA reports have been useful to law enforcement and are provided more actionable information about serious threats to our financial system. In turn, the banking industry should facilitate dissemination of this enhanced feedback, foster more effective means to share relevant experience and financial intelligence, and promote priority-focused training to improve the value of information detected and reported. Together, these undertakings will establish a foundation for better trust and partnership and will enable bank regulatory agencies, law enforcement and the banking industry to strengthen the interdependence upon which the BSA regime depends.

Recommendation 4: Streamline reporting and validate its utility.

BSA data reporting obligations should be streamlined and their utility validated using appropriate metrics to ensure accountability and to improve transparency. This will enhance system efficiency and the ability of legislators and regulators to strike the proper balance among individual privacy, law enforcement, national security and financial system integrity policy concerns.

Recommendation 5: Refrain from criminal sanctions that impose administrative compliance standards and redefine procedures for taking criminal actions against banks.

The responsibility and authority for establishing and enforcing the administrative standards for bank regulatory compliance belong with the relevant bank regulatory agencies. Thus, law enforcement agencies should avoid the imposition of criminal remedies that address a bank’s ongoing administrative standards for BSA compliance. Further, certain standards and procedures should be established for bringing BSA-related criminal actions against banks, including a policy that law enforcement consult with applicable bank regulatory agencies prior to bringing BSA-related criminal actions.

Summary

This Report and these Recommendations will serve as the guiding principles for future ABA advocacy with respect to BSA/AML compliance and will provide a constructive strategic vision that the ABA will recommend to this and the next administration as they chart their policy courses. The goal of the ABA will be to achieve a New Framework for Partnership with the Government, the law enforcement/intelligence agencies and the bank regulatory agencies that is dedicated to the principle that the purpose of BSA/AML compliance is to protect financial system integrity and to provide quality and valuable information to law enforcement in the face of serious criminal and national security challenges without compromising the efficiency of the American banking system and its ability to meet future global and domestic economic needs.

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Preface

On July 2007, the American Bankers Association (ABA) formed a special Chairman’s Committee on Bank Secrecy Act (BSA)/ Anti-Money Laundering (AML) Reform. The panel, appointed by ABA Chairman Earl D. McVicker, was made up of banking industry leaders in the field of anti-money laundering. The Committee’s task was to take a “fresh look” at the history and current status of BSA legislation, regulation and enforcement and to make appropriate recommendations for possible changes and improvements.

In conducting this review, the Committee obtained input from various people with insight and experience in the BSA process, including from the legislative branch, the law enforcement agencies, the bank regulatory agencies, the banking industry and the public. The Committee and the ABA appreciate their thoughtful insight and thank them for their many observations and suggestions.

The Committee engaged in extensive deliberations and worked closely with staff and the special consultant to prepare this Report. The resulting Report and its recommendations are those of the American Bankers Association and do not necessarily reflect the views of individual committee members or the institutions with which they are associated.

Introduction

With the passage of the first piece of BSA legislation by Congress in 1970, and even before, the ABA and its members have been active and supportive partners in the fight against money laundering and, more recently, terrorist financing. As set forth in the ABA’s testimony before Congress in 1989:

Since the early part of this decade, the financial industry has cooperated closely with the law enforcement community to rid our nation’s institutions of this terrible menace. The American Bankers Association has been in the forefront of providing information and education to the banking community in order to prevent our institutions from being part of this process.

In issuing this report, the ABA would like to echo the introductory words of the President’s Commission on Organized Crime in its 1984 Interim Report entitled: “The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering”:

By issuing this report, the Commission seeks to develop a closer and continuing collaboration with the Congress, the Treasury Department and financial institutions in devising a sound and effective program of legislation, administration, and voluntary actions to combat money laundering.

Almost a quarter of a century later, we seek to renew that collaboration by creating a new framework for partnership between the banking industry, the bank regulatory and law enforcement agencies and Congress that is more responsive to the banking system and the threats it faces.
Composition of the Committee

The members of the Chairman’s Committee on BSA Reform are:

- Jeff Austin, III, Vice Chairman, Austin Bank, Jacksonville, Texas;
- William Fox, Senior Vice President and Global Anti-Money Laundering Executive, Bank of America, Charlotte, North Carolina;
- Michael Kelsey, Managing Vice President, Anti-Money Laundering Compliance, Capital One, Richmond, Virginia;
- William D. Langford, Senior Vice President and Director of Global Anti-Money Laundering, JP Morgan Chase, New York, New York;
- Thomas Laursen, General Counsel, Zions Bancorporation, Salt Lake City, Utah;
- Rick Maltz, Senior Vice President and Chief Risk Officer, Bangor Savings Bank, Bangor, Maine;
- Anna Rentschler, Vice President and Bank Secrecy Act Officer, Central Bancompany, Jefferson City, Missouri;
- Rick Small, Vice President, Enterprise Wide Anti-Money Laundering and Sanctions Risk Management, American Express, New York, New York;
- Daniel D. Soto, Senior Vice President, Anti-Money Laundering/Bank Secrecy Act Officer, Wachovia Corporation, Charlotte, North Carolina; and

ABA staff working with the Committee are:

- Wayne Abernathy;
- Richard Riese; and
- Sepideh Behram.

Special Consultant and Reporter

- Robert Pasley, attorney and consultant, AML and bank regulatory matters.
Purpose and Layout of the Report

The overriding purpose of this report is to take a “fresh look” at the BSA/AML compliance regime to identify enhancements that will enable the ABA and its membership and the industry at large to more effectively and efficiently contribute to the on-going fight against money laundering and terrorist financing. The ABA has always been a partner with the banking industry and the Government in this effort. With this report, the ABA seeks to establish a new framework for partnership between the banking industry and the Government in finding ways to improve our collective efforts in fighting money laundering and terrorist financing.

The report contains an executive summary with a summary of recommendations. Following that is an explanation and analysis of the policy foundation for the recommendations. The recommendations are described primarily in terms of strategic goals and tactical objectives. Appendix A to the report sets forth additional concrete suggestions accumulated during the Committee’s efforts. Appendix B sets forth the Congressional reports and hearings on anti-money laundering and counter-terrorism financing issues that led up to the various BSA legislative acts. Appendix C contains an overview of the BSA legislation, from the initial Congressional Act in 1970 to the present, in order to establish how we have gotten to where we are now and to serve as a baseline for examining our current BSA/AML policies, practices and procedures. Appendix D sets forth an overview of the BSA and counter-terrorism financing-related regulations.

Background

In 1970, Congress passed the initial BSA legislation with the intent of assisting law enforcement in the investigation and prosecution of financially-related crimes. Prior to that time, law enforcement had been frustrated in its efforts by the lack of transactional records kept by banks and by foreign bank secrecy laws. The BSA legislation, thus, started with basic recordkeeping requirements and fairly mechanical transaction reporting requirements.

From the beginning, the fundamental policy trade-off between the value to law enforcement and the cost of industry implementation were embedded in the BSA regime. In addition, the tension between leveraging existing common business practice versus imposing additional paperwork was present. However, there was no mistaking that the pivotal objective around which these issues were intended to revolve was, as articulated by Will Wilson, Assistant Attorney General of the Department of Justice, in 1970: “to detect and prosecute crime, not build a mountain of paper.”

Over the subsequent decades, Congress expanded these recordkeeping and reporting requirements and, in 1992, mandated that banks establish anti-money laundering programs, with experienced staff, extensive internal controls, training and audits. This provision, which required what has become commonly known as the “Four Pillars” of BSA compliance programs, has become the cornerstone for banks’ BSA compliance efforts. In this fashion, the BSA regime went from a relatively passive recordkeeping and reporting process to a comprehensive compliance system that has escalated into an industry all of its own.

In light of the banking industry’s long and dedicated participation, commitment, cooperation and overall extensive compliance, it is appropriate that the banking industry play a significant role in redefining and reinvigorating the partnership that was envisioned from the beginning between the private sector and the government in the fight against our common foes who would abuse our financial system.
Analysis of Foundation for Recommendations

Create a BSA Gatekeeper to Oversee and Coordinate the BSA Regime and to Promote System Integrity and Efficiency

In light of the fact that the BSA regime in the United States has gone from a relatively mechanical process in 1970 of filing some reports and maintaining certain records to a virtual industry supporting an extensive BSA compliance effort, it would be appropriate to have a clearly designated “gatekeeper” within the Government to oversee and coordinate BSA compliance, guidance and enforcement.

As is evident from a review of the legislative history of the BSA, the BSA regime has become a complex layering of successive legislative and regulatory efforts that stem from disparate and sometimes conflicting focuses and purposes. In addition, it has been widely recognized for some time that there “are too many agencies responsible for money laundering deterrence oversight and [that] this detracts from government efforts at eliminating the problem.”

In partial response to this increasingly complex and overlapping structure, the Secretary of the Treasury established the Office of Financial Enforcement (OFE) (and later the Financial Crime Enforcement Network (FinCEN) into which OFE eventually was merged) to administer the BSA and to coordinate the various stakeholders in the process. However, as Senator Sarbanes noted just four years ago, the creation of OFE and then FinCEN did not eliminate the complexity or overlap:

No one seems to be directly accountable for enforcement of the Bank Secrecy Act. Congress vested authority for the Bank Secrecy Act’s administration and enforcement in the Secretary of the Treasury, who has delegated that authority, since 1994, to the Director of FinCEN. The Federal banking agencies examine the compliance of depository institutions with the Bank Secrecy Act, under authority delegated by Treasury. But they also have a separate statutory obligation to examine for BSA compliance procedures, employing a different set of sanctions than the statutory penalties in the Bank Secrecy Act.

The list of agencies involved in potential BSA compliance problems does not end there. Federal enforcement and, now, intelligence agencies — for example, the FBI, the Bureau of Immigration and Customs Enforcement, the Drug Enforcement Administration, the Criminal Investigation Division of the Internal Revenue Service – investigate potential BSA violations in the course of their activities. State bank regulators have their own oversight authority that extends to the Bank Secrecy Act in the case of State-chartered institutions. Different regulators may — in fact, likely will — regulate different parts of increasingly integrated bank holding companies. Treasury, through FinCEN, will become involved in compliance penalties only in a limited number of situations in which cases are referred to it under procedures that, according to testimony we will be receiving today, are more than a decade old.

... the Bank Secrecy Act is not really “administered” at all in any coordinated way. Again, no one seems to be responsible for putting the statute into effect.

Consequently, it is time to step back to articulate a unifying mission that can accommodate and coordinate the variety of regulatory, law enforcement and national security agencies and their overlapping goals. In doing so, it is apparent that a renewal of the founding purpose of BSA that places the emphasis on detecting and prosecuting financial crime in furtherance of financial system integrity should serve as the core mission of a reformed BSA regime.
To accomplish this mission, there must be a coordinating authority — or gatekeeper — that is charged with the responsibility of both encouraging detection of financial system abuse, including money laundering and terrorist financing, and maintaining system operating efficiency. Only with both of these responsibilities can a BSA Gatekeeper properly balance the interests of law enforcement and banking in furtherance of the overarching mandate to safeguard financial system integrity.

To advance this mandate and mission, the BSA Gatekeeper must be carefully situated within the financial/payments system and must be sensitive and responsive to both the public and private aspects of the systems. While being neither a law enforcement agency nor a bank regulatory agency, it must serve and support both. At the same time, it should have sufficient independence from both in order to hold each of them accountable for fulfilling their respective roles in the BSA regime. Only with the combination of positioning the Gatekeeper within the financial/payments system and the independence described here can the BSA Gatekeeper be truly effective in properly carrying out the function of overseeing the BSA regime.

It is clear that the creation of a BSA Gatekeeper cannot be drawn on a blank slate. FinCEN is already assigned many of the responsibilities that should become duties of the BSA Gatekeeper. In particular, FinCEN issues BSA regulations; provides interpretive guidance; pursues enforcement actions; serves as the receiver and disseminator of data collected under BSA requirements; and mobilizes feedback to the private sector regarding the utility of BSA data to law enforcement.

However, in order to ensure that the BSA Gatekeeper can accomplish its mission of safeguarding system integrity and can meet its responsibilities of encouraging the detection of system abuse and promoting system operating efficiency, the following critical elements should be required steps in establishing the Gatekeeper:

- Integrate the Gatekeeper in the financial/payments system;
- Keep the Gatekeeper independent of both law enforcement and national security/intelligence agencies that are the consumers of BSA data;
- Distinguish the Gatekeeper’s role of ensuring BSA data utility and security from any obligations as a Financial Intelligence Unit (FIU) to conduct investigative analysis; and
- Incorporate an Ombudsman function within the Gatekeeper to resolve issues pertaining to the bank regulatory agencies’ conduct of BSA examinations.

**Integrate the Gatekeeper in the Financial/Payments System**

From a functional standpoint, establishing a nexus with the financial/payments system is essential to properly positioning the BSA Gatekeeper to meet its objectives. Time and again bankers have been concerned that BSA compliance might generate burdens that could adversely affect the efficiency of the financial system. Accordingly, the BSA Gatekeeper will be severely disadvantaged in meeting its mission if it is not closely embedded in the functioning of the financial/payments system so that it is accountable for preserving system efficiency as an integral part of its responsibility to safeguard system integrity.

**Keep the Gatekeeper Independent of Law Enforcement**

The “prosecutorial” and intelligence-gathering part of the BSA regime is the responsibility and function of law enforcement, the national security/intelligence agencies and the FIU. Although the Gatekeeper would administer a process for collecting information on financial transactions for law enforcement and the intelligence agencies, its ability to monitor law enforcement or the intelligence...
agencies’ use and utility of such information can be compromised if the Gatekeeper does not adequately maintain its independence.

As set forth by this Report’s proposal, the Gatekeeper should be positioned within the financial/payments system structure and should be charged with promoting both system integrity and operating efficiency. To fulfill these responsibilities, it needs to oversee BSA compliance to promote the type of reporting that contributes to safeguarding financial system integrity. Encouraging reporting for the purposes of protecting the banking industry from abuse; while, at the same time, being independent of law enforcement may be difficult at times, but it is nonetheless essential. It is for this reason that the Gatekeeper should be identified with the financial/payments system, not the law enforcement/national security/intelligence apparatus.

**Distinguish between the Gatekeeper’s Functions and the FIU**

It is further recommended that there be a designated, independent FIU that would have the responsibility of gathering, analyzing and disseminating appropriate BSA information.

The need for an FIU is well established. As set forth by the Financial Action Task Force’s (FATF’s), 40 Recommendations:

Countries should establish a FIU that serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR [Suspicious Transaction Reports] and other information regarding potential money laundering or terrorist financing.

This is echoed by the United Nations in its Convention against Transnational Organised Crime (2000) (Palermo Convention):

Each state Party … shall … consider the establishment of a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money laundering.

In terms of what an FIU is and what it does, the Egmont Group in 1996 set forth a universally accepted definition of an FIU. In 2004, the Egmont Group revised the definition of an FIU to specifically include combating terrorist financing. As a result, the current definition of an FIU is as follows:

A central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating to competent authorities, disclosures of financial information:

i. concerning suspected proceeds of crime and potential financing of terrorism, or

ii. required by national legislation or regulation, in order to combat money laundering and terrorist financing.

In the establishment of FIUs, there are basically three different models — the administrative model, the law enforcement model and the judicial model. In the administrative model, FIUs are usually part of the structure, or under the supervision, of an administration or an agency other than law enforcement or judicial authorities. The primary benefit for such an arrangement is to have a “buffer” between the financial sector and the law enforcement authorities in charge of financial crime investigations and prosecutions.

The second type of FIU model, the law enforcement model, provides for the FIU to be placed within the law enforcement structure. The primary benefit of this model is a perceived enhanced coordination and level of communication and sharing between the FIU and law enforcement.
The third type of FIU model is the judicial or prosecutorial model which is ordinarily found in countries with a continental law tradition, where the public prosecutors are part of the judicial system and have authority over the investigatory bodies, allowing the former to direct and supervise criminal investigations.

There is a fourth model, but it is simply referred to as the Hybrid Model and includes any combination of the above mentioned three models.

Today, FinCEN is the United States’ officially designated FIU and is considered an example of the administrative model. However, FinCEN is probably more an example of a hybrid model. Evaluating its resource-constrained operations, it appears that FinCEN represents more of a data conduit than a true buffer between the banking industry and the law enforcement agencies and is limited in its target- or case-specific analytical capabilities.

Under the new framework, the FIU would be separate from the Gatekeeper. The FIU’s responsibilities for data handling, analysis, dissemination and security, would be separated from the Gatekeeper’s role of promoting system integrity and efficiency. Such a separate FIU could then be aligned more directly with the law enforcement/national security/intelligence community, while being subject to the oversight of an independent, financial system-oriented Gatekeeper. The Gatekeeper would continue to be the official collector of BSA data, thereby putting it in a strong position to hold the FIU accountable for demonstrating BSA data use, utility, security and proper access. This would create a desirable check and balance on the FIU.

Establish the Gatekeepers as the BSA Ombudsman

While BSA examination and first-line compliance enforcement are the responsibilities of the bank regulatory agencies, the oversight of the bank regulatory agency’s adherence to the rules and policies established by the administrator can be improved by designating the BSA Gatekeeper as the Ombudsman for BSA issues.

Although the Ombudsman model within the bank regulatory agencies has varied, in this proposed framework, the BSA Gatekeeper would be primarily focused on examination quality assurance. To effectuate this focus, the Ombudsman functions would include:

- Serving as an umpire for interpretive issues that arise during the course of an examination at the request of the bank or the bank regulatory agency;
- Conducting management reviews of a bank regulatory agency’s BSA examination program and performance, much as is done by an Inspector General conducting similar reviews; and
- Being a resource for the Ombudsman role within each agency.

The Gatekeeper qua Ombudsman would be available to provide case specific guidance in the course of an examination, if requested by the bank or the bank regulatory agency. Such guidance would facilitate resolution of exam issues and would promote consistency with BSA national policy in the application of the Interagency BSA/AML Exam Procedures. While providing this kind of ad hoc guidance during the course of an examination, may not be definitive due to its immediacy and potential lack of vetting, it needs to be emphasized that the Gatekeeper will be the ultimate arbiter of BSA-related issues. The bank regulatory agencies, however, will continue to have the final supervisory authority over the institutions they regulate.
The Gatekeeper would also conduct management reviews of a bank regulatory agency’s adherence to the BSA rules and applicable examination procedures. This would enable the Gatekeeper to promote interagency examination consistency and quality assurance. It would also establish benchmarks for comparing different functional regulator exam programs against the standards of the Gatekeeper, thus, fostering greater consistency and efficiency across regulatory jurisdictions. 

Finally, the Gatekeeper would act in the Ombudsman function by simply enabling each bank regulatory agency Ombudsman to directly tap into the expertise of the Gatekeeper with respect to any matter the agency Ombudsman deems appropriate. By encouraging this collegial interaction, examination quality and consistency should be enhanced.

**Recommendation 1: Create an independent BSA Gatekeeper to oversee and coordinate the BSA regime and to promote system integrity and efficiency.**

A BSA Gatekeeper positioned within the financial system and independent from law enforcement should be created to oversee and coordinate the BSA regime. Such positioning and independence will facilitate a more cooperative balance between law enforcement/intelligence agencies and the banking industry, and will foster BSA efficiency through priority-focused, risk-based regulation. The BSA Gatekeeper should be empowered to ensure a consistent application of the BSA regime and to promote the integrity and efficiency of the American banking system while also encouraging the detection of banking system abuse in the areas of financial crime, money laundering and terrorist financing.

Authorities and responsibilities critical to the proper functioning of the Gatekeeper include:

- Being positioned within the government structure such that it is sufficiently integrated with the entities responsible for the prudential supervision of the financial system and its various components, and is completely independent from government law enforcement or national security agencies.
- Developing a national, priority-based, BSA policy (after the solicitation and consideration of input from BSA system stakeholders, including the Bank Secrecy Act Advisory Group) over a long-term horizon that enables stakeholders to plan effectively, set priorities and manage risk with reasonable assurance about the consistency of supervisory expectations over time.
- Overseeing and coordinating BSA compliance, guidance and enforcement that enables bank regulatory agencies to fulfill their statutory obligations to regulate the safety, soundness and compliance of banks within their respective jurisdictions in accordance with a priority-focused approach.
- Issuing all BSA-related regulations and interpretations, exercising such authority with the prior consultation of relevant bank regulatory agencies and with the purpose of coordinating functional regulators in a way to minimize the burden on institutions subject to compound supervision.
- Facilitating, in cooperation with the banking industry, the bank regulatory agencies, and law enforcement agencies, BSA-related feedback and ensuring that it is instructive and up-to-date.
- Providing the definitive guidance for BSA compliance and serving as Ombudsman for bank regulatory agency supervision of BSA compliance obligations.
- Monitoring law enforcement/intelligence agencies’ use and utility of BSA data, as well as their ability to ensure the security of and proper access to BSA data.
While the ensuing four recommendations are offered on a stand-alone basis, it should be emphasized that these four recommendations will work more effectively and efficiently if implemented in conjunction with the creation of the BSA Gatekeeper set forth in this first recommendation.

**Take a Priority-Focused Approach to Compliance**

It is generally accepted that, overall, BSA compliance programs, examinations and administrative enforcement actions are priority-focused and risk-based in that they tend to focus on high-risk transactions and activity and on the most serious risks and instances of non-compliance. However, such a priority-focused approach needs to be more explicit and the individual judgments of banks on how best to address their money laundering risks and to achieve BSA compliance should be respected and given deference.

Too often, there is an approach to BSA compliance that tends to take every risk identified in an assessment and to marry it to an expectation that each risk must be minimized without regard to its overall significance. This is anathema to the motivating principles behind risk-based compliance. It substitutes an expectation of undifferentiated risk minimization for the original goal of differentiating among risks in accordance with their importance and prioritizing resources accordingly.

In order to capture the need to differentiate risks to establish and address priorities, the emphasis should be on “priority-focused, risk-based” compliance. This will serve as a reminder that the purpose of adopting a priority-focused approach has always been to recognize the legitimacy of making judgments among risks to establish priorities for the application of scarce resources and to devise internal controls tailored to address those risks.

Therefore, there should be a formal and explicit statement issued by all bank regulatory agencies espousing the need for and importance of priority-focused compliance, examinations and enforcement actions in the area of BSA. In this regard, the banking industry and the bank regulatory agencies should work together in partnership to make the approach to BSA compliance and enforcement explicitly priority-focused, recognizing the complexity and comprehensiveness of the task, the limited resources on all sides, the need to address the highest risks on a priority basis and the need to ensure that administrative sanctions are only taken in appropriate cases.

As recognized by leading organizations worldwide, the goal of a priority-focused approach to BSA programs is not to reduce the BSA efforts of banks, but to make sure that banks’ BSA efforts are designed to create the most powerful, efficient system possible.

In 2007, FATF, in a public-private partnership effort, issued a publication endorsing the need to create a risk-based approach to BSA compliance. In the publication, entitled “Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing,” FATF explained and justified the risk-based approach by expressly linking it to the application of resources in accordance with the prioritization of risks as follows:

> By adopting a risk-based approach, competent authorities and financial institutions are able to ensure the measures to prevent or mitigate money laundering and terrorist financing are commensurate to the risks identified. This will allow resources to be allocated in the most efficient ways. **The principle is that resources should be directed in accordance with priorities so that the greatest risks receive the highest attention.** The alternative approaches are that resources are either applied evenly, so that all financial
institutions, customers, products, etc. receive equal attention, or that resources are targeted, but on the basis of factors other than the risk assessed. This can inadvertently lead to a “tick box” approach with the focus on meeting regulatory needs rather than combating money laundering or terrorist financing.18

As FATF explained further, the formal adoption of a risk-based approach should lead to an improved and more effective use of resources and to an enhanced implementation of a BSA regime:

The adoption of a risk-based approach to combating money laundering and terrorist financing can yield benefits for all parties including the public. Applied effectively, the approach should allow financial institutions and supervisory authorities to be more efficient and effective in their use of resources and minimise burdens on customers. Focusing on higher risk threats should mean that beneficial outcomes can be achieved more effectively.19

One of the primary goals of BSA regulation should be to improve the effectiveness of banks’ efforts in assisting law enforcement agencies discover and prosecute financial crimes. In helping banks meet this goal, bank regulatory agencies and other agencies should focus on supporting and guiding the institutions in creating and implementing a priority-focused BSA compliance program.

**Priority-Focused, Risk-based Compliance Promotes Partnership**

Many BSA regulations already call for reasonable steps to be taken and underscore the fact that banks are not expected to — nor can they — uncover or protect against every instance of possible money laundering or terrorist financing. However, this needs to be made a greater and more concrete part of the BSA regime. In doing so, the government would more effectively dispel the perception that sometimes occurs that all risks must be equally mitigated, if not eliminated altogether. With a firm policy statement to this effect, followed up with coordinated work by the banking industry and the government in partnership, this perception can be effectively overcome.

The goal of having a strong, priority-focused BSA regime is, thus, one that the banking industry and the Government should work towards together. FinCEN itself has stressed the importance of “the strong partnership that Congress mandated under the BSA”20 and the fact that such a partnership is “essential to our risk-based approach.”21 In addition, FinCEN has noted that the “public policy choice requiring government and private industry to work together to fight money laundering, terrorist financing and other illicit activity is not unique to the United States, but rather represents a global consensus.”22

One country that is part of this consensus is the United Kingdom, which has stated:

The Government has made clear that it regards the risk-based approach to AML as essential to the effective and proportionate functioning of the UK’s AML regime.23

A proportionate challenge to crime and terrorism is one that is unremittingly “risk-based.” Under this principle, all parties — law enforcement, Government departments, regulators and industry — focus their resources on the areas where the likelihood and impact of abuse is greatest.24

What the United Kingdom stresses is the fact that a risk-based approach should not be merely implicit, as it is in many countries, but that it should be made explicit.25 It should be clearly articulated that “[w]e manifestly cannot do everything, and need a mechanism for prioritising our work.”26 This need to prioritize and to recognize that even BSA compliance resources are finite is the first step toward our new partnership.
Priority-Focused, Risk-Based Compliance Recognizes Bank Judgment

FATF’s Guidance stresses the fact that using a risk-based approach means that not all risks will be identified and that the bank regulatory agencies must keep this fact in mind:

However, it must be recognized that any reasonably applied controls, including controls implemented as a result of a reasonably implemented risk-based approach will not identify and detect all instances of money laundering or terrorist financing. Therefore, regulators, law enforcement and judicial authorities must take into account and give due consideration to a financial institution’s well-reasoned risk-based approach.27

This regulatory caution was articulated as well by the United Kingdom in the following fashion:

Acceptance that money laundering can never be entirely eliminated. Criminals will continue to attempt to make use of the proceeds of crime. Firms will not always be able to prevent this. There should therefore be reasonable supervisory expectations about what a firm with sound controls aimed at preventing money laundering is able to achieve. To attempt to design a ‘zero-failure regime’ would be damaging and counterproductive: it would place excessive burdens on supervisors and firms alike and, consequently, act against the interests of the general public.28

As set forth by the United Kingdom, there needs to be:

A principles-based supervisory approach that encourages firms to aim for achieving outcomes related to reducing money laundering, rather than exclusively concentrating on compliance with prescriptive and detailed rules.29

Based on this reasoning, FATF pointed out the need to give considerable deference to banks’ judgment and their efforts to comply with BSA requirements:

An effective risk-based approach will allow financial institutions to exercise reasonable business judgment with respect to their customers. Application of a reasoned and well-articulated risk-based approach will justify the determinations of financial institutions with regard to managing potential money laundering and terrorist financing risks and allow financial institutions to exercise reasonable business judgment with respect to their customers.30

Supervisors should appreciate that even though the financial institution has established appropriate risk management structures and procedures that are regularly updated, and has followed the relevant policies, procedures, and processes, the financial institution may still make decisions that were incorrect in light of additional information not reasonably available at the time.

In implementing the risk-based approach financial institutions should be given the opportunity to make reasonable judgments. This will mean that no two financial institutions are likely to adopt the exact same detailed practices. Such potential diversity of practice will require that regulators make greater effort to identify and disseminate guidelines on sound practice, and may pose challenges to supervisory staff working to monitor compliance.31

Such a priority-focused, risk-based examination process is essential to guard against the perception that some examiners may use a “tick-box” approach to BSA examinations or may overly
stress the need for banks to address all possible risks. In addition, a priority-focused, risk-based approach is important in order to avoid having bank examiners rely too heavily on peer comparisons, potentially resulting in a situation where examiners expect a bank to have whatever compliance bells and whistles another bank might have, regardless of the bank’s particular situation, BSA-related risk and legitimate compliance priorities. As noted by FATF, each bank should be allowed to devise its own compliance program based on its own reasonable risk analysis.

These sentiments have also been articulated by FinCEN:

> Both the financial industry and the government have limited resources to devote to detecting and preventing illicit financial activity. As such, we need to work together to ensure these resources are directed where they will be most productive for AML/CFT purposes.32

A primary focus of the New Framework for Partnership being proposed must be the effort to “work together” to ensure the implementation of and respect for a priority-focused approach to BSA compliance and examinations.

In the same vein, under a priority-focused, risk-based approach to compliance and BSA administration, the bank regulatory agencies should expressly recognize the resource constraints of community banks. As Secretary Paulson has recognized, BSA examinations can and should be streamlined for community banks. For example, expectations for implementing a self-testing, self-correcting process can be administered in a way that does not require banks to incur the considerable expense of retaining outside BSA experts to conduct the testing. General outside auditors or the board level audit committee can supply sufficient independent oversight of internally conducted program quality reviews to satisfy an appropriately stream-lined BSA exam process for community banks.

**Priority-Focused, Risk-Based Administrative Enforcement Reinforces Compliance**

As part of a newly forged partnership between the government and the banking industry and in keeping with the necessity for a priority-focused compliance and examination process, there also needs to be a corresponding priority-focused enforcement process. As the 1970 Congressional Report accompanying the initial legislation stated: “mere isolated lapses ought not ordinarily be the occasion for the imposition of heavy penalties.”33

As noted, a priority-focused approach would allow a bank to make objective judgment calls about the prioritization and allocation of its limited BSA compliance resources. In addition, a priority-focused approach would recognize that some matters may be missed. This must be reflected not only in the examination process, but also in the enforcement actions taken by the bank regulatory agencies.

It is heartening that FinCEN has said that: “It is paramount to FinCEN and our federal partners that we continually work to dispel the myth that minor technical infractions lead to major penalties.”34 However, this “myth” can only be thoroughly dispelled through a better partnership and an explicit commitment from all of the bank regulatory agencies that adhere to this standard.

As observed nearly 25 years ago, the President’s Commission on Organized Crime in 1984 recommended that in considering administrative actions:

> Treasury should take into account whether the institution has adopted formal procedures for ensuring compliance with the Act, as well as the scope and detail of such procedures and the vigor with which the institution applies and enforces them.35

Reflecting these factors and this approach, the Department of the Treasury testified during the 1986 Congressional hearings:
We would not generally assess civil penalties against banks that have taken prudent steps to ensure that their employees comply with the law, but nevertheless have discovered Bank Secrecy Act violations by their employees in a routine audit or other timely fashion.36

These pronouncements provide a policy predicate for the legislative directive in the 1992 Annunzio-Wylie Anti-Money Laundering Act establishing the Four Pillars of BSA compliance directing that banks establish board-approved control programs with suitable governance and a self-testing, self-correcting process. The 1992 Annunzio-Wylie reforms sought to establish robust compliance programs. The intent was not to instill perfection, but to promote a process that enabled reasonable judgment to be applied to the challenge of detecting often elusive indicators of financial crime.

That administrative enforcement should reinforce a self-testing, self-correcting compliance program was recently recognized in a study conducted by British authorities:

The Hampton Review also recognised that a penalty regime should be [to] manage the risk of re-offending, and the impact of the offence, with tougher penalties for businesses that persistently or seriously break the rules. This should be accompanied with greater focus upon giving advice and support to businesses on how to comply with regulations.37

Following this dictate, it is clear that emphasis should be placed by the Government on providing advice and support as a partner and, only as a last resort, on assessing penalties against banks for noncompliance.

Unfortunately, the bank regulatory agencies, and the banking industry as a result, are still saddled with overly prescriptive legislation from 22 years ago that was triggered by a Congressional reaction to primarily one case. Specifically, as set forth in Appendix C to this Report, as the result of the First National Bank of Boston case and concern about the perceived lack of forcefulness by the bank regulatory agencies at the time, Congress mandated that each and every bank examination review BSA compliance and that formal enforcement action be taken on a relatively automatic basis.38 This prescriptive approach is an anathema to the risk-based approach that is currently needed.39 Consequently, it will greatly undermine the government’s commitment to a risk-based approach if this legislation is not repealed.

Even if Congress’ concern was well-taken in 1986, it represents a different era and does not reflect the effort and progress over the last 22 years, as well as the fact that all of the bank regulatory agencies have extremely robust BSA examination and enforcement programs and that the banking industry has more than proven its commitment to compliance with BSA and to cooperating with and assisting the Government in all anti-money laundering and counter-terrorist financing efforts.

The standard set forth in the Agency Statement addressing problems outside the prescriptive scope of 12 U.S.C. § 1818(s)(3) more properly reflects an appropriate approach:

The form of the enforcement action in a particular case will depend on the severity of the noncompliance, weaknesses, or deficiencies, the capability and cooperation of the institution’s management, and the Agency’s confidence that the institution will take appropriate and timely corrective action.40

Under a proper risk-based approach, provisions such as 12 U.S.C. §§ 1818(s)(2) and (3) have no value and should be repealed. The repeal of these sections will not diminish the ability of bank regulatory agencies to take whatever enforcement action they might determine to be necessary in particular cases.
Recommenda**tion 2:** Take a priority-focused approach to compliance.

The bank regulatory agencies should explicitly endorse a priority-focused, risk-based approach to BSA regulation, coupled with deference to a bank’s risk assessment and assignment of priorities for its BSA compliance program. Each bank, understanding its particular operations and customers, is uniquely positioned to design a BSA program that focuses resources where there is the greatest opportunity for addressing and mitigating the risk posed by potential money laundering and terrorist financing. Applied across the banking industry, a priority-focused, risk-based approach should create a more powerful and efficient regime for detecting illegal financial activity.

This recommendation would include the following:

1. **Interagency BSA Compliance Policy Statement**
   - After notice and comment, and working in partnership with the banking industry, the bank regulatory agencies, as well as other relevant agencies, should adopt a policy statement that explicitly endorses a priority-focused, risk-based compliance approach with regard to BSA, anti-money laundering efforts and counter-terrorist financing efforts, that includes:
     - An explicit statement by the bank regulatory agencies that banks should focus their priorities on their highest risks, with the aim of creating more powerful and efficient BSA programs.
     - A recognition that BSA resources are finite and that, as a result, not all risks can be addressed with the same level of resource allocation.
     - A recognition that using a priority-focused, risk-based approach will result in banks not uncovering — and not being expected to uncover — every potential instance of money laundering or terrorist financing.
     - An explicit recognition that a priority-focused, risk-based approach means that different banks will have different risks and different priorities in addressing those risks.

2. **Interagency BSA Examination Process**
   - The interagency exam procedures should be amended, in partnership and consultation with the banking industry, to include the following items:
     - A requirement that examiners review and discuss a bank’s risk assessment with bank management and reach an initial evaluation of the bank’s stated priorities and self-testing procedures at the beginning of BSA examinations, prior to conducting any supervisory transaction testing.
     - An explicit recognition that deference should be given by bank examiners to individual banks in their analysis and articulation of their BSA-related risks and their prioritization of BSA compliance resources.
     - A directive to examiners that the risk-mitigation considerations set forth in the interagency BSA/AML Examination Manual (BSA Manual) be considered, as originally intended, as suggestions subject to a bank’s weighing of its own risk assessment, rather than as rules or as mandatory expectations.
     - A directive to examiners not to criticize a bank for failing to follow a best practice or agency suggestion unless warranted by the nature and magnitude of the risk facing the bank and its failure to take alternative reasonable measures.
• The Interagency BSA/AML Exam Procedures should be administered so that:
  – A bank that self-identifies and appropriately self-corrects program deficiencies will be evaluated favorably as displaying the desirable traits of a dynamically responsive priority-focused BSA compliance program.
  – Quality assurance is recognized as the primary goal of independent testing and therefore community banks with modest BSA risk-profiles will be provided latitude in conducting and having adequate oversight of program testing without insisting that the bank incur unnecessary additional expense to retain an outside BSA expert to conduct such testing.

3. Interagency BSA Administrative Enforcement Policy

• The interagency enforcement policy should be amended, in partnership and consultation with the banking industry, to include the following items:
  – The bank regulatory agencies should confirm, as a matter of administrative enforcement policy, that a bank’s failure to uncover instances of potential money laundering or terrorist financing shall not ordinarily result in an enforcement action if the bank otherwise has conscientiously established a BSA compliance program reasonably addressing the statutory elements consistent with a fair, priority-focused, risk-based assessment of the bank’s operations.
  – The bank regulatory agencies should confirm, as a matter of administrative enforcement policy, that a bank that self-identifies and appropriately corrects program deficiencies should not, absent special circumstances, be subject to an enforcement action based on the deficiencies identified and corrected.

4. Legislative Recommendation

• 12 U.S.C §§ 1818(s)(2) and (3) should be repealed.

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Increase the Quality of Feedback and Transparency

Feedback and transparency are key to a public/private collaboration in combating financial crime and are an integral part of a priority-focused approach to BSA compliance. As acknowledged by FinCEN, providing feedback represents “good government” and, moreover, is essential to a risk-based approach for BSA compliance efforts. Accordingly, the ABA and the banking industry would like to work in partnership with the Government to ensure continued and enhanced feedback to better support a priority-focused BSA regime.

In addition, transparency, which often includes a form of feedback — namely, information about what the bank regulatory agencies expect of the banking industry and how the bank regulatory agencies function — is also a process which needs to be instilled as part of a new framework for partnership. Further, there needs to be a process whereby the banking industry, working with FinCEN and the bank regulatory agencies, can be assured that the transparency effort is successful and reliable.
Feedback

Providing feedback is not only representative of “good government,” it is essential to providing the banking industry with a better understanding of how its compliance efforts and reports are useful in the fight against money laundering, terrorist financing, and other financial crimes; and how the industry can improve its efforts and modify, where appropriate, its allocation of compliance resources.

As FinCEN explained in an address to the banking industry:

by providing feedback about emerging risks and criminal typologies, and about how law enforcement uses the reports you file and what they are looking for, it helps you provide the information the government needs most. This in turn helps protect your financial institutions and your customers from criminal actors and perpetrators of fraud who may try to abuse them.42

Over the years, FinCEN has increasingly striven to improve and enhance the content and extent of feedback to the banking industry.43 It is important to continue these efforts, while improving, enhancing and expanding the feedback as much as possible. This feedback should include even more descriptions of specific cases and explanations as to how the activity was uncovered, and what was most useful to law enforcement.

This type of feedback and assistance from the government is essential. As set forth by the ABA in its Congressional testimony in 1990 with regard to suspicious reporting:

we would like to spend more of our efforts on what is unusual or unique, but we cannot do it alone. We are bankers. We are not law enforcement. We have some idea, but we need a real cooperative effort with Justice and others ….44

More recently, in one of the hearings leading up to the passage of the USA PATRIOT Act, the ABA reiterated the need for feedback from the government and the need for an “alliance,” or partnership, for purposes of such feedback:

The trends in money laundering must, by definition, be discovered by law enforcement and state and federal bank regulators since those entities are better equipped than bank officials to discover new forms of criminal activities and to distribute this information to all concerned parties. The U.S. government has been working toward an improved “alliance” with the private sector to share information on new trends and schemes and we are optimistic that the sharing of critical information will continue.45

The necessity for good and complete feedback and information sharing as part of a public/private partnership is promoted internationally. As stressed by the United Kingdom, for instance, in executing its risk-based approach to anti-money laundering and counter-terrorist financing compliance:

a genuinely risk-based approach requires supervisors and businesses to develop and share knowledge of changing threats, and use this to focus on areas that are particularly vulnerable to exploitation.46

The European Union has also echoed the need for feedback as follows:

In order to ensure that the institutions and others subject to Community legislation in this field remain committed, feedback should, where practicable, be made available to them on the usefulness and follow-up of the reports they present.47
The importance of feedback and of doing it as part of a partnership between the government and the banking industry was specifically outlined by FATF in its Guidance on the Risk-Based Approach:

It is desirable that public and private bodies work collaboratively to identify what information is valuable to help combat money laundering and terrorist financing, and to develop means by which this information might be shared in a timely and effective manner.48

**Collaboration is the Core of the Renewed Partnership**

Outreach by the Chairman’s Committee revealed a well-spring of goodwill between law enforcement agency staff and bank BSA officers. At the most basic level, good communication among bankers and law enforcement officers has fostered real success in pursuing, apprehending and prosecuting those who would abuse our financial system. At the same time, these successes are not universally experienced, or consistently repeated. It is toward this shortfall that further collaboration should be encouraged and better feedback should be directed.

It is clear that banks and their compliance programs have been very effective in combating money laundering and in identifying activity that may be related to terrorist financing and that further progress and efficiency can be best achieved by keeping communication between law enforcement and bankers at local, regional and national levels open and not obscured by technical regulatory detail. The goal is not mindless compliance, but compliance mindful of the priority of providing highly useful information to law enforcement to safeguard financial system integrity.

Consequently, the goal of a new framework for partnership is to make improved collaboration on system integrity a priority and to build compliance around detection reflective of a priority-focused, risk-based BSA policy. For this reason, there should be better leverage of feedback and transparency.

With regard to feedback and the sharing of information, one of the more obvious methods, which has been neglected to date, is through the use of the § 314(a) process set forth in the USA PATRIOT Act. Section 314(a) specifically called for Government-to-bank sharing as follows:

(a) Cooperation Among Financial Institutions, Regulatory Authorities, and Law Enforcement Authorities.

(1) Regulations. — The Secretary shall ... adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in, or reasonably suspected based on credible evidence of engaging in, terrorist acts or money laundering activities.

In spite of this directive, the Government implemented § 314(a) to only require banks to respond to inquiries from law enforcement. The Government’s regulations did not provide for any substantive sharing, as envisioned by § 314(a), from the Government to the banking industry. The current use of § 314(a) is laudable and appears to be useful to the Government, but full implementation of the statutory design would be better.

The importance of public/private sharing was stressed in one of the Congressional Reports issued in support of the USA PATRIOT Act:
[The Act] provides the United States government with new tools to combat the financing of terrorism and other financial crimes. The legislation contains provisions to strengthen law enforcement authorities, as well as enhance public-private cooperation between government and industry in disrupting terrorist funding.49

The need for complete and thorough public/private sharing is essential to combat money laundering and, in particular, terrorist financing. Consequently, there should be an expanded use of § 314(a) in a way that fully implements the original Congressional intent of public to private sharing. It is important to stress that the Government-to-private sector sharing must be informative and actionable with regard to specific targets and cases, and not simply a recitation of background information about the general risks of money laundering and terrorist financing. At the same time, this sharing should be accomplished without increasing the documentation requirements imposed on the banking industry. Specifically, this cooperative effort should not become burdened by a supervisory expectation for a paper trail demonstrating how each communication was disseminated or applied internally. After all, the goal of a more robust use of 314(a) is to enable banks to better make their own detection decisions using actionable information in a manner that comports with their own operating context and risk profile. The purpose is to assist bank judgment, not to supplant or second-guess that judgment by imposing a new agency compliance standard.

Further, it is recommended that the dissemination of information through the use of § 314(b) of the USA PATRIOT Act, relating to bank-to-bank sharing, should be encouraged and improved. This is a greatly under-used process for sharing and for providing information and it can be put to great advantage. However, it must be stressed that sharing under § 314(b) must be recognized as being voluntary and that the bank regulatory agencies should not critique banks on the manner or extent to which they avail themselves of 314(b) sharing avenues. It is simply recommended that the industry and the Government work together to come up with improved and easier ways to use the provisions of § 314(b). The ABA stands ready to take a more active role in this process.

**Transparency**

In addition to feedback, there should be extensive transparency with regard to the BSA compliance and examination functions. As part of a priority-focused BSA regime, the banking industry needs to be as informed as possible as to what is expected by the bank regulatory agencies. Part of this is knowing what BSA-related risks and trends the Government is identifying and, also, knowing how the bank regulatory agencies will be examining for BSA compliance.

The issuance and continued updating of the interagency BSA Manual is an excellent example of the transparency that has been provided to the banking industry — and should be applied in other industries. However, enhanced transparency could serve to eliminate the occasional perception that examiners may be reading the check lists and guidance contained in the BSA Manual and elsewhere as de facto requirements, regardless of the actual legal requirements of the BSA statutes and regulations. In addition, enhanced transparency could serve to eliminate the perception that some examiners might convert commitments, best practices and peer conduct into requirements, regardless of the demonstrable need of a particular bank, based on its individualized BSA risk analysis.

One way to dispel some of these perceptions and to enhance transparency is to delineate or highlight in the BSA Manual the BSA legal and regulatory requirements versus suggested risk mitigation practices. The goal of improved partnership is not to convert helpful feedback into detailed supervisory expectations.

Another way to promote transparency is to provide for interagency BSA training to ensure consistency. This training could also be coordinated with the banking industry as part of an
on-going partnership. This would enhance the training process and would improve the level of trust and communication between the public and private sectors.

A third and very important way of protecting and ensuring transparency and uniformity is to establish a BSA ombudsman, as discussed earlier, who would be available to review BSA-examination issues as they arise. In this way, there could be an independent review process and the banking industry and the government could both be assured that there is transparency, consistency and accuracy in the BSA examination process.

**Recommendation 3: Increase the quality of feedback and transparency.**

Although there has been improvement in agency-initiated communication of BSA feedback, greater feedback is needed on the law enforcement cases attributable to bank reporting. The ability of banks to design and implement effective BSA programs will be enhanced if banks have a more tangible understanding of how their BSA reports have been useful to law enforcement and are provided more actionable information about serious threats to our financial system. In turn, the banking industry should facilitate dissemination of this enhanced feedback, foster more effective means to share relevant experience and financial intelligence, and promote priority-focused training to improve the value of information detected and reported. Together, these undertakings will establish a foundation for better trust and partnership and will enable bank regulatory agencies, law enforcement and the banking industry to strengthen the interdependence upon which the BSA regime depends.

It is recommended that the government and the banking industry work in partnership to create more feedback to banks. It is also recommended that this partnership work to create more transparency as to what is expected by the bank regulatory agencies of the banking industry and as to how the examination process is conducted.

These recommendations would include the following:

1. **Feedback Recommendations**

   - There should be a public/private collaboration developed to sponsor regular direct contact between local/regional law enforcement users of BSA data, the banks in those communities and the bank regulatory agency staff in the regions so that all can be better informed about the value of information received as well as improving the appreciation of all stakeholders for the contributions of each.
   
   - The existing SAR trend analysis should be enhanced by going beyond descriptive reports to include more instructive lessons about law enforcement’s use of the data, ways to identify the activities subject to reporting and pointers from law enforcement about what they found more or less valuable — and what to be attuned to in the future.
   
   - The Government should fully implement the original intent of § 314(a) of the USA PATRIOT Act by providing for meaningful sharing by the Government to the private sector of actionable guidance about serious money laundering and terrorist financing information.
   
   - There should be a careful study conducted on how to improve government-to-private sector communication of sensitive alerts and typologies under the § 314(a) process without generating unnecessary compliance paperwork expectations or other burdens for recipients.
• The banking industry association leadership and the Government should work together to re-invigorate the use of § 314(b) by having the banking industry participate, on a voluntary basis, more fully in the certification process and work to promote the sharing of highly useful information among banking industry members.

2. Transparency Recommendations

• Bank regulatory agencies and other functional regulators should be expected to make exam procedures and/or exam expectations available to the banks or the regulated entities, and exam citations of violations should be strictly based on BSA statutes and regulations and not on guidance or peer practice.
  – The BSA Manual, for clarity’s sake, should specifically delineate or highlight BSA legal requirements versus suggested risk mitigation practices.

• There should be enhanced training for bank examiners conducted on an interagency basis and jointly with the banking industry and law enforcement in order to ensure accuracy, consistency and transparency. There is no need to instruct bank examiners differently from banking industry representatives.

• During examinations, the bank regulatory agencies should provide banks with the same data that examiners receive concerning the particular bank’s SAR and CTR filings.

Streamline Reporting and Validate its Utility

In 1970, Congress passed the initial BSA legislation with the intent of assisting law enforcement in the investigation and prosecution of financially-related crimes. Prior to that time, law enforcement had been frustrated in its efforts by the lack of transactional records kept by banks and by foreign bank secrecy laws. The BSA legislation, thus, started with basic recordkeeping requirements and fairly mechanical transaction reporting requirements.

These reporting and recordkeeping responsibilities fell chiefly upon U.S. banks which were required to file Currency Transaction Reports (CTRs) and to maintain certain BSA-related records.

In spite of this one-sided burden, Congress, in enacting the Bank Secrecy Act, repeatedly professed the desire to not burden the banking industry or to disrupt international commerce. In fact, in its legislative report, Congress claimed that it was actually using a conservative and non-burdensome approach.

Further, Congress cited the flexibility built into the law and the contention that most banks were already doing what the legislation would require:

It should be noted that the Secretary has ample authority to limit recordkeeping and reporting requirements to those which will be useful to carry out the purposes of the Act and not unduly burdensome to legitimate business.

Administrative agencies are given the flexibility to avoid the imposition of unwarranted and burdensome reporting and recordkeeping requirements. Most of the records required to be maintained under the bill are already kept by most financial institutions, so the regulations should impose almost no additional expense upon those affected.
The photocopying requirements of the bill will not significantly increase the cost to the affected financial institutions. Most banks and other financial institutions already maintain the types of records contemplated by the bill. In addition, the cost of microfilming checks and similar drafts is minimal.\(^54\)

The overall theme of the lack of burden was echoed by a number of witnesses testifying at the hearings that led up to the passage of the 1970 legislation. As stated by the Department of Justice: “Our purpose ... should be to detect and prosecute crime, not build a mountain of paper.”\(^55\)

Congress ended up hearing testimony on both sides of the issue of burden and ultimately determined that the need for the legislation outweighed any potential burden, concluding:

Many of these records are already kept by financial institutions and it is not the committee’s intent to encumber these institutions with a substantial volume of additional paperwork. The committee has, however, received testimony from law enforcement officials on the high degree of importance of having access to copies of checks drawn on commercial banks.\(^56\)

Further, in addition to providing the bank regulatory agencies with flexibility in implementing the requirements of the legislation, Congress provided the Secretary of the Treasury with exemptive powers as a possible means to reduce any undue burden:\(^57\)

For that reason, the Secretary of the Treasury ... [was] given broad exemptive authority which the committee expects will be applied whenever the law enforcement benefits are not sufficient to outweigh the cost of implementation.\(^58\)

From the beginning, the fundamental policy trade-off between law enforcement value and the costs of industry implementation were embedded in the BSA regime. In addition, the tension between leveraging existing common business practice versus imposing additional paperwork was recognized.

How to address this trade-off in the future as reporting and recordkeeping obligations expand continues to be a matter of primary concern to America’s bankers who are tasked with compliance. Accordingly, it is important to develop appropriate metrics for evaluating the use and utility of BSA data so that the value of reporting can be more clearly demonstrated.

**Currency Transaction Reports**

CTR filings have continued to grow in number despite efforts to contain that growth. Specifically, in 1994, the volume of CTR filings was overwhelming the system and, accordingly, Congress passed legislation calling for the Secretary of the Treasury to “seek to reduce” CTR filings by 30%, primarily through the use of exemptions.\(^59\) Of course, such a reduction was never achieved.

In the subsequent 14 years, annual CTR filings have increased from approximately 9 million\(^60\) to 16 million,\(^61\) representing an increase of 78%. While in a recent study the GAO concludes that data processing advances have enabled law enforcement agencies to better handle the burgeoning numbers of CTRs, those same agencies have taken no action to apply that technology to track their use of CTRs or the utility of CTRs in developing or proving cases involving financial crime.\(^62\)

This is in contrast to the tracking and publication of the use of information developed from the § 314(a) process. FinCEN has in place a robust system to link § 314(a) data to outcomes and regularly reports these results in aggregated form, enabling banks, agencies, Congress and the public to have a common source for evaluating the use and utility of § 314(a) data.
The recent GAO Study went on to conclude that:

Increasing [the] use of exemptions would help depository institutions avoid filing unnecessary CTGs, as well as reduce the government’s costs to process them. … Because the transactions of exempt customers are likely to be of little use to law enforcement efforts, steps to encourage the use of exemptions among depository institutions would not be harmful to law enforcement and could avoid some CTR filing costs.63

Ideas abound for improving the CTR filing and exemption system, including legislative initiatives that have received wide support in Congress. FinCEN, too, has proposed instituting several of the GAO recommendations. The ABA has also advocated for the simplification of the system and will continue to do so. Other concrete suggestions for reform are set forth in Appendix A. All of these ideas are on the table and may contribute to the effort to craft a better CTR process.

From among this broad range of ideas, ABA recommends that first and foremost, in keeping with a priority-focused, risk-based approach, deference should be given to banks in their decisions as to how they establish and implement their CTR compliance process and, specifically, how they determine whether or not to exempt a particular customer. Banks should not run the risk of having exemption decisions second-guessed and of being required to undertake a time-consuming and expensive “look-back” procedure. Banks should not be required to undertake such measures unless their exemption and overall CTR system is fundamentally flawed.

Based on the history of BSA, it is noted that, as part of a simplified exemption process, it may be appropriate to implement the little-noticed provision in the 1994 legislation, the Money Laundering Suppression Act of 1994, that called for Treasury to:

publish in the Federal Register at such times as the Secretary determines to be appropriate (but not less frequently than once each year) a list of all the entities whose transactions with a depository institution are exempt under this subsection from the reporting requirements of subsection (a).64

This Treasury list of exempt entities provided for in the 1994 Act was widely supported65 but was never implemented. If such a list were published, especially as an aide to minimizing confusion about whether companies are “listed” for purposes of Phase I, it could be very useful to banks seeking to exempt more of its customers and, as stated by Congress, would “eliminate any uncertainty or hesitation on the part of financial institutions to exempt institutions since such exemptions would be approved by Treasury.”66

Fundamentally, in order to reduce reporting burdens through streamlining and to improve the accountability of law enforcement agencies’ use of BSA data, the Government should: (1) develop appropriate measures to track the use and utility of CTGs that more clearly associate them with the outcomes of criminal prosecutions; and (2) work to further simplify the CTR filing and exemption processes.

**Suspicious Activity Reports**

Reform of the original criminal referral process in the 1990s ushered in the current format of the Suspicious Activity Report (SAR). The development of the SAR form brought together the reporting requirements on one form and provided for a single filing. Funneling these reports to a central repository for controlled access by appropriate law enforcement and bank regulatory agencies sought to lessen reporting compliance burdens; at the same time it worked to provide more direct alerts to law enforcement of factual circumstances meriting further investigation.
It is appropriate to follow up this simplification process by ensuring that deference be given to banks on how they establish and implement their SAR monitoring and compliance procedures based on the individual circumstances, location, risk, client base and products of the particular institution.

In addition, deference should be given to banks in connection with their decision not to file a particular SAR. Not every unusual or anomalous situation over $5,000 should be the subject of a SAR and, as long as there is a reasonable justification for the decision not to file, banks should not be second-guessed. In this regard, it is imperative that requirements to create extensive and overly burdensome documentation of decisions not to file, which requirements were never part of the SAR regulations, should be substantially reduced. The system will not work if banks are expected to spend more time justifying and documenting the decision not to file, than the time it would take to actually file a SAR. Further, it should be recognized that, in the decision to file or not to file a SAR, a bank is almost always operating with imperfect and incomplete information. That needs to be taken into account when reviewing a particular bank’s record and its decision to not file a particular SAR.

As noted previously in this Report, improved feedback from the Government can contribute to the ability of banks to provide quality SARs. Through improved communication between law enforcement agencies and banking industry groups, banks can focus on responding to identified law enforcement priorities. Better communication and more direct partnership will also help banks improve their priority-focused judgments about their own internal controls. This will lead to a shift in emphasis from supervisory second-guessing of the SAR process to a more general oversight of the SAR compliance process to reasonably detect and report suspicious activity.

A more robust partnership with law enforcement representatives can help resolve issues related to SAR reporting. For instance, it is noted that the banking industry has received conflicting guidance on whether the narrative portion of the SAR should be as detailed as possible, or should just identify the broad nature of the potentially unusual or suspicious activity. Further, there is confusion, even among bank examiners, with regard to how many times repetitive SARs need to be filed, and whether there can be a presumption that a bank can cease making repetitive filings after three times.

Similarly, as with the filing of CTRs, it should be the practice of bank examiners, absent unusual circumstances, not to measure the volume of a particular bank’s SAR filings and compare it to peers, or to criticize a bank for the manner in which a SAR is filed or worded. This is not a meaningful measure of either SAR compliance process or a beneficial means of promoting partnership with law enforcement agencies.

Last, the integrity and confidentiality of SARs has recently become an issue. Breaches of SAR confidentiality by Government representatives can erode a bank staff’s sense of security when being candid about reporting suspicious customer activity. Consequently, procedures should be established for maintaining the confidentiality of SAR information and for investigating and taking appropriate action when Government representatives breach this confidentiality. As is already the case for the banking industry, if breaches of SAR confidentiality are the result of disclosures from the Government, then the Government should be held accountable.

**Other Data Reporting**

While CTRs and SARs are the two types of BSA data that receive the most attention and form (at this time) the bulk of BSA data, other types exist and new types may be added.
The ABA has taken positions, for instance, on the wisdom, value and burden of collecting data about cross-border electronic funds transfers (CBEFT). Those views have been expressed on several occasions. For purposes of this Report, the ABA urges that, in addition to current statutory hurdles associated with the proposed collection of CBEFT data, the Government, after public notice and comment, establish appropriate metrics to measure the use and utility of any such data should it ever be collected. One lesson learned from the § 314(a) reporting process is that such tracking systems are easier to implement when they are installed at the beginning rather than after the reporting process has been in place.

**Recommendation 4: Streamline reporting and validate its utility.**

BSA data reporting obligations should be streamlined and their utility validated using appropriate metrics to ensure accountability and to improve transparency. This will enhance system efficiency and the ability of legislators and regulators to strike the proper balance among individual privacy, law enforcement, national security and financial system integrity policy concerns.

This recommendation would include the following:

- The bank regulatory agencies should ensure that reasonable deference is given to banks in their establishment of monitoring systems and in their decisions not to file SARs in particular cases so that they are encouraged to apply their best judgment.
  - A supervisory presumption should be established that allows banks to stop filing repetitive SARs after three filings.
  - The bank regulatory agencies should eliminate or greatly reduce the reliance on peer comparisons as a way to evaluate a bank’s compliance with the CTR and SAR requirements.

- Unnecessary reporting and recordkeeping requirements should be reduced by continuing the process to simplify the CTR process to make it as easy to comply with appropriate exemption qualifications as it is to file a CTR.
  - The bank regulatory agencies should ensure that reasonable deference is given to banks in their execution of CTR compliance procedures and in their procedures for exempting customers and the agencies should strive to eliminate excessive and redundant paperwork.

- Lessons from current § 314(a) reporting should be applied to better track and report on the law enforcement use of SARs and CTRs and to use such tracking in the regular evaluation of whether the BSA meets its mission to protect the efficiency, integrity and legitimacy of the financial system by detecting and prosecuting crime.

- The Government should refrain from expanding BSA-related financial data reporting requirements in the absence of record evidence that such expansion: is reasonably necessary to accomplish the mandate of maintaining financial system efficiency and integrity; cannot be achieved using less costly reporting requirements that intrude less broadly on the conduct of routine legitimate financial transactions; will have its utility validated by metrics implemented from its inception; and its collection and access can be effectively and securely managed.
The legislative history of BSA makes it clear that the intent of the initial legislation in 1970, and of all of the subsequent Acts, was to target organized crime, drug traffickers, tax evaders and money launderers in general.\textsuperscript{67} The involvement of the banking industry was and continues to be a necessary part of the implementation of the BSA regime, but the banking industry was never — and should not be viewed as — the target of the legislation. In 1993, Rep. Gonzalez, then Chairman of the House Banking Committee, reemphasized that criminal were the targets of the BSA regime:

Since the 1970’s, the committee has sought ways to reduce the ability of tax evaders, drug traffickers, and others with criminal intent from using our Nation’s financial institutions as their own personal laundromat in order to wash clean the proceeds of their dirty deeds.\textsuperscript{68}

**Standard for Taking Criminal Actions against Banks**

A necessary corollary to this history is the fact that a priority-focused BSA regime should continue to be directed toward obtaining information about organized crime and money launderers BSA-related criminal prosecutions and penalties should be targeted against the real perpetrators and not against the banks that represent the front line implementing BSA in good faith.

With regard to the founding concept of BSA being focused on money launderers instead of on banks, Eugene Rossides, former Assistant Secretary of the Treasury for Enforcement who testified before Congress on behalf of Treasury with regard to the early BSA legislation, submitted a written statement to Congress in 1986 after he had left the Department of the Treasury. It is instructive on this point and reads as follows:

First, while money laundering is a serious problem that must be vigorously addressed, it does not necessarily follow that imposing broad new requirements upon banks will solve the problem. Second, I become concerned when I see the law enforcement community shifting its focus away from drug traffickers and others in organized criminal groups and preoccupying itself with reporting failures by banks. While some banks have been less than diligent in meeting their filing obligations under the Act, I think William Nickerson, former Deputy Assistant Secretary of the Treasury for Enforcement, was directly on point recently when he observed that the government had “misenforced” the law by prosecuting bankers instead of narcotics dealers and other money launderers and that “what we’ve seen is a loss of understanding of the purpose of the act.”

To understand the application of the Currency and Foreign Transactions Reporting Act of 1970, often referred to as the “Bank Secrecy Act,” one must recall the purpose for which it was enacted. ... The data to be retained by the banks under the Act was to provide a source of information to bolster or help direct ongoing investigations of targeted suspects and future specific investigations. It was created to ensure that documents relevant to a particular suspect remained available for the use of the investigators and prosecutors. The Act’s target was the alleged criminals being investigated, not the banks.\textsuperscript{69}

This testimony serves to underscore the need for respecting the burden that banks are already under and the fact that the Government should reserve “major penalties,” as promised by FinCEN, for the “rare” cases.\textsuperscript{70}
There was additional testimony in 1985 and 1986 to the effect that the then increased penalties were designed, in part, to be assessed “against financial institutions that act in collusion with money launderers,” or that “facilitate[] laundering.” Such a standard requiring affirmative misconduct would obviously eliminate banks that attempt in good faith to comply with the many requirements under BSA.

The Department of the Treasury expressed this position in testimony in 1991:

Absent unusual circumstances, if a bank took proper measures to guard against money laundering and nevertheless discovered it was being used by money launderers, it would not be prosecuted following the report of illegal activity to Federal law enforcement.

To properly implement this concept, law enforcement and the bank regulatory agencies should jointly develop, in consultation with the banking industry, a policy setting forth the proper standard for taking BSA-related criminal cases against a bank. Pursuant to such a policy, the government should review and consider the compliance history of the bank; the nature and scope of its BSA program; whether the violations are “persistent and serious” as opposed to limited and nonrecurring; whether the bank has knowingly facilitated money laundering; whether the bank’s internal controls and management detected and corrected the violations; and whether the bank has substantially or significantly failed to implement a good-faith BSA compliance program. In keeping with this last factor, as set forth earlier, an appropriate standard for taking BSA-related enforcement actions — especially criminal actions — would be a finding that the bank has fundamentally failed to comply with the requirements of BSA.

**Consultation Before Prosecution**

It is further recommended that, prior to bringing any criminal action against a bank, the Department of Justice be required to consult with the relevant bank regulatory agency on the history of the institution’s compliance as well as the severity of the alleged misconduct. The existing guidelines issued by the Department of Justice already suggest that prosecutors “may” consider a bank’s “history of similar conduct, including prior criminal, civil, and regulatory enforcement actions …” Given the complexity and importance of the banking system as well as the BSA regime, it is recommended that the review of the bank’s history be mandatory.

In connection with the recommendation that the Department of Justice consult with the bank regulatory agencies, it is important to note that the bank regulatory agencies are in the best position to review and evaluate the history and efficacy of the compliance efforts of the banks they supervise and examine on an on-going basis. This is particularly true when a proposed criminal action is based on the inadequacy of a bank’s BSA program, bank regulatory agencies, which regularly examine in detail the BSA programs of all banks, have a breadth of experience and expertise with which to inform the prosecutorial decision.

The need for reviewing a bank’s history and for consulting with a bank regulatory agency is based on the gravity and sensitivity of taking actions against banks for BSA-related violations. This sensitivity is recognized by the Department of Justice itself by virtue of the fact that § 9-105.300(4) of the United States Attorneys’ Manual requires that all money laundering prosecutions and deferred prosecutions against banks be approved by the Asset Forfeiture and Money Laundering Section of the Department of Justice.

In further support of this recommendation, it should be noted that the complexity of the financial regulatory environment, and the expertise of the bank regulatory agencies, is also specifically recognized in the Department of Justice guidelines:
Many corporations [including banks] operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program’s design and implementation. For instance, state and federal banking [agencies] . . . have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs.75

This type of consultation is in fact in keeping with a 1985 Agreement the Department of Justice entered into with the bank regulatory agencies on the day before the start of the Congressional hearings on the First National Bank of Boston case.76 Pursuant to this Agreement, the Department of Justice and the bank regulatory agencies promised to coordinate and cooperate in the handling of criminal cases relating to banks.77 Of particular note is the ninth paragraph of the Agreement which allowed for “inquiries, complains and [even] ‘appeals’” by the bank regulatory agencies with regard to Department of Justice cases against banks:

The Supervisory Agencies will strive to communicate directly with the U.S. Attorneys’ offices about significant criminal referrals involving their regulated financial institutions…. These parties shall communicate their concerns about particular cases and engage in dialogue to resolve problems. Thereafter, the Justice Department Fraud Section will entertain inquiries, complaints, and “appeals” of declinations by U.S. Attorneys with respect to referrals made by the Supervisory Agencies or their regulated financial institutions on cases believed by the Agencies to be significant.78

While this language is focused primarily on permitting the bank regulatory agencies to raise issues about cases not prosecuted, the addendum to the Agreement79 is broader and speaks in general of “inquiries, complaints, and ‘appeals’ by the Supervisory Agencies concerning referrals made to U.S. Attorneys’ offices (Paragraph 9).”80 This would encompass the equally important aspect of reviewing cases that potentially should not be brought against banks.

It should be noted that the current statutory authority set forth in the USA PATRIOT Act provides for other similar examples of required consultations. Specifically, Section 311 of the USA PATRIOT Act, pertaining to the issuance of “special measures” against foreign jurisdictions, foreign financial institutions, international transactions and accounts that are deemed to be “of primary money laundering concern,” requires a variety of interagency consultations. For instance, in determining whether there is a “primary money laundering concern,” the Secretary of the Treasury is required to consult with the Secretary of State and with the Attorney General.81 Further, in selecting the appropriate “special measure,” the Secretary of the Treasury is required to consult with the “Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency …. the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board and … such other agencies and interested parties as the Secretary may find to be appropriate.”82 Last, before selecting the fifth, or most stringent, “special measure,” dealing with the prohibition of opening or maintaining correspondent or payable-through accounts, the Secretary of Treasury must consult with “the Secretary of State, the Attorney General, and the Chairman of the Board of Governors of the Federal Reserve System.”83

Another provision of the USA PATRIOT Act requiring consultation is Section 319 which allows either the Secretary of the Treasury or the Attorney General to issue a summons or subpoena for information relating to a foreign correspondent account,84 but which requires each to consult with the other before ordering a U.S. bank to terminate the foreign correspondent relationship for noncompliance with the summons or subpoena.
This history of promised and required coordination, cooperation and consultation provide compelling grounds to reaffirm the need for binding, consultative processes in this very important and sensitive area.

**Avoid Using Criminal Sanctions to Impose Administrative Compliance Obligations**

In addition to establishing a clear standard for taking BSA-related actions against banks, it is recommended that changes be made in connection with the manner in which the Department of Justice takes BSA-related actions against banks. There is no question that the Department of Justice has the responsibility to take all appropriate criminal actions, including those against banks when necessary. The banking industry supports the Department of Justice in investigating and prosecuting all financial crimes, particularly those relating to money laundering and terrorist financing.

However, there is a concern that the relief mandated in some criminal cases has impinged on the administrative regulatory functions of the bank regulatory agencies. In one case, for instance, the criminal action required a bank to “demonstrate its future good conduct and full compliance with the Bank Secrecy Act and all of its implementing regulations.”85 In another case, the Department of Justice required the bank to undertake extensive and detailed remedial steps.86 In two other BSA-related cases, the Department of Justice required the banks to comply with the remedial consent orders that each bank had previously entered into with its respective bank regulatory agency.87

Again, this Report is neither questioning the underlying basis for the criminal action in any of these cases nor challenging the appropriateness of the required relief. In fact, as noted, in the last two cases referred to, the bank regulatory agency not only concurred with the relief, it was the agency that actually wrote out the steps the banks were to take.

It is not and should not be the role of the Department of Justice to implement or to monitor remedial BSA-related compliance procedures. The Department of Justice is not in a position to properly determine the standards for, or sufficiency of, programmatic compliance by a bank with the BSA regulations. That is the jurisdiction of the bank regulatory agencies based on their experience developed over the past 38 years of working with BSA, as well as 145 years of experience in bank examination and supervision. To place the Department of Justice in the position of reviewing administrative BSA compliance, without either the technical or practical experience in bank supervision or regulation, is unfair to the Department of Justice and risks confusing and disrupting the policies and administration of a complex regulatory scheme. Thus, it is recommended that the Department of Justice leave the oversight of BSA regulatory compliance by a bank to the bank regulatory agencies.

**Recommendation 5: Refrain from criminal sanctions to impose administrative compliance standards and redefine procedures for taking criminal actions against financial institutions.**

The responsibility and authority for establishing and enforcing the administrative standards for bank regulatory compliance belong with the relevant bank regulatory agencies. Thus, law enforcement agencies should avoid the imposition of criminal remedies that address a bank’s ongoing supervisory expectations for BSA compliance. Further, certain standards and procedures should be established for bringing BSA-related criminal actions against banks, including a policy that law enforcement consult with applicable bank regulatory agencies prior to bringing BSA-related criminal actions.
In light of the importance of the BSA regime and the significant effect criminal proceedings can have not just the individual bank at issue, but on the banking industry as a whole, certain standards and procedures should be established for taking BSA-related criminal actions against banks.

To further re-balance the roles of law enforcement and the bank regulatory agencies under the BSA regime, the following steps should be taken:

- The Department of Justice (DOJ) and the bank regulatory agencies should jointly develop, in consultation with the banking industry, a policy setting forth the proper standard for bringing BSA-related criminal cases against a bank.
- DOJ should establish and abide by a formal statement of prosecutorial policy setting forth appropriate standards for prior consultation with the relevant bank regulatory agency in advance of taking a criminal prosecution against a bank or its affiliate for a Bank Secrecy Act violation.
- DOJ and state prosecutorial offices should establish and follow guidelines that involve the bank regulatory agencies in determining the appropriateness of criminal sanctions that include the imposition of regulatory compliance requirements, programs or standards.

**Conclusion**

The ABA advances the recommendations set forth in this Report as a basis for developing a New Framework for Partnership between the banking industry and the Government — one in which compliance is a process for better protecting our financial system from abuse. The goal is to apply our resources to priorities that achieve real progress against, and prosecutions of, serious financial crimes, money laundering and terrorist financing. This is an aspiration we know that all of the system partners share.

The ABA encourages feedback to the recommendations in this Report and looks forward to discuss it further with the banking industry and the Government, including Congress, the Executive branch and the bank regulatory agencies.

The ABA expresses its gratitude to the Committee members for their significant service in preparing this Report. The ABA would also like to thank the various people from the legislative branch, law enforcement agencies, the bank regulatory agencies, the banking industry and the public who provided useful input and thoughts. Our experience in this process convinces the ABA and its members that all the participants in the BSA/AML regime share a common goal of improving our collective ability to more effectively and efficiently safeguard the integrity of the American financial system from serious abuse.
Endnotes

2 The ABA and the Committee are keenly aware of the recent extraordinary events in the financial market and the banking industry. In pursuing the recommendations and the New Framework for Partnership, ABA will adjust its strategy and objectives as appropriate to the events as they continue to unfold.
3 As noted in the BSA History and Overview of BSA Regulations, set forth in Appendices C (footnote 23) and D, the requirement to file Currency Transaction Reports and limited criminal referrals dates back to 1959 and the passage of the Trading with the Enemy Act.
4 1990 – V – 156. 1990 – V – 156. (The convention for these types of citations in this Report relates to Appendix B. The Congressional reports and hearings are grouped in Appendix B by the date of the legislation they relate to. Thus, this citation refers to the 1990 Act, the Crime Control Act of 1990. The Roman numeral refers to the Congressional report or hearing as numbered in Appendix B. The number at the end refers to the page in the report or hearing.) This testimony included the following personal anecdote from Cliff Cook on behalf of the ABA, which is relevant today: This testimony included the following personal anecdote from Cliff Cook on behalf of the ABA, which is relevant today: Finally, Mr. Chairman, to sum up the general feelings of the industry I would like to read an excerpt from a recent ABA study on the overall regulatory burden of banking. “Bankers in our study group expressed strong support for the underlying goal of limiting drug traffic. Most appear quite willing to accept some cost in order to further this goal.” One compliance officer whom we interviewed stated seriously and emphatically, “It is our kids that we are doing this for.” (1990 – V – 73.)
5 1986 – X – 87. This Interim Report was issued in October, 1984. Hereinafter referred to as the President’s Commission’s Report.
7 This requirement, however, could have been promulgated as early as 1970, based on § 205 of the original BSA Act. Similarly, in §1359 of the Money Laundering Control Act of 1986, the bank regulatory agencies were directed to prescribe regulations requiring banks to establish BSA compliance procedures.
10 FATF is an international organization created by the G-7 group of countries and is recognized as a leading authority on anti-money laundering and counter-terrorist financing guidance.
12 The Egmont Group is an informal organization of financial intelligence units named after the location of the group’s first meeting at the Egmont-Arenberg Palace in Brussels in 1995. It is recognized as the international standard setter for FIUs.
16 There is no intention to add redundant oversight to the exam process; but rather the intent is to suggest that the Inspector Generals, in the interest of comity, accede to the specialized expertise and the focused mission of the Gatekeeper when it comes to conducting BSA-related supervisory management reviews. Mindful of the limitation of the resources available to the current BSA administrator, it may be appropriate to conduct management reviews using IG staff detailed to the Gatekeeper.
17 FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing, June, 2007, ¶¶ 1.2-1.3.
18 FATF Guidance on the Risk-Based Approach, ¶ 1.7. [Emphasis added.]
20 Speeches by the Director of FinCEN given on 2/27/08 and 3/5/08.
21 Speeches by the Director of FinCEN given on 2/27/08 and 3/5/08.
22 Speech by the Director of FinCEN given on 3/5/08.
24 “Risk Based Regulation: The FSA’s Experience,” Speech by Callum McCarthy, Chairman, FSA, 2/13/06.
25 “Risk Based Regulation: The FSA’s Experience,” Speech by Callum McCarthy, Chairman, FSA, 2/13/06.
27 Speech by the Director of FinCEN given on 2/27/08 and 3/5/08.
28 Speech by the Director of FinCEN given on 2/27/08.
29 Speech by the Director of FinCEN given on 2/27/08.
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Recommendations for Bank Secrecy Act/Anti-Money Laundering Reform

35 1986 – X – 139.
38 12 U.S.C. §§ 1818(s)(2) and (3).
39 As set forth by FATF, “Barriers to a risk-based approach may include inappropriate reliance on detailed and prescriptive requirements . . . “ FATF Guidance, ¶ 2.8.
40 Joint Agency Statement on Enforcement, 7/19/07.
41 Speech by the Director of FinCEN given on 2/27/08.
42 Speeches by the Director of FinCEN given on 2/27/08 and 3/5/08.
43 FinCEN has conducted extensive outreach to the banking industry and to various banking organizations; has issued extensive guidance on their website; and has continued to issue ever-expanding and comprehensive editions of its periodic publication entitled “The SAR Activity Review: Tips, Trends and Issues.” In addition, pursuant to a Memorandum of Understanding between FinCEN and the bank regulatory agencies signed on 9/30/04, FinCEN agreed to provide: analytical products that identify common BSA compliance deficiencies, patterns, trends in BSA compliance, developments in money laundering and terrorist financing, and trends and best practices in BSA examination. Such products also focus on assisting the banking organizations and other financial institutions in meeting their BSA compliance obligations. Accordingly, FinCEN will provide the FBAs, and, as appropriate, the industry, and the public with such analytical products to enhance the overall effectiveness of the agencies administration of the BSA. (MOU between FinCEN and the federal banking agencies, dated 9/30/04, ¶ III.C.)
47 Third EU Directive, issued 10/26/05; effective 12/15/07, ¶ 38.
48 FATF Guidance on the Risk-Based Approach, ¶ 2.18.
49 2001 – III – 33.
60 1994 – VI – 1.
61 FinCEN FY 2007 Annual Report, p. 5.
62 GAO Report on CTRs, supra. at p. 25.
63 GAO Report on CTRs, supra. at p. 55.
64 The Money Laundering Suppression Act of 1994, § 402(a); 31 U.S.C § 5313(d)(2).
69 1986 – VII – 198. (Emphasis in the original.)
70 Speech by the Director of FinCEN given on 2/27/08. This is especially important given the fact that the cost of sanctions is the third most expensive aspect of BSA compliance, behind monitoring and training costs. KPMG Report, page 9.
75 Id. page 15.
77 1985 – 1, 441-467. The lack of coordination and cooperation up to then was made particularly stark during the course of the Congressional questioning of the Comptroller:
Rep. Cooper – So I would like to ask Mr. Conover if he in any way participated or was involved with the Justice Department determination that half a million dollars [as a penalty] was appropriate in this case.
Conover – No, we were not involved. If you recall, we were asked to stay out of the bank as far as the Bank Secrecy Act was concerned in April 1983. We had absolutely nothing to do with the Justice Department’s case – no contact whatsoever, and no information on the subject until not too long ago when I got a phone call that informed me, “Tomorrow morning, you are going to read an article in the newspaper about the Bank of Boston pleading guilty and being fined $500,000.” I had no contact with the Justice Department on that subject whatsoever.

BB – 418. The fact that this was the way the OCC found out that a major national bank was pleading guilty to a major felony charge and was paying the largest criminal BSA penalty to date underscored the obvious need for reform.

The timing of this Agreement is explained by the fact that the agencies knew that they were going to be highly criticized for their handling of the First National Bank of Boston case – the bank regulatory agencies for not recognizing that there was a problem and for failing to refer the case to law enforcement; and the Department of Justice for being too lenient on the bank. BB – 1-3, 276, 296, 357, 418.

78 1985 – 452.

79 The addendum is entitled “Summary of the rationale for certain of the matters set forth in the attached agreements and recommendations of the Justice Department – Supervisory Agencies working group.”

80 1985 – 463.


85 Department of Justice action against AmSouth Bank, Birmingham, Alabama, 10/12/04.

86 Department of Justice action against the Bank of New York, 11/4/05.

87 Department of Justice actions against American Express Bank International, 8/6/07, and Union Bank of California, 9/7/07.
Appendix A
Additional Specific Suggestions

During the Committee’s consideration of how to improve the BSA regime, it conducted meetings and discussions with a variety of people with insight and experience in the BSA process, including from the banking industry, the legislative branch, law enforcement agencies, the bank regulatory agencies and the public. They provided numerous suggestions about how to improve the BSA system, many of which are reflected thematically in the main body of the report. However, there are additional suggestions that the Committee believes may be considered as contributing to the New Framework for Partnership. Accordingly, this Appendix seeks to identify those suggestions that are in addition to those put forth in the main report.

As the ABA develops and implements its advocacy plan to support the report’s recommendations, it will draw from these suggestions and will encourage others. The ABA will work with all BSA stakeholders to evaluate these ideas and to develop additional improvements.

These additional suggestions include:

- Expand government’s role as central repository and clearing house for common BSA related risk information and leverage Internet communication methods to disseminate such information rather than expect individual financial institutions to independently (and redundantly) research and identify the information. Agency sources throughout the government could be mobilized and coordinated by the BSA Administrator/Gatekeeper to provide a single site for specific types of information. This could take the form of various lists or databases covering:
  - PEPS (politically exposed persons) based on State Department sources;
  - Publicly listed companies for Phase I CTR exemption and any change in status thereof based on SEC and SRO sources;
  - MSBs (money service businesses) based on FinCEN registration and State licensing sources; and
  - Certified foreign correspondent financial institutions.
- Study the possibility of increasing reporting thresholds for SARs.
- Remove barriers to SAR sharing within financial enterprise provided that it is conducted as part of a comprehensive BSA/AML compliance program and appropriate information security controls are observed.
- Consider expanding the scope of 314(a) and 314(b) to cover serious financial criminal activity beyond money laundering or terrorist financing.
- Recognize the significant limits of current monitoring technology, reduce supervisory emphasis on reliance on such systems and respect institution judgment in managing technological outputs.
- Foster agency/industry exchanges and training on sources and methods for conducting transaction monitoring especially in circumstances beyond traditional banking activities such as trade finance and securities brokerage.
- Promote access to BSA Administrator/Gatekeeper staff during the course of exams and record on the exam record any specific guidance obtained from such contact regarding any BSA related matter in dispute during the examination.
• Implement simplifying changes to the CTR process:
  – Eliminate the 12 month waiting period under 31 CFR § 103.22(d)(2)(vi)(A).
  – Eliminate the initial filing requirement under 31 CFR § 103.22(d)(3).
  – Eliminate the biennial filing requirement under 31 CFR § 103.22(d)(5).
  – Reduce the burden requirements in conducting an annual review and verification of exempt customers under 31 CFR § 103.22(d)(4).
# Appendix B

## Chart of BSA Legislative History

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<thead>
<tr>
<th>STATUTE</th>
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<td><strong>1968 Hearing</strong> (which led up to the passage of BSA in 1970)</td>
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<td>II. S. Rpt 91-1139 “Foreign Bank Secrecy and Bank Recordkeeping” Report of the Committee on Banking and Currency 91st Cong., 2nd Sess. 8/24/70</td>
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<td>Money and Finance, Enactment as USC Title 31</td>
<td>97-258</td>
<td>9/13/82</td>
<td>96 Stat. 877</td>
<td>I. H. Rpt. 97-651 “Revision of Title 31, USC. “Money and Finance” To accompany HR 6128 Committee of the Judiciary 97th Cong., 2nd Sess. 7/21/82</td>
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<td>VII. “The Drug Money Seizure Act and the Bank Secrecy Act Amendments” Hearing before the Committee on Banking, Housing and Urban Affairs (Senate) 99th Cong., 2nd Sess. 5/1/86</td>
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<td>• Title VI – The Anti-Drug Abuse Amendments Act of 1988</td>
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Appendix C

History of the Bank Secrecy Act

The Bank Secrecy Act comprises 12 separate legislative acts stemming from 1970 to the present, including the USA PATRIOT Act, passed in 2001. In order to understand the development of this legislation and to determine what legislative and regulatory changes might be appropriate to recommend at this point in time, it is important to review this legislation, its original intent and its history.

“The Bank Secrecy Act” (1970)

On December 9, 1968, the House Committee on Banking and Currency held a one-day investigative hearing on the legal and economic impact of foreign banking in the United States. Among other things, the hearing concluded that some Americans were using secret foreign bank accounts and foreign financial institutions as part of illegal schemes and that the use of these secret foreign accounts were the “underpinning of organized crime in the United States.”

On that day, Chairman Wright Patman announced his intention to introduce what became the “Banks Records and Foreign Transactions Act,” which was passed on 10/26/70 and is better known by its informal name, the “Bank Secrecy Act.” This name stems from the fact that one of the primary focuses of the Act was the secrecy of the banking laws of some foreign countries and the use by Americans of secret foreign bank accounts for illegal purposes.

Background and Purpose of the Legislation

As set forth in the Congressional reports, this initial legislation dealt with two major problem areas in law enforcement:

The first is that of financial recordkeeping by domestic banks and certain other domestic financial institutions. The second is the use by American residents of foreign financial facilities located in jurisdictions with various types of secrecy law.

With regard to the first issue, pertaining to financial recordkeeping, Congress noted that some large banks had stopped or had reduced the practice of photocopying checks and similar instruments and that that had impeded a number of criminal prosecutions.

The importance of photocopies of checks to effective law enforcement, especially where white-collar crimes are concerned, simply cannot be overestimated. The recipient of a direct or indirect bribe, for example, will make no record of his receipt of the money, and the person who wrote the check will take pains to see that it is totally destroyed after cancellation. In many instances, payments by check which are not necessarily illegal in and of themselves may constitute the only way that the prosecution can establish the existence of a relationship or pattern of conduct which may be essential to making its case.

With regard to the second issue, pertaining to foreign secret bank accounts, Congress noted that:

Considerable testimony was received … about serious and widespread use of foreign financial facilities located in secrecy jurisdictions for the purpose of violating American law. Secret foreign bank accounts and secret foreign financial institutions have permitted
proliferation of “white collar” crime; have served as the financial underpinning of organized
criminal operations in the United States; have been utilized by Americans to evade income
taxes, conceal assets illegally and purchase gold; have allowed Americans and others to
avoid the law and regulations governing securities and exchanges; .... 9

Congress determined that the existence of bank accounts in foreign countries with strict secrecy
laws greatly impeded the ability of law enforcement agencies to bring financially-related
prosecutions because they could not obtain the necessary evidence.10 The foreign countries
frequently refused to provide requested documents, or made the process extremely burdensome
and time-consuming.11 In addition, countries like Switzerland refused to provide any information
unless it pertained to a matter which was also a crime under their own laws. As Congress noted:

U.S. law enforcement officials have been able to obtain access to bank accounts in
Switzerland, but only when the information is needed pursuant to a crime which would be
a criminal offense under Swiss law. Since tax evasion, securities manipulation, or other
so-called fiscal crimes are generally not criminal offenses under Swiss law, our law
enforcement authorities have been frustrated in their investigations of U.S. citizens who can
shield their financial activities through the use of a Swiss numbered bank account.12

Further, U.S. financial institutions themselves had refused to honor subpoenas for the information
if in doing so they would be in violation of governing foreign law.13

**Burden of the Legislation**

The reporting and recordkeeping responsibilities, other than the infrequent need for an individual
to report a foreign bank account or the transportation of a large amount of cash into or out of the
country, fell upon U.S. financial institutions which were required to file Currency Transaction Reports
and to maintain certain records.

In spite of this one-sided burden, Congress, in enacting the Bank Secrecy Act, repeatedly professed the
desire to not burden the financial industry or to disrupt international commerce.14 In fact, in its legislative
report, Congress claimed that it was actually using a conservative and non-burdensome approach.15

Further, Congress cited the flexibility built into the law and the contention that most financial
institutions were already doing what the legislation would require:

It should be noted that the Secretary has ample authority to limit recordkeeping and
reporting requirements to those which will be useful to carry out the purposes of the Act and
not unduly burdensome to legitimate business.16

Administrative agencies are given the flexibility to avoid the imposition of unwarranted and
burdensome reporting and recordkeeping requirements. Most of the records required to be
maintained under the bill are already kept by most financial institutions, so the regulations
should impose almost no additional expense upon those affected.17

The photocopying requirements of the bill will not significantly increase the cost to the
affected financial institutions. Most banks and other financial institutions already maintain
the types of records contemplated by the bill. In addition, the cost of microfilming checks
and similar drafts is minimal.18

The overall theme of the lack of burden was echoed by a number of witnesses testifying at
the hearings that led up to the passage of the legislation. As stated by the Department of Justice:
“Our purpose, I said, should be to detect and prosecute crime, not build a mountain of paper.”19
Congress ended up hearing testimony on both sides of the issue of burden and ultimately determined that the need for the legislation outweighed any potential burden, concluding:

Many of these records are already kept by financial institutions and it is not the committee’s intent to encumber these institutions with a substantial volume of additional paperwork. The committee has, however, received testimony from law enforcement officials on the high degree of importance of having access to copies of checks drawn on commercial banks.20

Further, in addition to providing the agencies with flexibility in implementing the requirements of the legislation, Congress provided the Secretary of the Treasury with exemptive powers as a supposed way to reduce any undue burden:21

For that reason, the Secretary of the Treasury . . . [was] given broad exemptive authority which the committee expects will be applied whenever the law enforcement benefits are not sufficient to outweigh the cost of implementation.22

**Provisions of the Act**

The legislation in essence authorized the Secretary of the Treasury to issue regulations requiring various reports and recordkeeping of insured and uninsured financial institutions and individuals, primarily relating to Currency Transaction Reports (CTRs), Reports of International Transportation of Currency or Monetary Instruments (CMIRs) and Reports of Foreign Bank and Financial Accounts (FBARs).23 In addition, the legislation provided for civil and criminal penalties, primarily at the level of $1,000.24

In 1972, Treasury issued regulations implementing the provisions of the Bank Secrecy Act. A summary of these and other BSA-related regulations is set forth in Appendix D.

**General Summary of the Act**

The legislation provided for the following:

- Authorized the Secretary of the Treasury to prescribe regulations requiring insured banks:
  - to maintain records concerning the identity of its customers,25 and authorized the Secretary to make appropriate exemptions to this requirement;
  - to make copies of checks and deposits and similar instruments;26
  - to maintain evidence of the identity of an individual to any transaction with the bank;
  - to maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section; and
  - to retain records for not more than six years.

- Authorized the Secretary to prescribe regulations requiring “other financial institutions”:27
  - to submit reports with respect to ownership or management of the institution and any changes therein; and
  - to maintain records and procedures determined to have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

- Authorized the Secretary to assess “other financial institutions” a civil penalty for each willful violation of any regulation under the regulations pertaining to “other financial institutions” in the amount of $1,000 per violation.
• Authorized a criminal penalty of whoever willfully violated any regulation pertaining to “other financial institutions” of $1,000/1 year.

• Authorized an additional criminal penalty, if the willful violation was in furtherance of a Federal felony, of $10,000/5 years.

• Authorized the Secretary to delegate responsibility to ensure compliance with the regulations pertaining to insured banks and “other financial institutions” to the appropriate federal bank regulatory agency.

• Authorized the Secretary to prescribe such regulations as he deemed appropriate to carry out the purposes of this title pertaining to the “Currency and Foreign Transactions Reporting Act.”

• Authorized the Secretary to delegate the responsibility to ensure compliance with the requirements of the “Currency and Foreign Transactions Reporting Act” to the appropriate federal bank regulatory agency.

• Authorized the Secretary to delegate responsibility to ensure compliance with the requirements of the “Currency and Foreign Transactions Reporting Act” to the appropriate federal bank regulatory agency.

• Authorized the Secretary by regulation to require domestic financial institutions to maintain procedures to ensure compliance with the “Currency and Foreign Transactions Reporting Act.”

• Authorized the Secretary to make exemptions from the requirements of the “Currency and Foreign Transactions Reporting Act.”

• Authorized the Secretary to assess a civil penalty for each willful violation by any domestic financial institution of the “Currency and Foreign Transactions Reporting Act” (pertaining to CTRs, CMIRs and FBARs) in the amount of $1,000.

• Authorized a criminal penalty for a willful violation of the “Currency and Foreign Transactions Reporting Act” of $1,000/1 year.

• Authorized an additional criminal penalty – if the willful violation was in furtherance of the commission of any other violation of Federal law, or part of a pattern of illegal activity involving > $100,000 within 12 months – of $500,000/5 years.

• Authorized the Secretary to establish, by regulation, conditions and procedures to make any information in reports filed pursuant to the “Currency and Foreign Transactions Reporting Act” available to any other Federal agency upon request.

• Authorized the Secretary to issue regulations requiring domestic financial institution to file reports of currency transactions, or other monetary instrument as the Secretary may specify, in amounts he determined.

  – As set forth in the legislation, the reports were to be signed both by the financial institution and one or more of the other parties to the transaction, as the Secretary determined.

• Required reports (CMIRs) of monetary instruments in amounts > $5,000 transported into or out of the country.

  – Authorized the Secretary to determine the timing, form and content of the reports.

• Authorized the Secretary to assess a civil penalty against whoever failed to file a CMIR, or who filed a CMIR with a material omission or misstatement, in an amount not to exceed the amount of the monetary instrument.

• Authorized the Secretary to prescribe regulations requiring a person to maintain records or to file reports setting forth the following information with regard to transactions or relationships with a foreign financial agency:

  – Identities and addresses of the parties to the transaction or relationship.
  – The legal capacities of the parties.
  – A description of the transaction or relationship.
**In-depth Summary of the Act**

**Title I - Financial Recordkeeping.**

**Chapter 1. Insured banks and institutions.**

- § 101. Retention of records by insured banks:
  - Established a new Section 21 of FDI Act that:
    - Authorized the Secretary to prescribe regulations when he determined that the maintenance of appropriate types of records and other evidence had a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.
    - Required each bank to maintain such records as the Secretary required of the identity of each person having an account in the U.S. and of each individual authorized to sign checks. Authorized the Secretary to make such exemptions as were consistent with the purpose of this section.
    - Required each bank to make, to the extent that the regulations required, a microfilm or other copy of each check, etc., presented for payment and a record of each check, etc., for deposit.
    - Required each bank to retain, to the extent that the regulations provided, evidence of the identity of an individual engaged in any transaction with the bank.
    - In addition to or in lieu of the records and evidence otherwise referred to in this section, required each insured bank to maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.
    - Provided for the retention of records, not to exceed six years.

**Chapter 2. Other financial institutions.**

- § 122. Granted authority to the Secretary to require reports with respect to ownership or management of any uninsured bank or institution.

- § 123. Granted authority to the Secretary to require recordkeeping and procedures determined to have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings of an uninsured bank or uninsured institution or person engaged in the business of:
  - Issuing or redeeming checks, money orders, travelers’ checks or similar instruments.
  - Transferring funds domestically or internationally.
  - Operating a currency exchange.
  - Operating a credit card system.
  - Performing similar functions as specified by the Secretary.

With regard to any civil or criminal penalty under this paragraph, a violation was to be calculated per day and per location.

- § 125. CMPs.
  - (a) For each willful violation of any regulation under this chapter (dealing only with “other financial institutions”), authorized a CMP not exceeding $1,000 per violation.

- § 126. Criminal penalty.
For each willful violation of a regulation under this chapter (dealing with other financial institutions), authorized a criminal fine of $1,000/1 year per violation.

§ 127. Additional criminal penalty.
For each violation of a regulation under this chapter that was in furtherance of a Federal felony, authorized a criminal fine of $10,000/5 years.

§ 128. Delegation.
– Authorized the Secretary to delegate the authority to ensure compliance with the Act to the appropriate federal supervisory agency.

Title II - Reports of Currency and Foreign Transactions.

Chapter 1 - General.


§ 202. Purpose.
– It was the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 204. Regulations.
– Authorized the Secretary to prescribe such regulations as he deemed appropriate to carry out the purposes of this title.

§ 205. Compliance.
– Authorized the Secretary to delegate compliance responsibility to the banking agencies.
– Authorized the Secretary to require, by regulation, domestic financial institutions to maintain procedures to ensure compliance with this title.

§ 206. Exemptions.
– Authorized the Secretary to make exemptions from the requirements of this title.

§ 207. Civil penalty.
– For each willful violation by any domestic financial institution of this title (pertaining to reports and including Chapters 1-4), authorized a CMP of $1,000.

§ 209. Criminal penalty.
– For each willful violation of this title, authorized a criminal penalty of $1,000/ 1 year.

§ 210. Additional criminal penalty.
– For each willful violation of this title that was in furtherance of the commission of any other violation of Federal law, or part of a pattern of illegal activity involving > $100,000 within 12 months, authorized a criminal fine of $500,000/5 years.

§ 212. Availability of information to other Federal agencies.
– Authorized the Secretary, pursuant to regulation, to make any information in reports filed pursuant to this title available to any other Federal agency upon request.
Chapter 2. Domestic Currency Transactions.

• § 221. Reports of currency.
  – Authorized the Secretary to issue regulations requiring reports of currency transactions, or other monetary instrument as the Secretary may specify, in amounts he determined.

• § 222. Persons required to file reports.
  – Required reports filed under this chapter to be signed both by the financial institution and one or more of the other parties to the transaction, as the Secretary determined by regulation.

Chapter 3. Reports of Exports and Imports of Monetary Instruments.

• § 231. Reports required (CMIRs).
  – Required reports of monetary instruments in amounts > $5,000 transported into or out of the country.

• § 233. Civil liability.
  – Authorized a civil penalty against whoever failed to filed a report required by § 231, or who filed a report with a material omission or misstatement, not to exceed the amount of the monetary instrument.

Chapter 4. Foreign Transactions.

• § 241. Records and reports required (FBARs).
  – Authorized the Secretary – while requiring the Secretary to have due regard to avoid impeding the export or import of currency or other monetary instrument and to avoid placing unreasonable burdens on legitimate transactions with foreign financial agencies – to issue a regulation requiring a person to maintain records or to file reports setting forth the following information with regard to transactions or relationships with a foreign financial agency:
    - Identities and addresses of the parties to the transaction or relationship.
    - The legal capacities of the parties.
    - A description of the transaction or relationship.
  – Provided for a person to not have to disclose contents of records except in compliance with a subpoena or as otherwise required by law.

“Money and Finance” (1982)

In 1982, Congress passed legislation, entitled “Money and Finance,” which revised and reissued the Bank Secrecy Act within Title 31 with only, at best, one substantive change. The one substantive change was the additional authority provided to the Secretary of the Treasury to require “Reports on foreign currency transactions.” This was in addition to the authority provided to the Secretary in 1970 that led to the regulation issued in 1972 requiring the filing of FBARs. While this additional section was more specific with regard to the authority to require FBARs, it did not result in any additional regulations being issued.
Provisions of the Act

The result of the restructuring of the statute in U.S.C. Title 31 was as follows:

- § 5313 – CTRs.
- § 5314 – FBARs.
- § 5315 – Reports on foreign currency transactions.
  - Congress found that additional authority should be provided to collect information on capital flows under section 5(b) of the Trading With the Enemy Act (50 U.S.C. § 5(b)) and section 8 of the Bretton Woods Agreement Act (22 U.S.C. § 286(f)).
  - Authorized the Secretary to require reports on foreign currency transactions.
- § 5316 – CMIRs.
- § 5317 – Forfeiture of monetary instruments.
  - Provided that monetary instruments not reported (or which were the subject of a report which had a material omission or misstatement) under § 5316 were subject to seizure and forfeiture.
- § 5318. Compliance and exemptions.
  - Authorized the Secretary to (except for § 5315):
    - delegate authority to an appropriate supervising agency;
    - require financial institutions to maintain appropriate procedures to ensure compliance; and
    - exempt certain requirements.
- § 5321. Civil penalties.
  - (a)(1) For each willful violation by a domestic financial institution or employee of a domestic financial institution of this subchapter or a regulation issued pursuant to this subchapter (except § 5315), authorized a CMP of $1,000/per day/per location.
    - Under § 5318(2) (requiring bank compliance procedures), provided that a separate violation occurred each day and each location.
  - (a)(2) Authorized the Secretary to impose an additional CMP under § 5316 (CMIRs) up to the amount of the monetary instrument.
  - (a)(3) For a person not filing a report under § 5315 (foreign currency transactions) or not complying with an injunction under § 5320, authorized a CMP of up to $10,000.
- § 5322. Criminal penalties.
  - For each willful violation of this subchapter (except for § 5315), authorized a criminal penalty of $1,000/1 year.
  - For each willful violation of this subchapter (except for § 5315) while violating another federal law, or as part of a pattern of illegal activity involving > $100,000 within 12 months, authorized a criminal penalty of $500,000/5 years.
  - For each violation of § 5318(2) (failure to maintain a BSA program), provided that a separate violation occurs for each day and each location.

In 1984, Congress passed the “Comprehensive Crime Control Act of 1984.” Chapter IX of that Act was entitled “Currency and Foreign Transactions Reporting Act Amendments” and accomplished five basic things:

1. It increased the dollar amount of civil penalties under BSA from $1,000 to $10,000.
2. It increased the dollar amount of criminal penalties under BSA from $1,000/ 1 year to $250,000/ 5 years.
3. It increased the reporting threshold for CMIRs from $5,000 to $10,000.
4. It made an attempt to evade the reporting requirements pertaining to the filing of a CMIR a crime.
5. It authorized the Secretary of the Treasury to pay rewards to “an individual who provides original information which leads to a recovery (criminal fine, civil fine or forfeiture) which exceeds $50,000.” The reward was limited to 25% of the net recovery, up to $250,000.

Background of the Legislation

The need for the legislation was in part due to the fact that law enforcement agencies were having difficulty in prosecuting violations of the reporting requirements associated with the filing of CMIRs. Specifically, some courts had held that the law was not violated “until the person [was] on the verge of boarding the plane or other mode of transportation at the final call for departure.” As a result, according to law enforcement, “customs agents must, regardless of the exigencies and inconvenience of the developing situation, stand by helplessly until virtually the last moment of departure before apprehending the suspect.”

In addition, the legislation was focused on the need to deter money launderers – as opposed to financial institutions – by imposing increased penalties:

While the full scope of these provisions is broad, it is important to recognize that they are primarily directed at persons who make a lucrative career in the illicit drug trade and organized crime. As such, the [existing] penalties are far too low to deter and punish such activity. Indeed, the modest penalties now applicable may simply be written off as a cost of doing business. Accordingly, section 901(a) of the bill raises the basic civil penalty for a willful violation from $1,000 to $10,000 and section 901(b) increases the criminal penalty for such a violation from a one year misdemeanor with a fine of up to $1,000 to a five year felony with a fine of up to $250,000.

In 1970, when Congress passed the initial Bank Secrecy Act, it recognized that the established penalties were “modest,” but believed at that time that they were sufficient to ensure compliance with BSA and its implementing regulations. Fourteen years later, the perception had obviously changed.

Last, the Act increased the threshold for the filing of CMIRs from $5,000 to $10,000 in order to focus law enforcement efforts more on the relatively large transactions.

Purpose of the Legislation

The overall purpose of the legislation was to amend “The Currency and Foreign Transactions Reporting Act to strengthen the ability of law enforcement officers to control illegal currency
transactions involved in narcotics trafficking and organized crime activities.” Obviously, the addition of an attempt provision for CMIR violations and the increased penalties both improved law enforcement’s ability to bring successful prosecutions under BSA and enhanced the deterrence effect of the Act. Further, the increased threshold for CMIR filings, as noted above, improved the efficiency and risk-based nature of the Act.

In order to give some financial benefit to those assisting the money laundering effort, Congress also provided for the payment of rewards and noted that:

This provision is a critical tool in combating drug trafficking. It is important to remember that we are dealing with a multibillion-dollar industry. Law enforcement authorities need some tool to combat the great financial attraction that remains in the drug trafficking industry.

**Provisions of the Act**

The specifics of the legislation were as follows:
- § 901
  - Amended 31 U.S.C. § 5321(a) to increase the civil penalty from $1,000 to $10,000.
  - Amended 31 U.S.C. § 5322 to increase the criminal penalty from $1,000/ 1 year to $250,000/ 5 years.
  - Amended 31 U.S.C. § 5316 to insert “or attempts to transport …” with regard to CMIRs.
  - Amended 31 U.S.C. § 5316 to increase the threshold for filing CMIRs from $5,000 to $10,000 in order to “focus enforcement efforts on relatively large transactions.”
  - Added 31 U.S.C. § 5323 to authorize the Secretary to pay a reward to an individual who provided original information which led to a recovery (criminal fine, civil fine or forfeiture) which exceeded $50,000. The reward could be up to 25% of the net recovery up to $150,000.
  - Authorized funds to be appropriated for paying rewards.

**“Money Laundering Control Act of 1986”**

In 1986, Congress passed the “Anti-Drug Abuse Act of 1986.” Title I of the Act was entitled the “Anti-Drug Enforcement Act,” and Subtitle H of that Title was entitled the “Money Laundering Control Act of 1986.” This law supplied a broad new series of components to the BSA regime that are prominent in today’s administration of the Act.

**Need for the Legislation**

A major concern relating to the effectiveness of BSA leading up to the passage of the “Money Laundering Control Act of 1986” was the inability of the Government to prosecute money launderers for structuring. As noted in the testimony: “The money launderer who complies with the recordkeeping and reporting requirements of the Bank Secrecy Act, as has often been done, cannot be prosecuted unless it has been proven that he has violated another Federal statute.”

What appeared to concern Congress the most in this regard was the case involving the Bank of New England where the bank was convicted and fined $1.24 million for failing to file CTRs. The individual charged with money laundering in that case, however, who allegedly had structured $817,000 in deposits over the course of 14 months, was acquitted due to his lack of an obligation to file a CTR and the Government’s inability to otherwise prove that he had committed a crime.
In response, Congress made structuring a violation and criminalized money laundering itself in this legislation.\[^{43}\] It also increased the penalties once more to further deter money launderers, as well as financial institutions that facilitated money laundering.\[^{44}\]

In addition to the concern that led to these legislative changes, Congress was upset over the fact that it believed that the bank regulatory agencies and the banking industry had done little to implement or comply with BSA over the previous 16 years.\[^{45}\] The House Report accompanying the legislation summed up the concern and frustration as follows:

> Unfortunately, the hearings on money laundering, beginning with the Bank of Boston hearing in April 1985, have shown that a major law enforcement tool has been rendered a virtual nullity by an industry that didn't seem to care and by a regulatory structure that proved to be ineffective.

Although there had been a marked increase in compliance after the extensive publicity surrounding the case involving the First National Bank of Boston, which resulted in a $500,000 criminal fine in 1985,\[^{46}\] Congress was concerned that it had taken too long for the banking industry to start to comply with BSA.\[^{47}\] Further, Congress was concerned that, while the fine against the First National Bank of Boston was large, it was only a small fraction of the $1.22 billion the bank had allegedly allowed to be laundered over the course of 1,163 separate transactions.\[^{48}\] In addition, the fine represented only half of the bank’s profit from engaging in the suspicious activity.\[^{49}\]

Faced with an apparent history of lax enforcement by the agencies, lax compliance by the banking industry and relatively small fines, Congress decided that it was time to take strong legislative action. Consequently, it included in the Money Laundering Control Act of 1986 the requirement for the bank regulatory agencies to issue regulations for financial institutions to have compliance procedures,\[^{50}\] the requirement that the bank regulatory agencies include a review of BSA during each examination and the requirement that the agencies issue cease and desist orders to address banks’ noncompliance with BSA and failure to correct noted deficiencies.\[^{51}\]

Yet another concern of Congress at the time was the lack of authority on the part of Treasury to demand needed information. While some focus was placed on the need for such authority with regard “to the 3,000 miscellaneous nonbank financial institutions such as casinos, foreign currency brokers, and others for which examination responsibility has been delegated to the IRS,”\[^{52}\] an additional concern was Treasury’s inability to obtain timely information from the bank regulatory agencies and the Department of Justice in order to proceed with cases, even important cases, such as the one involving the First National Bank of Boston.\[^{51}\]

Last, there was a perceived need to tighten the provisions relating to prohibiting attempted evasions of the requirement to file a CMIR, resulting in a modification of the statutory language by striking the word “attempts” and replacing it with “is about to transport.”

**Purpose of the Legislation**

The purpose of the legislation was to make money laundering a crime, to close the loophole involving structuring and to eliminate the difficulty in enforcing violations of the CMIR reporting requirements. In addition, the legislation was to further deter the act of money laundering by increasing the civil and criminal penalties. Last, the legislation was drafted with the intent of dealing with the perceived lack of enforcement by the bank regulatory agencies and lack of compliance by the banking industry by requiring the agencies to take certain regulatory and enforcement steps.
Provisions of the Act

The Act provided for the following changes to BSA in order to accomplish the stated purposes and to address the concerns set forth above:

- Made money laundering a crime through the creation of 18 U.S.C. §§ 1956 and 1957, imposing a criminal penalty of $500,000 or twice the value of the transaction, whichever was greater, and/or 20 years and a civil penalty of $10,000 or twice the value of the transaction, whichever was greater.

- Made structuring a violation.

- Gave the Secretary of the Treasury summons authority over financial institutions.

- Increased civil penalties for willful violations by financial institutions from $10,000 to $25,000 or the amount of transaction, whichever was greater, up to $100,000.

- Authorized civil money penalty authority for a financial institution who failed to maintain procedures to ensure compliance with BSA.

- Authorized civil money penalties of $500 for negligent violations.

- Increased criminal penalties from 5 years to 10 years (leaving the dollar amount unchanged at $250,000).

- Further clarified the attempt provision for violations of CMIR reporting requirements.

- Required the bank regulatory agencies to issue regulations requiring financial institutions to establish and maintain procedures reasonably designed to ensure and monitor compliance with BSA.

- Required the bank regulatory agencies to include a review of a bank’s BSA procedures during the course of each examination.

- Required the bank regulatory agencies to issue cease and desist order if a bank had:
  - Failed to establish and maintain required BSA procedures; or
  - Failed to correct any problem with the procedures previously reported to the bank by the agency.

- Added new sections for civil and criminal forfeiture.

In-depth Summary of the Act

- § 1352 – Made money laundering a criminal offense.
    - Provided for a criminal penalty of $500,000 or twice the value of the transaction, whichever was greater, and/or 20 years.
    - Provided for a civil penalty of $10,000 or twice the value of the transaction, whichever was greater.

- § 1354 – Structuring transactions to evade reporting requirements and attempt to evade reporting requirements [CTRs] prohibited.
  - Added 31 U.S.C. § 5324:
- No person shall, for the purpose of evading the reporting requirements of 31 U.S.C. § 5313(a), with respect to such transaction:
  (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
  (2) cause or attempt to cause a domestic financial institution to fail to file a report required under § 5313(a) that contained a material omission or misstatement or fact; or
  (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

• § 1355 – Seizure and civil forfeiture.
  – Amended 31 U.S.C. § 5317 to authorize the seizure and forfeiture of monetary instruments or property traceable to funds not reported or not properly reported in a CMIR.

• § 1356 – Compliance authority for Secretary.
  – (a) Amended 31 U.S.C. § 5318 in connection with BSA investigations or civil enforcement to:
    - Give the Secretary authority to examine the books and records of domestic financial institutions relating to BSA reporting and recordkeeping; and
    - Give the Secretary authority to issue summons a financial institution.
  – (b) Amended provision for exemptions to:
    - Provide that the financial institution had to prepare and maintain a detailed statement describing why customer was qualified for an exemption.
    - Provide that the customer had to sign a statement supporting the basis for the exemption.

• § 1357 – Penalties.
  – Authorized the Secretary to impose CMP for a willful violation of 31 U.S.C. § 5324 (new offense of structuring/attempt) up to the amount of transaction.
  – Increased the amount of a CMP under 31 U.S.C. § 5321(a)(1) for a domestic financial institution or employee for a willful violation of this subchapter (dealing with reports and recordkeeping), except for 31 U.S.C. § 5314 (records and reports on foreign financial agency transactions) and 31 U.S.C. § 5315 (reports on foreign currency transactions), from $10,000 to $25,000 or the amount of transaction, whichever was greater, up to $100,000.
  – Increased the amount of a CMP under 31 U.S.C. § 5321(a)(5) for a willful violation of 31 U.S.C. § 5314 (foreign financial agency transactions) from $10,000 to $25,000 or the amount of transaction, whichever was greater, up to $100,000.
  – Increased the amount of a CMP under 31 U.S.C. § 5321(a)(5) for a willful violation of 31 U.S.C. § 5314 for failure to report the existence of an account or any required identifying information from $10,000 to $25,000 or an amount equal to balance of the account, whichever was greater, up to $100,000.
  – Authorized a new CMP under 31 U.S.C. § 5321(a)(6) of $500 for a negligent violation by any financial institution of any provision of this subchapter.
  – Stated that a CMP may be imposed notwithstanding the imposition of a criminal penalty.
- Increased the criminal penalty from 5 years to 10 years (the dollar amount being left unchanged at $250,000).

• § 1358 – Monetary Transaction Reporting Amendments.
  - Amended the attempt provision of 31 U.S.C. § 5316 (CMIRs) by striking “attempts” and inserting “is about to transport.”

• § 1359 – Banking Regulatory Agency Supervision.
  - Amended 12 U.S.C. § 1818(s) to:
    - Direct the agencies to issue regulations requiring financial institutions to establish and maintain procedures reasonably designed to ensure and monitor compliance with BSA.
    - Require each examination to include a review of BSA procedures.
    - Require the agencies to issue a cease and desist order if a bank had:
      › Failed to establish and maintain required BSA procedures; or
      › Failed to correct any problem with the procedures previously reported to the bank by the agency.
  - Amended 12 U.S.C. § 1818(i) to give CMP authority to agencies with regard to banks’ failure to maintain compliance procedures.

  - Directed the Secretary to initiate discussions with the central banks of other countries and to propose that an information exchange system be established to assist the efforts to eliminate the international flow of money derived from illicit drug operations and other criminal activities.
  - Directed the Secretary to report to Congress in nine months on the results of these discussions.
  - Directed the Secretary, together with the Attorney General and the Federal Reserve, to study:
    - The extent to which foreign branches of U.S. banks were used to facilitate illicit transfers of currency and monetary instruments or to evade CMIR reporting requirements.
    - The extent to which U.S. law was applicable to the activities of foreign branches of U.S. banks.
    - Methods for obtaining the cooperation of the country where the U.S. foreign branch was located with respect to transfers and reports on monetary instruments in and out of the U.S.

• § 1366 – Forfeiture.
  - Added 18 U.S.C. §§ 981 and 982 pertaining to civil and criminal forfeiture.

“Money Laundering Prosecution Improvements Act of 1988”

In 1988, Congress passed the “Anti-Drug Abuse Act of 1988.” Title VI of the Act was entitled the “Anti-Drug Abuse Amendments Act of 1988,” and Subtitle E of that Title was called the “Money Laundering Prosecution Improvements Act of 1988.”
**Need for the Legislation**

At this time, there was a continuing concern that a person who did not have an account at a bank (thus avoiding the identification process entailed in opening an account) and who kept his or her currency transactions below the $10,000 reporting threshold, could avoid detection by the government and the financial institution. Consequently, there was a perceived need to specifically require financial institutions to obtain and verify identification in the sale of certain monetary instruments.

In addition, there was a perceived need for amendments to the agencies' civil money penalty authority due to the fact that there was, at that time, no penalty for willful violations of recordkeeping regulations for insured financial institutions and only a $1,000 a day fine for non-insured financial institutions. Congress correctly viewed the BSA recordkeeping requirements as being just as important as the reporting requirements. In addition, it was noted during the enactment of the 1986 legislation that the civil money penalty for violations of 31 U.S.C. § 5318, pertaining to the requirement that banks have BSA programs to ensure compliance, was inadvertently dropped and needed to be reinstated.

Also, Congress recognized that additional authority was “necessary in order to target those geographic areas and those specific financial institutions which may be more prone to be abused by organized crime, and especially narcotics trafficking.” Consequently, Congress included in this Act legislation authorizing the Secretary to issue Geographic Targeting Orders in order to “provide law enforcement authorities with additional tools to combat money laundering operations associated with organized crime and drug trafficking.

**Purpose of the Legislation**

The overall purpose of the legislation, in keeping with the original intent of the 1970 legislation, was set forth by Congressman St Germain, then Chairman of the House Banking Committee:

> [T]his committee reopens its efforts to protect against U.S. banks being used, wittingly or unwittingly, to launder the profits from international drug trafficking. We intend to make these laundering operations as difficult and costly as possible. We cannot allow financial institutions, insured by the U.S. Government, to be used whether by accident or design.

**Provisions of the Act**

The legislation was designed to:

- Require appropriate identification for the purchase of money orders, cashier’s checks and related instruments equal to or greater than $3,000.
- Authorize the issuance of Geographic Targeting Orders.
- Increase some civil money penalties and allow for penalties for gross negligence.
- Allow law enforcement to obtain the records of bank insiders suspected of criminal wrongdoing without notification under the Right to Financial Privacy Act (RFPA).

**In-depth Summary of the Act**

- § 6815
    - For the sale of a bank check, cashier’s check, traveler’s check, or money order for currency (or other monetary instrument designated by the Secretary) of $3,000 or more, provided that a financial institution shall:
› Verify that the individual is an account holder and maintain a record of the verification; or
› Verify the identity of the non-account customer in accord with Treasury’s regulations and maintain a record of the verification.
- Provided that a financial institution shall provide Treasury with the information recorded upon request.
  - Authorized the Secretary to issue Geographic Targeting Orders.
  – Amended civil penalty authority by adding new subsection (j) to 12 U.S.C. § 1829b for insured banks which:
    - Authorized civil money penalty of $10,000 for willful or gross negligent violation of any regulation issued pursuant to 12 U.S.C. § 1829b(b).
    - Stated that a separate violation occurred each day the violation continued and at each location.
  – For institutions subject to BSA recordkeeping requirements, increased CMPs from $1,000 to $10,000 and amended provision to include violations caused by gross negligence (12 U.S.C. § 1953(b)).
• § 6186 – Right to Financial Privacy Act Amendments.
  – Amended RFPA to exclude insiders of a financial institution who were the subject of referrals to the DOJ.

“Crime Control Act of 1990”

In 1990, Congress passed the “Crime Control Act of 1990.” Title XXV of the Act, the most relevant for our purposes, was known as the “Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990,” and Subtitle H of that title was known as the “Financial Institutions Anti-Fraud Enforcement Act of 1990.”

**Background of the Legislation**

The overriding focus of the hearings leading up to the passage of the “Crime Control Act of 1990” was the need to provide the Federal bank regulatory agencies with the authority to revoke the charters of financial institutions that were convicted of money laundering and to prohibit individuals who were convicted of money laundering from serving as an officer, director or employee of an insured financial institution. The concern that led to this focus was Congress’ belief that the action taken against the Bank of Credit and Commerce International (BCCI) for extensive money laundering had been far too lenient.62

In that case, two affiliates of BCCI, an international bank located in Luxembourg, were required to forfeit 14.8 million dollars in alleged drug profits, but Congress’ concern was that the bank could have been subject to fines up to $40 million.63 Moreover, the charters were not revoked. Congress viewed the resolution of the case as merely a “slap on the wrist.”64

In addition, Congress was concerned that no financial institution in the United States had ever been closed because of a conviction on money laundering charges.65
Purpose of the Legislation

The initial legislation that was proposed would have made charter revocation automatic upon conviction of money laundering, but various government and trade witnesses convinced Congress that that would be a bad idea. They noted, for instance, that a money laundering violation by a financial institution could be triggered by a single, low-level, employee, that the loss of a rural bank could bring about economic hardships for the community and that prosecutors might be inclined to only bring charges against a bank in the most serious of cases if they knew that a conviction would result in a death knell for the bank. On the other hand, there was little controversy with the more or less automatic removal of individuals from the banking industry upon conviction of money laundering. The resulting legislation, thus, addressed the removal of individuals convicted of money laundering, but the provision concerning revocation of bank charters did not pass until 1992, as part of the “Annunzio-Wylie Anti-Money Laundering Act.”

The 1990 legislation also attempted to increase the dollar amount for civil money penalties for negligent violations from $500 to $5,000 where the institution was found to have engaged in a pattern and practice of negligent violations. However, this provision, too, was not passed until 1992, as part of the “Annunzio-Wylie Anti-Money Laundering Act.”

Last, while it was the 1984 legislation that provided for the payment of awards in connection with a recovery of a civil or criminal fine or forfeiture, there was lengthy testimony in 1989 concerning the benefits of awards. In spite of the obvious benefits, it was pointed out that the provision for granting awards in 1984 had never been funded. Consequently, while some awards had been given out primarily by Customs through its forfeiture fund — the 1984 provision had not been actively used. There was also some discussion about eliminating the 25% or $150,000 cap on the amount of awards, as well as providing for a minimum award amount, but, ultimately, there were no legislative changes enacted with regard to rewards for information leading to money laundering convictions. There were, however, some legislative changes for reward provisions for other financial crimes.

Provisions of the Act

- § 2502 – Prohibition on control of or participation in depository institution by certain convicted persons.
  - Amended 12 U.S.C. § 1829(a) to basically prohibit anyone convicted of money laundering from owning or from serving as an officer, director or employee of an insured financial institution except with the permission of the FDIC. For certain crimes, including 18 U.S.C. § 1956, the prohibition was for a minimum of 10 years, unless a lesser amount was requested by the FDIC and was agreed to by the sentencing court.
- § 2504 – Increasing bank fraud and embezzlement penalties.
  - Amended various criminal provisions to increase criminal sentences for various bank-related crimes, such as bank fraud and embezzlement, from 20 years to 30 years.
- § 2569 – Financial Institution Information Award Fund.
  - Provided for a special fund for 18 U.S.C. § 3059A to pay awards relating to various financial crimes, not including money laundering. The appropriated amount for this fund was $5 million. This provision, however, was repealed on 11/2/02.
- § 2586 – Rewards for information leading to recoveries, civil penalties, or prosecutions.
  - Amended legislation enacted in 1989 (Pub. L. 101-73), 12 U.S.C. § 1831k(a), by striking the requirement that the recovery exceed $50,000 before an award was permitted, thus allowing awards for the recovery of a criminal fine, restitution or civil
penalty up to 25% of the recovery, or $100,000, whichever was less. The rewards were for information that led to various financial crimes, not including money laundering. This legislation is still on the books.

- § 2587 – Reward for information leading to possible prosecutions.
  - This section added 18 U.S.C. § 3059A, which provided for special rewards up to $50,000 to be paid by the Attorney General in connection with prosecutions under various criminal statutes. However, as noted above, this provision was later repealed.


In 1992, Congress passed the “Annunzio-Wylie Anti-Money Laundering Act.” It focused on some issues that had been previously raised but that were not enacted. These included the provision giving the agencies the authority for charter revocation and deposit insurance termination upon conviction of a money laundering offense. They also included a provision to authorize a civil money penalty of $500 against financial institutions for negligent BSA violations and a civil money penalty of $50,000 for any financial institution found to have engaged in a pattern of negligent violations.

In passing the legislation there was also an increasing recognition that money laundering was being conducted through the use of international wires. As noted by the ABA in its Congressional testimony:

Where the transaction involves currency or other monetary instruments, the banks have voluminous requirements and have driven away money launderers. Therefore, wire transactions have emerged as the primary method by which high volume launderers ply their trade because of their use in the international community.

The growing concern was highlighted by the fact that a criminal prosecution — dubbed Operation Polar Cap — (which was uncovered and brought to light by Wells Fargo, Security Pacific and Bank of America) was the largest money laundering case to date and involved the use of wire transfers to assist in the laundering of $1.2 billion. As the result of the case, 684 bank accounts, which contained $350 million in cocaine proceeds, were frozen. Consequently, there was a perceived need to obtain and record more information with respect to the issuance of wire funds transfers.

In addition, the “Annunzio-Wylie Anti-Money Laundering Act” added the suspicious activity reporting requirement and associated safe harbor. The safe harbor surrounding this reporting was a major recognition of the importance of, and the need to protect and encourage, industry cooperation in the effort to combat the full range of financial crimes.

The Act also provided Treasury with the authority to issue regulations requiring financial institutions to establish and maintain an anti-money laundering program that included what we now refer to as the “four pillars”: development of internal policies, procedures and controls; designation of a compliance officer; on-going training; and an independent audit. The “four pillars” compliance program requirement became the cornerstone for banks to build a tailored set of internal controls and to institute a self-identifying and self-correcting compliance process.

The Act also added structuring and attempt provisions to the verification requirements pertaining to the purchase of certain monetary instruments and to the CMIR filing requirements. In addition, it prohibited illegal money transmitting businesses.

Last, in order to enhance cooperation and coordination between the government and the private sector, Congress added a provision into the Act requiring the establishment of a “Bank Secrecy Act
Advisory Group consisting of representatives of the Department of the Treasury, the Department of Justice, and the Office of National Drug Control Policy and other interested persons and financial institutions subject to the [BSA] reporting requirements …” The formation of the group, known by its acronym, BSAAG, was announced on 5/24/93 and conducted its first meeting on 4/8/94. The creation of this group arose from a long-standing ABA recommendation and was designed to “serve as a think tank for ideas on how both Government and financial institutions should exercise their responsibilities for prevention and detection of money laundering.” Currently, the BSAAG includes as its members FinCEN, the federal bank regulatory agencies and many prominent BSA experts from the private sector, as well as the above-listed entities.

Provisions of the Act

- § 1512 – Prohibition of illegal money transmitting businesses.
  - Added 18 U.S.C. § 1960 prohibiting the conduct, control, management, etc. of an illegal money transmitting business.

- § 1515 – Provisions relating to recordkeeping with respect to certain funds transfers.
  - Amended 12 U.S.C. § 1829b(b) to give the Secretary and the Federal Reserve joint authority to issue regulations setting forth certain recordkeeping rules for domestic and international wires.

- § 1517 – Suspicious transactions and financial institution anti-money laundering programs.
  - Added subsection “(g) Reporting of Suspicious Transactions” to 31 U.S.C. § 5314.
  - Added subsection “(h) Anti-money laundering programs” to 31 U.S.C. § 5314, authorizing the Secretary of the Treasury to issue regulations requiring financial institutions to establish anti-money laundering programs that included the “four pillars”: development of internal policies, procedures and controls; designation of a compliance officer; on-going training; and an independent audit.

- § 1518 – International Money Laundering Reports.
  - Added, among other things, a requirement that Treasury file a report on the major money laundering countries.

- § 1525 – Structuring transactions to evade CMIR requirements.
  - Amended 31 U.S.C. § 5324 to:
    - Add an attempt provision to the requirement relating to the filing of CMIRs.
    - Add a structuring provision to the requirement relating to the filing of CMIRs.

- § 1529 – Awards in money laundering cases.

- § 1535 – Amendments to the Bank Secrecy Act.
  - Amended 31 U.S.C. § 5324, to include in the coverage of that section’s attempt and structuring prohibitions the requirements contained in 31 U.S.C. § 5325 – pertaining to the identification required to purchase certain monetary instruments.

- § 1561 – Civil Money Penalties.
  - Added authority under 31 U.S.C. § 5321 for the Secretary to:
    - Issue a civil money penalty of $500 against a financial institution for a negligent violation of BSA.
- Issue a civil penalty of $50,000 against a financial institution for a pattern of
  negligent violations of BSA.

- § 1562 – Authority to order depository institutions to obtain copies of CTRs.
  - Amended 31 U.S.C. § 5326 to grant authority to the Secretary to order depository
    institutions to obtain copies of CTRs from customers that are unregulated businesses.

- § 1564 – Advisory Group on Reporting Requirements.
  - Required the Secretary to establish a “Bank Secrecy Act Advisory Group” to advise
    the Secretary on how to modify reporting requirements to enhance law enforcement
    and to inform the private sector on the uses of reported information.

**“The Money Laundering Suppression Act of 1994”**

One of the driving forces of the 1994 Act was the effort to simplify and streamline the CTR filing
process and to “reduce the number and size of [CTR] reports consistent with effective law
enforcement.” At that time, there was concern about the overwhelming volume and burden posed
by CTR filing requirement. Even the Department of the Treasury, in its Congressional testimony,
noted that the system for CTR exemptions had become “cumbersome and difficult to understand” and
that the “current system [did] not provide banks with strong incentives to exempt customers.”

The general consensus was that it was often simpler to file a CTR than to try to obtain an
exemption. In addition, there was industry-wide concern about the risks of using the exemption
process because there had been two instances in the previous year where banks had been
assessed large penalties due to errors involving exemptions.

The problem from Congress’ perspective was that many CTR filings had no enforcement value,
were expensive to file and were impeding law enforcement by cluttering up Treasury’s CTR
database:

Last year banks filed more than 1,000 … CTRs on each of the 657 largest businesses in
the United States. These filings accounted for 2.3 million CTRs, or 25 percent of all CTRs
filed. Those CTRs, filed on reputable and well-known retailers, supermarkets, and others,
have no enforcement value.

As stated by Congressman Gonzalez, who was then head of the House Banking Committee:

Today there are about 50 million CTRs on file and the General Accounting Office estimates
that the data base will grow to 92 million by 1996. According to the General Accounting
Office, 30-40 percent of the 9 million CTRs being filed annually could be exempted because
they do not add to law enforcement efforts to detect money launderers. For example, …
banks routinely filed about 80,000 CTRs valued at $9 billion on the currency transactions
of one retail business with numerous stores throughout the county …

To counter this ever-growing number of unnecessary CTR flings, Congress directed the Secretary
of the Treasury to “seek to reduce, within a reasonable period of time, the number of reports
required to be filed in the aggregate by depository institutions … by at least 30 percent of the
number filed during [1993].” As the result of this legislative directive, Treasury implemented the
mandatory and discretionary exemption process we have today, but the volume of CTRs has
nevertheless steadily increased. At the end of fiscal year 2007, the annual volume of CTRs reported
was over 16 million and rising, as compared to the 9 million forms back in 1993.

With regard to CTR filings, Congress included in the 1994 legislation a limited safe harbor provision.
Specifically, the provision sought to protect depository institutions from being assessed a penalty for the failure to file a CTR with respect to an exempt customer, unless the institution knowingly filed false or incomplete information or had reason to believe that the exemption was granted or the transaction was engaged in without meeting the criteria for an exemption.100

To further simplify and reduce the burden with regard to CTR filings, the legislation called upon the Secretary to publish at least annually a list of all entities whose transactions were exempt from CTR filing.101 As the Congressional report explained:

First, the bill requires that the Treasury develop and publish a list of persons on whom no CTRs need to be filed. This will enable banks to know without a doubt that they need not file any CTRs on supermarket X or retailer Y.102

Even though both the ABA and the IBAA strongly supported this provision and noted that it would assist in reducing the volume of CTR filings,103 it was never implemented.

Other provisions of the 1994 Act were designed to reduce the burden of the BSA requirements and to improve the efficiency of the overall process. Specifically, there was a provision in the Act calling for each regulatory agency to review and enhance its training and examination procedures to improve the identification of money laundering schemes in banks.104 According to the Congressional Report accompanying the legislation, the purpose of this provision was to “focus supervisory efforts on identifying money laundering schemes rather than checking whether institutions are filling out forms correctly.”105 This obviously was designed to expedite — while also improving — the examination process.

Another aspect of the legislation designed to enhance the BSA regime was the Act’s directive to Treasury and law enforcement to provide the bank regulatory agencies, on a regular basis, with information regarding money laundering schemes and activities.106 Although there was considerable testimony for the need for more feedback to also be given to the banking industry,107 the legislatively mandated feedback did not go that far.

In order to improve the functioning of the BSA enforcement process and to counteract the lack of timely processing of cases at that time by the Office of Financial Enforcement (the precursor to FinCEN), Congress added a provision to the 1994 Act that the Secretary of the Treasury delegate civil money penalty authority to the federal bank regulatory agencies, “subject to any term or condition imposed by the Secretary.”108 However, in spite of assurance from Treasury that it agreed with this provision and that “serious consideration should be given to delegation of penalty assessment not only to the Federal banking agencies, but also to IRS for the non-bank financial institutions and to Customs for CMIR violators,”109 no delegation ever occurred.

Congress also included provisions in the Act for the registration of Money Service Businesses (MSBs) triggered primarily by a finding that MSBs were “particularly vulnerable to money laundering schemes … due to the fact that the level of BSA compliance is generally lower at money transmitters than at depository institutions …”110 Along with the registration requirement, there was a “sense of Congress” incorporated into the Act to the effect that States should license and regulate MSBs.111

To enhance the authority of law enforcement in bringing BSA-related prosecutions, Congress used the 1994 legislation as a means to overturn an adverse decision in a then-recent Supreme Court case entitled Ratzlaf v. United States, 510 U.S. 135 (1994). In that case, an individual owed a gambling debt to a casino in the amount of $160,000 that he wanted to repay. When he attempted to repay $100,000 of the debt in cash, he was informed that the casino would have a reporting
obligation. He indicated that he would not like to have any report filed. Accordingly, the casino made a limousine and a casino employee available to him so he could visit a number of banks where he purchased a series of cashiers checks, each in the amount of $9,500. According to the facts of the case, the individual knew that the banks had the same CTR reporting requirements as the casino. However, in spite of the obvious structuring to avoid CTR filing requirements, the Court held that “the government must prove not only that the defendant acted with the purpose of evading a financial institution’s reporting requirement under 31 U.S.C. § 5324, but also that the defendant knew his or her conduct to be unlawful.” Congress corrected this result by amending 31 U.S.C. § 5324:

This [amendment] restores the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement as the sufficient mens rea for the offense. The prosecution would need to prove that there was an intent to evade the reporting requirement, but would not need to prove that the defendant knew that structuring was illegal.

**Provisions of the Act**

**General Summary of the Act**

The 1994 Act covered the following:

- Directed the Secretary to try to reduce CTR filings by 30% in order to reduce the reporting burden and to improve the manageability of the Federal currency transaction report database.

- Directed the Federal banking agencies to enhance training and examination procedures to improve the ability of bank examiners to identify money laundering schemes.

- Expanded BSA reporting requirements for negotiable instruments drawn on foreign banks.

- Directed Treasury to delegate to the Federal banking agencies the authority to assess civil money penalties on depository institutions in money laundering cases.

- Expressed the sense of Congress that the States should develop and adopt uniform laws to license and regulate businesses – other than depository institutions – which provide check cashing and other money transmittal services.

- Established registration requirements for businesses which provide check cashing and other money transmittal services.

- Amended the criminal provision relating to structuring to delete requirement for proving willfulness.

**In-depth Summary of the Act**

- § 402 – Reform of CTR exemption requirements to reduce number and size of reports consistent with effective law enforcement.
  - Amended 31 U.S.C. § 5313 to:
    - Require the Secretary to institute certain mandatory exemptions from the CTR reporting requirements.
    - Authorize the Secretary to exempt certain qualified businesses.
      - Qualified businesses were defined as those which:
        - Maintain a transaction account;
        - Frequently engage in transactions subject to reporting; and
» Meet other criteria the Secretary establishes.

› Regulations issued by the Secretary were to require:
   » An annual review by the financial institution of the exemptions.
   » Submission to the Secretary by the financial institutions each year of designated information about the exemptions.

- Protect depository institutions from penalties for the failure of the institutions to file a CTR with respect to a customer for whom an exemption was given unless the institution:
  › Knowingly filed false or incomplete information; or
  › Had reason to believe that the exemption was granted or the transaction engaged in did not meet the criteria for exemption.

- Require the Secretary to publish at least annually a list of all entities whose transactions were exempt from CTR filing.

- Direct the Secretary, in implementing mandatory and discretionary exemptions, to seek to reduce, within a reasonable period of time, the filing of CTRs by at least 30% of the number filed in 1993.

• § 403 – Single designee for reporting of suspicious transactions.
  – Amended 31 U.S.C. § 5318(g) to require the Secretary to designate a single officer of agency to receive and disseminate SARs.

• § 404 – Improvement of identification of money laundering schemes.
  – Required each agency to review and enhance training and examination procedures to improve the identification of money laundering schemes involving depository institutions.
  – Required Treasury and each law enforcement agency to provide, on a regular basis, information regarding money laundering schemes and activities involving depository institutions to each banking agency in order to enhance each agency’s ability to examine for and identify money laundering activity.

• § 405 – Negotiable instruments drawn on foreign banks subject to recordkeeping and reporting requirements.
  – Amended the definition of negotiable instruments contained in 31 U.S.C. § 5312(a)(3) by adding “checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form.”

• § 406 – CMPs by Federal banking agencies.
  – Directed the Secretary to delegate cmp assessment authority to the Federal banking agencies “subject to any term or condition imposed by the Secretary,” including a limitation on the amount of the penalty.

• § 407 – Uniform State licensing and regulation of check cashing, currency exchange, and money transmitting businesses.
  – Set forth the sense of Congress that States should establish uniform laws for licensing and regulating such businesses.
  – Directed the Secretary to conduct a study of the progress made by the States in developing and enacting a model statute which requires such licensing.
• § 408 – Registration of money transmitting businesses to promote effective law enforcement.
  – Set forth Congress’ finding that money transmitting businesses are subject to BSA, but are largely unregulated and are frequently used in sophisticated schemes to launder money.
  – Required all money transmitting businesses to register with Treasury.

• § 409 – Uniform federal regulation of casinos.
  – Added to 31 U.S.C. § 5312(a)(2) casinos with annual revenue of more than $1mm.

• § 410 – Authority to grant exemptions to States with effective regulation and enforcement.
  – Amended 31 U.S.C. § 5318(a) by adding transactions subject to requirements substantially similar to those imposed under this subchapter.

• § 411 – Criminal and civil penalties for structuring domestic and international transactions.
  – Amended 31 U.S.C. § 5324 to provide for criminal penalties without a requirement for a showing of willfulness.
  – Made technical amendments relating to civil penalties.

• § 412 – GAO study of cashiers’ checks.
  – Directed the GAO to conduct a study of the vulnerability of cashiers’ checks in money laundering schemes.
  – Directed the GAO to make recommendations regarding additional recordkeeping requirements and/or additional regulations.


The “Money Laundering and Financial Crimes Strategy Act of 1998” concentrated on accomplishing two things, both related to strategy:

• Requiring Treasury to develop and implement a national strategy to combat money laundering and related financial crimes.

• Authorizing Treasury to designate selected localities, financial systems, industries and financial institutions as high-risk entities eligible for increased Federal assistance to combat money laundering and related financial crimes.

National Strategy

The first purpose of the Act was to require the President, acting through the Secretary of the Treasury, to develop a national strategy for combating money laundering and related financial crimes starting in 1989 and continuing through 2003.115 As set forth in the Congressional Report accompanying the legislation:

The legislation authorizes the Secretary of the Treasury, in consultation with the Attorney General, to promulgate a National Money Laundering Strategy, to be submitted to Congress on an annual basis. The Strategy would, among other things, (1) establish comprehensive, research-based goals, objectives and priorities for reducing money laundering; (2) coordinate efforts by Federal government agencies, state and local law enforcement authorities, and the private financial sector to prevent money laundering and related 

financial crimes; (3) describe operational initiatives to improve detection of money laundering and related financial crimes; … (7) identify any additional information needed to ascertain trends in financial crimes … .

In developing this annual strategy, the Secretary was required to consult with the Attorney General, the bank regulatory agencies and “representatives of the private financial services sector, to the extent appropriate.” In fact, as part of the development of the National Strategy, the Secretary was specifically directed to consider the “[e]nhancement of the role of the private financial sector in [the] prevention [of money laundering and related financial crimes]”: The enhancement of partnerships between the private financial sector and law enforcement agencies with regard to the prevention and detection of money laundering and related financial crimes, including providing incentives to strengthen internal controls and to adopt on an industrywide basis more effective policies.

**High-risk Money Laundering and Related Financial Crime Areas**

As a complement to the National Strategy, the legislation sought to build on the success of “Geographic Targeting Orders,” specifically the GTO used in the New York City area in 1996-1997, and to apply that concept on a national basis. As set forth by the Congressional Report accompanying the legislation:

Because money laundering and related financial crimes are frequently concentrated in particular geographic areas, financial systems, industry sectors, or financial institutions, and because these crimes have a destructive influence on many local communities, the legislation authorizes the Secretary of the Treasury, in consultation with the Attorney General, to designate certain regions as high risk money laundering areas.

In designating these high-risk areas, the legislation envisioned that more Federal attention and financial support would be provided to them:

The legislation provides for the designation of high risk money laundering areas for the purpose of providing these localities with increased Federal assistance and access to information relating to money laundering and other financial crimes.

**In depth Summary of the Act**

  - Directed the President, acting through the Secretary, to develop a national money laundering and related financial crimes strategy that considered:
    - Goals, objectives and priorities – Comprehensive, research-based goals, objectives and priorities for reducing money laundering and related financial crime.
    - Prevention – Coordination of regulatory and other efforts to prevent the exploitation of financial systems in the U.S. for money laundering and related financial crimes.
    - Detection and prosecution initiatives – A description of operational initiatives to improve detection and prosecution of money laundering and related financial crimes.
    - Enhancement of the role of the private financial sector – The enhancement of partnerships between the private financial sector and law enforcement agencies with regard to the prevention and detection of money laundering and related financial crimes, including providing incentives to strengthen internal controls and to adopt on an industrywide basis more effective policies.
- Enhancement of intergovernmental cooperation.
- Designated areas – A description of geographical areas designated as “high risk money laundering and related financial crime areas.”
- Consultations – Required consultations with various Federal and State entities, as well as “representatives of the private financial services sector, to the extent appropriate.”

  - Set forth the following two Congressional findings:
    - “Money laundering and related financial crimes frequently appear to be concentrated in particular geographic areas, financial systems, industry sectors, or financial institutions.”
    - “While the Secretary has the responsibility to act with regard to Federal offenses which are being committed in a particular locality or are directed at a single institution, because modern financial systems and institutions are interconnected to a degree which was not possible until recently, money laundering and other related financial crimes are likely to have local, State, national and international effects wherever they are committed.”
  - Set forth the following “Element of National Strategy”: “The designation of certain areas as areas in which money laundering and related financial crimes are extensive or present a substantial risk.”
  - Set forth the procedures for the designation of “any geographical area, industry, sector, or institution in the United States in which money laundering and related financial crimes are extensive or present a substantial risk as a ‘high-risk money laundering and related financial crimes area’.”
  - Set forth a list of 16 factors for the Secretary to consider in the designation of high-risk money laundering and related financial crime areas.

  - Directed the Secretary, in consultation with the Attorney General, to “establish a program to support local law enforcement efforts in the development and implementation of a program for the detection, prevention, and suppression of money laundering and related financial crimes.”

  - Set forth the criteria for a State, local law enforcement agency or prosecutor to be eligible to receive an initial grant or a renewal grant under this Act.

"USA PATRIOT Act"

The USA PATRIOT Act was passed shortly after the tragic events of September 11, 2001. However, many of the provisions of Title III of the Act, entitled the “International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001,” were in draft form way before 9/11. For instance, a very detailed draft of the provisions which became § 311 of the USA PATRIOT Act was set forth by Treasury in a Congressional hearing in March, 2000 in proposed legislation that was entitled “The International Counter Money Laundering Act of 2000.” In addition, issues pertaining to private banking, correspondent banking, offshore banks, shell banks, concentration...
accounts\textsuperscript{131} and bulk cash smuggling\textsuperscript{132} — all of which made it into the USA PATRIOT Act — were all addressed continuously prior to 2001.

Further, it should be noted that there were eight Congressional Reports and 41 Congressional hearings associated with the USA PATRIOT Act. However, only four reports and seven hearings post dated 9/11/01. With regard to the reports associated with the anti-money laundering and counter-terrorist financing provisions of the Act, two of the three reports were issued after 9/11, while only one of the 19 hearings was held after 9/11.

Consequently, it is clear that the USA PATRIOT Act was responding not only to the events of 9/11, but also to various legislative proposals that were already before Congress in one form or the other. The two, however, dovetailed. In the hearing held shortly after 9/11, Congress focused on the fact that terrorists in general could gain access to the American banking system through the use of the correspondent banking system. As Senator Levin said at the start of that hearing: “we know already that the September 11 terrorists have used our banks, our financial institutions, to accomplish their ends.”\textsuperscript{133} In addition, there was a specific focus on Osama bin Laden, noting that he owned or partly owned a bank in Sudan and that, in spite of the OFAC blocking of Sudan, money was able to be transferred from that bank to the U.S. through the indirect use of correspondent accounts.\textsuperscript{134} There was also concern cited in this hearing about shell banks and offshore banks, as well as the need to have service of process authority over foreign correspondent banks.\textsuperscript{135} As mentioned above, all of these issues were addressed in the USA PATRIOT Act.

Some of the more important sections of Title III of the Act included:

- § 311 – Authorized the Secretary of the Treasury to take certain special measures against foreign jurisdictions, banks, accounts or transactions found to be of primary money laundering concern. There was an extensive consulting process for all phases of this section.
- § 312 – Required certain due diligence and enhanced due diligence with regard to foreign correspondent accounts and large private banking accounts provided to non-U.S. persons.
- § 313 – Prohibited the establishment or maintenance of correspondent accounts for a foreign shell bank and required reasonable steps to be taken to ensure that other foreign correspondent accounts are not used indirectly by shell banks.
- § 314 – Authorized the Secretary of the Treasury to promulgate regulations for the sharing of information between the government and financial institutions and between financial institutions.
- § 319 – Authorized both the Secretary of the Treasury and the Attorney General to issue subpoenas to any foreign bank that maintains a correspondent account in the U.S. if the subpoena relates to records pertaining to the account, even if the records are held overseas. Required U.S. banks to maintain records identifying owners and agent of foreign banks maintaining a correspondent bank account at the U.S. bank.
- § 325 – Authorized the Secretary of the Treasury to issue regulations to ensure that concentration accounts are not used in a way that would “prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner.”
- § 326 – Authorized the Secretary of the Treasury to issue regulations setting forth minimum standards for financial institutions in identifying and verifying the identity of new account holders.
• § 352 – Directed the Secretary to issue regulations requiring the establishment of a BSA program by financial institutions not already under such a requirement.

• § 362 – Directed the Secretary to establish a “highly secure network” that allows financial institutions to file BSA reports and that provides financial institutions with alerts regarding suspicious activities.

• § 363 – Granted the Secretary the authority to issue civil BSA penalties under 31 U.S.C. § 5321(a) in an amount of two times the amount of the transaction, but not more than $1 million, against any financial institution that violates orders issued pursuant to § 311 of the USA PATRIOT Act. Amended 31 U.S.C. § 5322 by authorizing a criminal penalty in an amount of two times the amount of the transaction, but not more than $1 million, for violations of orders issued pursuant to § 311 or regulations issued pursuant to §§ 312 or 313 of the USA PATRIOT Act.

• § 371 – Set forth the Congressional finding that bulk cash smuggling was being used to avoid traditional financial institutions and CTR filings and that the penalties for violating currency reporting requirements were “insufficient to provide a deterrent to the laundering of criminal proceeds.” Accordingly, this provision added 31 U.S.C. § 5332 to provide for forfeiture of smuggled cash and 5 years imprisonment.136

“The Intelligence Reform and Terrorism Prevention Act of 2004”

The Intelligence Reform and Terrorism Prevention Act of 2004 was passed on 12/17/04 and, among other things, granted funding to FinCEN for technological improvements, including the creating of a new web-based system for accessing FinCEN data called “BSA Direct.” It also authorized FinCEN to promulgate new regulations pertaining to cross-border wires.

Provisions of the Act

Subtitle B. Money Laundering and Terrorist Financing.

• § 6101. Additional Authorization for FinCEN.
  – Granted $16.5 million to FinCEN for BSA Direct – For technological improvements to provide authorized law enforcement and financial regulatory agencies with web-based access to FinCEN data, to fully develop and implement the highly secure network required under section 362 of Public Law 107-56 [the USA PATRIOT Act] to expedite the filing of, and to reduce the filing costs for, financial institution reports, including suspicious activity reports, collected by FinCEN.
  – Granted FinCEN another $19 million for other IT improvements.

Subtitle D. Additional Enforcement Tools.

• §6302. Reporting of certain cross-border transmittal of funds.
  – Authorized Secretary to prescribe new regulations requiring financial institutions to report to FinCEN certain cross-border electronic transmittals of funds that the Secretary determined were necessary to conduct the anti-money laundering and counter-terrorist financing efforts.
  – Required the Secretary, before prescribing the regulations, to submit a feasibility report to Congress that:
- Identified the information in cross-border electronic transmittals of funds that may be reasonably necessary to identify money laundering and terrorist financing;
- Outlined the form, content and frequency of the reports to be filed;
- Identified the technology necessary for FinCEN to receive, analyze and disseminate the information; and
- Discussed the information security protections required.

  – Provided that the Secretary, in developing the feasibility report, may consult with BSAAG.
  – Directed that no regulations could be promulgated before FinCEN certified that it had the necessary technological systems.

“USA PATRIOT Improvement and Reauthorization Act of 2005”

The USA PATRIOT Improvement and Reauthorization Act of 2005 was passed on 3/9/06. Title IV of the Act is known as the “Combating Terrorism Financing Act of 2005” and accomplished the following:

• Increased penalties for terrorist financing from $10,000 to $50,000 and from 10 years to 20 years under the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1705).
• Added illegal money transmitters to the coverage of the RICO statute, 18 U.S.C. § 1961.
• Added the Foreign Corrupt Practices Act to the coverage of 18 U.S.C. § 1956(c)(7)(D) as a “Specified Unlawful Activity.”
• Authorized the seizure of assets of persons committing international terrorist acts.
• Amended 18 U.S.C. § 1956(a)(1) to include money laundering through Hawalas as a “financial transaction” covered by the statute.
Endnotes for Appendix C

1 1968 – I – 1—2; 1970 – IV – 8. (The convention for these types of citations in this Report relates to Appendix B. The Congressional reports and hearings are grouped in Appendix B by the date of the legislation they relate to. The Roman numeral refers to the Congressional report or hearing as numbered in Appendix B. The number at the end refers to the page in the report or hearing.)


4 This legislation, Public Law 91-508, is known officially as the “Bank Records and Foreign Transactions Act,” the first two titles of which are entitled: I. Financial Recordkeeping and II. Currency and Foreign Transactions Reporting Act, and, collectively, are known informally as the Bank Secrecy Act.


23 It should be noted that the requirement for currency transaction reports stems back to 1959 under the authority of the Trading with the Enemy Act (31 U.S.C. § 427). 1970 – I – 11; 1970 – II – 6. See 12 C.F.R. Part 102 (1972). However, “these reports had limited usefulness because of uncertainty as to when they were required and the extent of the banks’ responsibilities to report the identity of the person.” 1970 – IV – 61.

24 For failure to file CMIRs, the amount of the civil penalty was not to exceed the amount of the transactions. For criminal violations under Title I, chapter 2, that were in furtherance of a Federal felony, the penalty was $10,000/5 years. For criminal violations under Title II, that were in furtherance of other Federal crimes, or involving more than $100,000 within 12 months, the penalty was $500,000/5 years.

25 Customers were identified as those with accounts or authorized to act on an account.

26 At the request of Treasury, a statutory limit (as opposed to a regulatory limit) of $500 was deleted; as was a distinction between domestic and foreign checks as being too difficult to discern.

27 “Other financial institutions” were defined as those uninsured banks or uninsured businesses that were engaged in the business of:

• issuing or redeeming checks, money orders, travelers’ checks or similar instruments;
• transferring funds domestically or internationally;
• operating a currency exchange;
• operating a credit card system; or
• performing similar functions as specified by the Secretary.

28 A suggestion of requiring reports of annual aggregate transactions of either $10,000 or $20,000 was deleted as being too difficult to monitor.

29 Specifically, 31 U.S.C. §§ 1051-62; 1081-83; 1101-05; 1121-22; 1141-43 were transferred to 31 U.S.C. §§ 5311-22.

30 This additional authority was set forth in 31 U.S.C. § 5315.


32 1984 – II – 301.

33 1984 – II – 301.


CIS Legislative History Abstract. The continued focus of the BSA legislation was on organized crime and drug traffickers and their use offshore banks in secrecy havens to hide ill-gotten gains. 1984 – II – 303. In fact, the Committee report quoted Senator Roth as noting: “it is these offshore bank secrecy laws that are the glue holding criminal operations together.” 1984 – II – 300.


The authority to issue these regulations was actually set forth in the 1970 Bank Secrecy Act. See § 205 of the 1970 Act. However, it was not until the passage of the Annunzio-Wylie Anti-Money Laundering Act in 1992 that such regulations were specifically called for and subsequently promulgated.

It should be noted that the requirement to file criminal referrals dates back to the 1970’s. See, 12 C.F.R. § 7.5225 (1975).
<table>
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<td>1994 – VII – 82.</td>
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<td>100</td>
<td>1994 – I – 10; Section 402.</td>
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<td>101</td>
<td>1994 – VI – 2; Section 402(a).</td>
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<td>105</td>
<td>1994 – I – 17. As Treasury also noted at the time: “We would agree that currently too much examination time is spent on technical review of BSA compliance.” 1994 – VI – 64.</td>
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<td>112</td>
<td>The jury specifically found beyond a reasonable doubt that Ratzlaf knew of the financial institutions’ duty to report cash transactions in excess of $10,000 and that he structured transactions for the specific purpose of evading the reporting requirements.</td>
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<td>123</td>
<td>USA PATRIOT represents an acronym standing for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.”</td>
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<td>125</td>
<td>Section 311 authorizes the Secretary of the Treasury to take certain special measures against foreign jurisdictions, institutions, accounts or transactions determined to be of primary money laundering concern.</td>
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<td>136</td>
<td>This provision was passed in order to override the Supreme Court decision in the case United States v. Bajakajian, 524 U.S. 321 (1998), in which the Court held that the forfeiture, under 31 U.S.C. § 5316, of $357,144 being smuggled out of the U.S. violated the Excessive Fines Clause of the 8th Amendment. 2001 – III – 37; 2001 – IX – 19, 193.</td>
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Appendix D
Overview of BSA Regulations

Title 31 Regulations
Implementing the Bank Secrecy Act

Issued 8/8/59:


• § 102.1 – Reports of currency transactions required.
  – Required every financial institution, starting August, 1959, to file monthly reports on each deposit or withdrawal on:
    - (a) Transactions involving $2,500 or more in currency in $100 denominations or greater;
    - (b) Transactions involving $10,000 or more in currency in any denomination; and
    - (c) Transactions involving currency in any amount in any denominations which exceed the customary conduct of the customer’s business, industry or profession.

• § 102.3 – Identification required.
  – Prohibited financial institutions from effect any transaction subject to a report in this Part without satisfactory identification.

Issued 4/5/72, unless otherwise noted:

31 C.F.R. Part 103 – Financial Recordkeeping and Reporting of Currency and Foreign Transactions:

Subpart B – Reports Required To Be Made.

• § 103.22 – Reports of currency transactions (CTRs).
  – (a) Required each financial institution to file a report on transactions involving more than $10,000 in currency.
  – (b) Allowed exemptions for: (i) Federal Reserve Banks and Federal Home Loan Banks; (ii) transaction solely with or originated by domestic financial institutions or foreign banks; and (iii) established customers in amounts which the bank reasonably concluded did not exceed amounts commensurate with the customary conduct of the customer’s business, industry or profession. Required a listing of exemptions to be sent to the Secretary upon demand.

• § 103.23. Reports of transportation of currency or monetary instruments (CMIRs).²
  – (a) Required a report by a person who physically transports more than $5,000 in currency or other monetary instruments into or out of the country.
  – (b) Required a report by each person who receives more than $5,000 in currency or other monetary instruments from outside of the country if no report has otherwise been filed.
(c) Exempted, in part, the following from the reporting requirements: (i) Federal Reserve Banks; (ii) various financial institutions with respect to shipments made by the postal service or by common carrier; and (iii) various financial institutions with respect to shipments made by an established customer in amounts commensurate with customary conduct of the customer’s business, industry or profession.

- § 103.24 – Reports of foreign financial accounts (FBARs).
  - Required each person having a financial interest or authority over a financial account in a foreign country to report that relationship on his or her Federal income tax return.

- § 103.26 – Identification required.
  - Required a financial institution, before effecting any transaction involving the filing of a CTR, to verify and record the identity of the customer. Verification could be by account number, driver’s license, passport, alien identification card or other appropriate document.

Subpart C - Records Required To Be Maintained.

- § 103.32 – Records to be made and retained by persons having financial interests in foreign financial accounts.
  - Required persons having to file an FBAR under 31 C.F.R. § 103.24 to retain records pertaining to the account for 5 years.

- § 103.33 – Records to be made and retained by financial institutions
  - Required financial institutions to retain a record of the following:
    - (a) Extensions of credit over $5,000, unless secured by real estate.
    - (b) Transfers of funds, currency or other monetary instruments of more than $10,000 to a place outside the country.

- § 103.34 – Additional records to be made and retained by banks.
  - (a) Required a bank, with respect to each deposit account opened after 6/30/72, to obtain a taxpayer identification number of all individuals having a financial interest in the account.
  - (b) Required a bank to obtain a copy of, among other things, the following:
    - Signature cards.
    - Account statements.
    - Checks greater than $100.
    - Deposits greater than $100.
    - Transfers of funds of more than $10,000 to a place outside the country.
    - Transfers of funds from a foreign bank.
    - Records necessary to reconstruct a transaction in excess of $100.

- § 103.35 – Additional records to be made and retained by brokers and dealers in securities.
  - Set forth the records to be maintained by brokers and dealers in establishing an account.
§ 103.36 – Nature of records and retention period.
   - Set forth a general record retention period of 5 years.
     - For records under § 103.34(b)10), pertaining records necessary to reconstruct a transaction in excess of $100, the record retention period was 2 years.

§ 103.47 – Civil Penalties.
   - (a) Authorized a CMP of $1,000 against any domestic financial institution or employee for a willful violation of C.F.R. Part 103.
   - (b) Authorized a CMP for a CMIR violation up to the amount of the transaction.

§ 103.49 – Criminal penalty.
   - (a) Authorized a criminal penalty for a willful violation of 31 C.F.R. Part 103 of $1,000/1 year.
     - Authorized a further penalty of $10,000/5 years if the violation is also a violation of Title I of the BSA (pertaining to recordkeeping requirements) and if the violation is in furtherance of any Federal felony.
   - (b) Authorized a criminal penalty for a willful violation of Title II of the BSA (pertaining to reporting requirements) of $500,000/5 years if the violation is:
     - In furtherance of any Federal crime; or
     - Is a part of a pattern involving $100,000 within 12 months.
   - (c) Authorized a criminal penalty of $10,000/5 years for a false statement made in connection with BSA reports.

Issued 12/20/77:

§ 103.24 – FBARs.
   - Amended this section to require the FBAR to be filed annually with the Secretary on a form prescribed by the Secretary instead of on the annual Federal income tax return.
   - Amended this section to require a person who has a financial interest of 25% or more in a foreign account to note that on the form filed. Such an individual will be required to provide more information upon request.

Issued 5/15/78:

§ 103.34 – Additional records to be made and retained by banks.
   - Added certificates of deposit issued after 5/31/78 to ¶ (a)(1).
   - Added discussion at the end of ¶ (a) dealing with the situation where the bank is acting as an agent re a certificate of deposit.
   - Added ¶¶ (b)(11) and (12) to the end of the regulation addressing information needed for certificates of deposit.
**Issued 6/5/80:**

- § 103.22 – CTRs.
  - (a) Added to this paragraph the fact that the report shall be made on forms prescribed by the Secretary.
  - (b) Revised the exemptions: to include (i) Federal Reserve Banks and Federal Home Loan Banks; (ii) transactions between domestic banks; and (iii) transactions by nonbank financial institutions with commercial banks.
  - Further revised the exemptions to allow for exemptions for:
    - Established customers who are U.S. residents and operate a retail business in the U.S., except for dealerships for cars, boats or planes.
    - Established U.S. customers who operate a sports arena, race track, etc., including licensed check cashers.
    - Transactions with the Federal, State or local governments.
    - Established U.S. business customers who pay employees in cash.
  - (c) Revised the explanation of the level of an exemption to be those amounts which the bank reasonably concluded were commensurate with the customary conduct of the customer’s business [deleting the phrase “industry or profession”] and further restricted the governmental exemptions to those that are customary. The paragraph continued to require a listing of exemptions to be sent to the Secretary upon demand.
  - (d) Provided for a bank to be able to apply for other exemptions.
  - (e) Required a centralized record of exemptions to be kept and required the records to be provided to Secretary upon request.

- § 103.25 – Filing of reports.
  - Amended this section to require that CTRs be filed within 15 days, instead of 45.
  - Added a requirement that the reports be retained for 5 years.

- § 103.26 – Identification required.
  - Added a phrase to this section to the effect that if a customer is an alien, or not a U.S. resident, verification has to be made by passport, alien identification card or other official document evidencing nationality or residence.

**Issued 2/6/85:**

- § 103.22 – CTRs.
  - (a) Amended to add a separate section to this paragraph which added casinos to the coverage of the regulation.

- § 103.36 – Additional records to be made and retained by casinos.
  - Set forth the records to be maintained by casinos relating to accounts opened and credit extended.
Issued 5/1/85:

- § 103.23 – CMIRs.
  - (a) Added the phrase “or attempts.”
  - Increased the threshold for reporting CMIRs from $5,000 to $10,000.

- § 103.47 – CMPs.
  - (a) Increased the CMP for a willful violation of this Part [31 C.F.R. Part 103] from $1,000 to $10,000.

- § 103.49 – Criminal penalty.
  - (a) Changed the phrase from “Any person who willfully violates any provision of this part . . .” to “Any person who willfully violates any provision of title I of Pub. L. 91-508 [the 1970 Act] (pertaining to recordkeeping), or of this part . . .”
  - (b) Added a new ¶ (b) – for a violation of Title II of the 1970 Act, pertaining to reporting, established a penalty of $250,000/5 years.
  - Old (b) and (c) became (c) and (d).

- § 103.52 – Rewards for informants.
  - Added this new regulation which provided for rewards:
    - For recoveries in excess of $50,000, rewards for informants could be 25% of the net recovery, up to $150,000.

Issued 7/8/85:

- § 103.25 – Reports of transactions with foreign financial agencies.
  - Added this regulation indicating that the Secretary may, when deemed appropriate, promulgate regulations requiring specified financial institutions to file reports of certain transactions with designated foreign financial agencies. The Secretary may issue the regulation without notice if there is good cause.

Issued 10/22/85:

- § 103.22 – CTRs.
  - (a) Rewritten with no substantive changes.

- § 103.23 – CMIRs.
  - Deleted the phrase at the end of ¶ (a) saying that “A transfer of funds through normal banking procedures which does not involve the physical transportation of currency …” does not have to be reported and put it at the beginning of ¶ (d).
• § 103.22 – CTRs.
  – (a) Added section to (a)(1) to require financial institutions to aggregate multiple currency
    transactions made on a single business day.
  – Added section to (a)(2) to require casinos to aggregate multiple currency transactions
    made within any 24 hour period that the casinos knows are on behalf of any one
    person.
  – Added ¶ (a)(3) stating that a financial institution includes all of its domestic branches
    for reporting purposes.
  – (b) Added “regularly scheduled passenger carrier or any public utility” to the list of
    established customers that can be exempt.
  – (c) Excluded licensed check cashing services from the prohibition of exempting
    nonbank financial institutions.
  – (d) Added ¶ (d) requiring the signed statement after 10/27/86 of the customer in order
    to exempt the customer.
  – (e) Added requirement to requests for further exemptions that the customer sign a
    statement.

• § 103.27 – Identification required.
  – Added statement that use of a bank signature card for identification is not sufficient
    unless it “was issued after documents establishing the identity of the individual were
    examined and notation of the specific information was made on the signature card.”
  – Added “the mere notation of ‘known customer’ or ‘bank signature card on file’ on the
    report is prohibited.”

• § 103.32 – Records required to be retained for FBARs.
  – Added “or signature or other authority over any such account” after phrase “Records
    of accounts … shall be retained by each person having a financial interest in ….”

• § 103.33 – Records to be retained by financial institutions.
  – Increased the threshold requirement for retaining records of extensions of credit from
    $5,000 to $10,000.

• § 103.34 – Additional records to be retained by banks.
  – Changed time frame for getting information on new accounts from 45 days to 30 days.
  – Added ¶ (b)(13) pertaining to deposits or credits in excess of $100 for direct deposit or
    wire transfer transactions.

• § 103.35 – Additional records to be made and retained by brokers or dealers in securities.
  – Changed time frame for getting information on new accounts from 45 days to 30 days.

• § 103.37 – Additional records to be made and retained by currency dealers or exchangers.
  – Added new regulation setting forth the records to be maintained by currency dealers
    or exchangers in establishing an account or line of credit.

• § 103.47 – Civil penalty.
  – Substantially rewrote the regulation to read as follows:
- (a) Added new paragraph to authorize a CMP for a willful violation of the BSA reporting requirements or the recordkeeping requirements of § 103.22 (CTRs) of $1,000 against a bank.

- (b) Modified former ¶ (a) to authorize a CMP for a willful violation occurring between 10/12/84 – 10/27/86 of any BSA reporting requirement or the recordkeeping requirements of § 103.32 (FBARs) of $10,000 against a bank.

- (c) Added new paragraph to authorize a CMP for a willful violation of BSA recordkeeping requirements, except under § 103.32 (FBARs), of $1,000 against a bank.

- (d) Was former ¶ (b) but was otherwise not changed.

- (e) Added new paragraph to authorize a CMP for a willful violation occurring after 1/26/87 of § 103.53 (structuring) equal to the amount of the transaction.

- (f) Added new paragraph to authorize a CMP for a willful violation occurring on or after 10/28/86 of the BSA reporting requirements, except for §§ 103.24 (FBARs), 103.25 (transactions with foreign agencies) and 103.32 (FBAR records), equal to the amount of the transaction or $25,000, whichever was greater, up to $100,000 against a bank.

- (g) Added new paragraph to authorize a CMP for a willful violation occurring on or after 10/28/86 of §§ 103.24, 103.25 or 103.32 against an individual. For violations of § 103.24, the CMP would be equal to the amount of the transaction or $25,000, whichever was greater, up to $100,000; for §§ 103.25 or 103.32, the CMP would be the balance of the account or $25,000, whichever was greater, up to $100,000.

- (h) Added new paragraph to authorize a CMP of $500 for a negligent violation of BSA.

• § 103.53 – Structured transactions.
  – Added this new section to prohibit structured transaction to evade the CTR reporting requirements.

Issued 1/13/88:

• § 103.22 – CTRs.
  – (a) Added the Postal Service as an entity that has to file CTRs.

Issued 2/12/88:

• § 103.23 – CMIRs.
  – Raised the threshold with regard to persons who receive currency from abroad for which a report has not been filed, from $5,000 to $10,000.\(^6\)

• § 103.25 – Reports of transactions with foreign financial agencies.
  – Added provision stating that if financial institution is given notice of a reporting requirement by means other than through the Federal Register, the Secretary may prohibit further disclosure of the reporting requirement.
• § 103.49 – Criminal penalty.
  – (c)(1) Changed the language from “Committed in furtherance of the commission of any other violation of Federal law” to “Committed while violating another law of the United States.”
  – (c)(2) Increased the penalty for violation of Title II of BSA (pertaining to reporting requirements) while violating another law or as part of a pattern involving $100,000 within 12 months from $500,000/ 5 years to $500,000/ 10 years (no change in the dollar amount).

Issued 1/23/89:

• § 103.27 – Identification required.
  – Changed phrase from “for whose or which account” to: “on whose behalf.”

Issued 7/6/89:

• § 103.23 – CMIRs.
  – (a) and (b) Added term “at one time” so it reads “in an aggregate amount exceeding $10,000 at one time … .”
  – (c) Added ¶ (8) to not require a report for restrictively endorsed traveler’s checks.

Issued 8/16/89:

• § 103.26 – Reports of certain domestic coin and currency transactions.
  – Added new regulation authorizing the issuance of “geographic targeting orders.”
• § 103.33 – Records to be made and retained by financial institutions.
  – Added a new ¶ (d) which required a record retention of documents under 103.26(a), pertaining to geographic targeting orders, of five years.
• § 103.38 – Nature of records and retention period.
  – Made a corresponding record retention requirement of five years for documents under § 103.26.

Issued 5/15/90 (effective 8/13/90):

• § 103.29 – Purchase of bank checks and drafts, cashier’s checks, money orders and traveler’s checks.
  – Added new section that sets forth requirements for recordkeeping with regard to the sale of certain monetary instruments for $3,000 or more.
Issued 3/12/93:

- § 103.22 – CTRs.
  - (a)(2) Expanded and rewrote section pertaining to casinos.
- § 103.28 – Identification required.
  - Expanded and rewrote section adding paragraphs pertaining to casinos.
- § 103.36 – Additional records to be made and retained by casinos.
  - Added requirement to ¶ (a) that the casino verify the name and address of the account holder or borrower.
  - Increased the threshold amount for additional record keeping requirements with regard to extensions of credit from $2,500 to $3,000.
  - Added ¶ (b)(9)-(15) setting forth with more specificity the records the casino is required to maintain.
- § 103.54 – Special rules for casinos.
  - New regulation issued to set forth requirements for compliance programs for casinos.

Issued 10/17/94:

- § 103.29 – Purchase of bank checks and drafts, cashier’s checks, money orders and traveler’s checks.
  - Modified and shortened the regulation.

Issued 12/1/94:

- § 103.22 – CTRs.
  - Amended section pertaining to casinos by deleting ¶ (a)(2)(iv).
- § 103.36 – Additional records to be made and retained by casinos.
  - Reduced the threshold amount for additional record keeping requirements with regard to extensions of credit from $3,000 back down to $2,500.
  - Deleted ¶¶ (b)(9), (10) and (13)-(15) from earlier version of the regulation.
- § 103.54 – Special rules for casinos.
  - Made minor changes to ¶ (a).
  - Deleted ¶¶ (b) and (d) from earlier version of the regulation.

Issued 1/3/95:

- § 103.25 – Reports of transactions with foreign financial agencies.
(b)(2) Changed the term “wire or electronic transfers” to “transmittal orders” and deleted a long litany of information required and substituted the phrase: “all information maintained by that institution pursuant to § 103.33,” pertaining to “records to be made and retained by financial institutions.”

- § 103.33 – Records to be made and retained by financial institutions.
  - Added ¶¶ (e), (f) and (g) to implement the wire rule as authorized by the Annunzio-Wylie Anti-Money Laundering Act in 1992.

**Issued 4/24-25/96:**

- § 103.21 – Reports by banks of suspicious transactions.
  - Added this new regulation setting forth the requirement of banks to file suspicious activity reports.

- § 103.22 – CTRs.
  - (a)(1) Inserted the phrase: “Transactions in currency by exempt persons with banks occurring after April 30, 1996, are not subject to this requirement [to file CTRs] to the extent provided in ¶ (h) of this section.”
  - (h) Added this new paragraph which set forth the following five categories of exempt customers who could be treated as exempt from the filing requirements of the regulation after 4/30/96:
    - A bank’s domestic operations.
    - An agency of the U.S.
    - A government established entity.
    - A corporation listed on a stock exchange.
    - A subsidiary of a listed corporation.
  - This section added a limited safe harbor for failure to file a CTR based on an incorrect exemption.

- § 103.33 – Records to be made and retained by financial institutions.
  - Amended introductory language to ¶¶ (e), (f) and (g).
  - Added ¶¶ (g)(3) and (4) to provide for a safe harbor for transmittals of funds prior to conversion to the expanded Fedwire message format.

**Issued 9/8/97:**

- § 103.22 – CTRs.
  - (a) Deleted modifying date “occurring after 4/30/96.”
  - (h) Made the following amendments:
    - Deleted the date of 4/30/96.
    - Added to the list of exempt customers the domestic operations of a nonbank financial institution.
- Added examples to the list of exempt customers.
- Set forth the requirement for, at a minimum, annual verification of the status of exempt customers.

**Issued 9/21/98:**

- § 103.22 – CTRs.
  - Significantly rewrote the regulation, establishing the phase I and I exemption process.
  - Eliminated the need for the customer to sign the exemption filing.
  - Eliminated the requirement that the exemption be restricted to a designated amount commensurate with the customer’s customary activity.
  - Added requirement that the customer to be exempt has maintained an account for at least 12 months.
  - Added a requirement for an annual review of the exemption.
  - Added a requirement for a biennial filing.

**Issued 8/20/99:**

- § 103.37 – Additional records to be made and retained by currency dealers or exchangers.
  - Added ¶ (c) which states that the regulation does not apply to banks that offer services in dealing or changing currency to their customers as an adjunct to their regular service.

- § 103.41 – Registration of money services businesses.
  - Added new Subpart D – Special Rules for Money Services Businesses, setting forth the new registration requirements for money services businesses. The effective date of the regulation was 9/30/99 and the date for registration of MSBs was 12/31/01.

- § 103.57 – Civil penalty.
  - Changed the citations in ¶¶ (d) and (e) to correspond to renumbered citations in the regulations.

**Issued 3/14/00:**

- § 103.20 – Reports by money services businesses of suspicious transactions.
  - Added new regulation requiring SARs to be filed by MSBs. Effective date of the regulation was 12/31/01.
Issued 12/31/01:

- § 103.30 – Reports relating to currency in excess of $10,000 received in a trade or business.
  - Added new regulation requiring CTRs to be filed by a trade or business.

Issued 3/4/02:

- § 103.100 – Information sharing with federal law enforcement agencies.
  - Section reserved.
- § 103.110 – Voluntary information sharing among financial institutions.
  - Added new regulation implementing § 314(b) of the USA Patriot Act dealing with the sharing of information between banks.

Issued 4/29/02:

- § 103.120 – AML program requirements for financial institutions.
  - Set forth overview of requirements for a BSA program.
- § 103.125 – AML program for MSBs.
  - Set forth the AML program requirements for MSBs.
- § 103.130 – AML program for mutual funds.
  - Set forth the AML program requirements for mutual funds.
- § 103.135 – AML program for operators of credit card systems.
  - Set forth the AML program requirements for operators of credit card systems.
- § 103.170 – Deferred AML programs for certain financial institutions.
  - Deferred the issuance of AML program requirements for various financial institutions.

Issued 7/1/02:

- § 103.19 – Reports by brokers or dealers in securities of suspicious transactions.
  - Added new regulation requiring SARs to be filed by securities broker/dealers. Effective date of the regulation was 12/30/02.

Issued 7/23/02:

- 103.181 – Special due diligence programs for banks, savings associations and credit unions.
  - Issued as a place holder for regulations to be issued implementing § 312 of the USA Patriot Act.
- 103.182 – Special due diligence programs for securities brokers and dealers, FCMs and introducing brokers.
  - Issued as a place holder for regulations to be issued implementing § 312 of the USA Patriot Act.
- 103.183 – Special due diligence programs for other financial institutions.
  - Issued as a place holder for regulations to be issued implementing § 312 of the USA Patriot Act.

**Issued 9/26/02:**

- § 103.21 – Reports by casinos of suspicious transactions.
  - Added new regulation requiring SARs to be filed by casinos. Effective date of the regulation was 3/25/03.
- § 103.100 – Information sharing between Federal law enforcement agencies and financial institutions.
  - Added new regulation implementing § 314(a) of the USA Patriot Act dealing with the sharing of information between the government and banks.
- § 103.110 – Voluntary information sharing among financial institutions.
  - Rewrote this regulation implementing § 314(b) of the USA Patriot Act dealing with the sharing of information between banks.
- § 103.185 – Summons or subpoenas of foreign records; termination of correspondent relationship.
  - Added new regulation implementing § 319 of the USA Patriot Act.

**Issued 12/4/02:**

- § 103.177 – Prohibition on correspondent accounts for foreign shell banks; records concerning owners of foreign banks and agents for service of legal process.
  - Added new regulation implementing §§ 313 and 319 of the USA Patriot Act.

**Issued 5/9/03:**

- § 103.121 – Customer Identification Programs for banks, etc.
  - Added new regulation implementing § 326 of the USA Patriot Act dealing with customer identification programs for banks and other financial institutions.
- § 103.122 – CIP for broker-dealers.
  - Added new regulation implementing § 326 of the USA Patriot Act dealing with CIP for broker-dealers.
- § 103.123 – CIP for futures commission merchants and introducing brokers.
– Added new regulation implementing § 326 of the USA Patriot Act dealing with CIP for FCMs and IBs.

• § 103.131 – CIP for mutual funds.
– Added new regulation implementing § 326 of the USA Patriot Act dealing with CIP for mutual funds.

**Issued 11/20/03:**

• § 103.17 – Reports by futures commission merchants and introducing brokers of suspicious transactions.
– Added new regulation requiring SARs to be filed by FCMs and IBs. Effective date of the regulation was 11/20/03.

**Issued 6/9/05:**

• § 103.140 – AML programs for dealers in precious metals, precious stones, or jewels.
– Set forth the AML program requirements for dealers in precious metals, precious stones, or jewels. Effective date of 7/11/05.

**Issued 11/3/05:**

• § 103.16 – Reports by insurance companies of suspicious transactions.
– Added new regulation requiring SARs to be filed by insurance companies. Effective date of the regulation was 5/2/06.
• § 103.137 – AML programs for insurance companies.
– Set forth the AML program requirements for insurance companies.

**Issued 1/4/06:**

• § 103.176 – Due diligence programs for correspondent accounts for foreign financial institutions.
– Added new regulation implementing § 312 of the USA Patriot Act pertaining to foreign correspondent banks. Effective date of the regulation was 7/5/06.
• § 103.178 – Due diligence programs for private banking accounts.
– Added new regulation implementing § 312 of the USA Patriot Act pertaining to private banking accounts. Effective date of the regulation was 7/5/06.
• § 103.181-183 - Special due diligence programs.
– Repealed the regulations issued on 7/23/02 that effectively served as place holders for regulations implementing § 312 of the USA Patriot Act.
Issued 5/4/06:

- 103.15 – Reports by mutual funds of suspicious transactions.
  - Added new regulation requiring SARs to be filed by mutual funds. Effective date of the regulation was 10/31/06.
Endnotes for Appendix D

1 These are the first regulations issued implementing the Bank Secrecy Act. These regulations replaced 31 C.F.R. Part 102.
2 Amended 12/13/72.
3 Amended 1/22/73 and 2/7/73.
4 Issued on 12/13/72 and amended on 1/22/73.
5 It appears that this amendment was to correspond to the increased thresholds for CMIRs filed under ¶ (a) made on 5/1/85.
6 Changes were delayed until 12/1/94.
7 Changes were effective 9/8/93; then delayed until 3/1/94, then 12/1/94; and then withdrawn.
8 Changes were effective 9/3/93; then delayed until 3/1/94.
9 Effective date of 9/8/93; delayed until 3/1/94.
10 These changes were to be effective 1/1/96, but were delayed until 4/1/96 and then 5/28/96.
11 The wire rule was effective 1/1/96; then delayed to 5/28/96.