

Feds Draft Lawyers to Fight War on Terrorism: Anti-Money Laundering Laws and the USA Patriot Act

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Shortly after the terrorist attacks on the World Trade Center on September 11, 2001, Congress enacted the 342-page United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. The act includes provisions designed to detect, block and freeze funds and assets used to promote international terrorism efforts and advance the United States government's war on terrorism. Title III of the act makes significant amendments to the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001, the Money Laundering Control Act of 1986 and the Bank Secrecy Act (BSA) of 1970. Some of these changes affect all financial institutions in the United States, broadly defined to include banks, brokers and dealers of securities, insurance companies, investment companies and firms, *persons involved in real estate settlements and closings*, currency exchangers, and money transmitters and many other industry sectors not recognized as "traditional" financial institutions. Three key sections of the act directed at financial institutions amend existing anti-money laundering laws: Sections 314, 326 and 352.

Section 314¹ instructs the secretary of the treasury to 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 of (based on credible evidence) engaging in terrorist acts or money laundering activities. Most importantly, this section authorizes regulations to create procedures for cooperation and information sharing on matters specifically related to the finances of terrorist groups as well as their relationships with international narcotics traffickers.

Section 314 requires the secretary of the treasury to distribute, annually, to financial institutions a detailed analysis identifying patterns of suspicious activity and other investigative insights derived from suspicious activity reports and investigations by federal, state and local law enforcement agencies. Section 326² directs the secretary to issue regulations prescribing minimum standards for financial institutions regarding customer identity in connection with the opening of accounts. It also requires the secretary to report to Congress on: the most timely and effective way to require foreign nationals to provide domestic financial institutions and agencies with appropriate and accurate information; whether to require foreign nationals to obtain an identification number (similar to a Social Security or tax identification number) before opening an account with a domestic financial institution; and a system for domestic financial institutions and agencies to review Government agency information to verify the identities of such foreign nationals. The minimum requirements of Section 326 of the USA Patriot

Act include: verifying the identity of any person seeking to open an account to the extent reasonable and practiceable; maintaining records for the information used to verify a person's identity, including name, address and other identifying information; and consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether a person seeking to open an account appears on any such list. Section 326 (a)(2). Section 326 (a)(5) grants authority to the secretary of the treasury and other federal agencies to exempt any financial institution from the regulations issued pursuant to Section 326 (a).

A Treasury Department press release dated October 11, 2002, advised all financial institutions that they will not be required to comply with Section 326 of the USA Patriot Act or the proposed rules issued by Treasury and the federal functional regulators, including the Financial Crimes Enforcement Network (FinCEN) until final implementing regulations are issued and become effective.³ The proposed rules issued in April and July 2002 applied to the following financial institutions: banks, savings associations and credit unions, securities brokers and dealers, mutual funds, future commission merchants and introducing brokers and credit unions, private banks and trust companies that do not have a federal regulator.⁴ After issuing a series of regulations in April 2002, the Treasury Department announced that it was temporarily exempting other types of financial institutions such as: dealers in precious metals, stones or jewels; pawnbrokers; loan or finance companies; travel agencies; telegraph companies; businesses engaged in vehicle sales; persons involved in real estate closings and settlements; investment companies other than mutual funds; and commodity pool operators and trading advisors. 67 *Fed. Reg.* 21,110.

Section 352⁵ of the USA Patriot Act, which became effective on April 24, 2002, amended section 5318 (h) of the BSA, requiring every financial institution, including persons involved in real estate settlements and closings,⁶ to establish an anti-money laundering (AML) program that includes, at a minimum: the development of internal policies, procedures and controls; the designation of a compliance officer; an ongoing employee training program and an independent audit function to test programs.

Treasury delegated to FinCEN the authority to administer the BSA. As the bureau charged with primary enforcement responsibility, FinCEN has published more than 50 notices concerning proposed, interim and final rules over the past two years implementing provisions of the USA Patriot Act.⁷

On April 29, 2002, and again in November 2002, FinCEN temporarily exempted certain financial institutions, including

persons involved in real estate closings and settlements from the requirements of establishing an AML program. These temporary exemptions were intended to allow Treasury and FinCEN more time to study the affected industries and the extent to which AML requirements should be applied to them. Treasury and FinCEN have yet to figure out how to apply the AML requirements to “persons involved in real estate settlements and closings.” As recently as April 10, 2003, a notice appeared in the *Federal Register* from FinCEN soliciting public comments on how to define “persons involved in real estate closings and settlements” making clear that no decision has yet been made in applying Section 352 of the act to persons involved in real estate closings and settlements. *Fed. Reg.* 17569-17571 (April 10, 2003).

However, at least one regulation affecting “persons involved in real estate closings and settlements” is final—31 C.F.R. § 103.100. This regulation appears to implement some of the requirements of Section 314 of the USA Patriot Act. Its provisions apply to “financial institutions” as defined by 31 U.S.C. § 5312 (a)(2) and provides that a federal law enforcement agency may request that FinCEN obtain, on that agency’s behalf, information from a financial institution about a particular person or organization which the federal law enforcement agency is investigating. The law enforcement agency must certify, based on credible evidence, that the individual or organization is engaged in, or is reasonably suspected of terrorist activity or money laundering. Upon receiving an information request from FinCEN, a financial institution is required to “expeditiously search its records to determine whether it has maintained any account for, or has engaged in, any transactions with each individual, entity or organization named in FinCEN’s request.” 31 C.F.R. § 103.100 (b)(1). The rule imposes limits on how far a financial institution must go back in its search. The financial institution need only search for current accounts or any account maintained for a named suspect during the preceding 12 months; or, any transaction conducted for or on behalf of a named suspect who was either the transmitter or recipient of funds during the preceding six months where the financial institution, by law or regulation, is required to maintain a record of such transaction. If the financial institution finds an account or transaction identified with any individual, entity or organization named in a request from FinCEN, it shall provide to FinCEN certain account and identification information it has on the named individual, entity or organization.⁸ In addition, the new rule has a “no tip-off” provision under which a financial institution shall not disclose the fact that FinCEN has requested or has obtained information from the financial institution. 31 C.F.R. § 103.100 (b)(2)(iv)(B)(1).

Recently, some title insurance underwriters have advised their approved attorneys that the USA Patriot Act now requires “all persons involved in real estate closings and settlements” to:

- verify the identity of all persons to the transaction, i.e., the buyer and seller;
- check their names against the “Terrorist List” maintained by the U.S. Treasury, Office of Foreign Assets Control (OFAC);
- maintain records for 5 years evidencing the fact that the search was conducted; and
- not disclose to the parties to the transaction any required contacts with the U.S. Treasury as a result of the search.

This information is not correct and raises ethics problems for those real estate attorneys who choose to follow such directions from the underwriter. Since the requirements set out in the preceding paragraph have not been implemented by rule or regulation, real estate settlement attorneys who follow the title insurance company’s directive risk a violation of Rule 1.6 of the *Virginia Rules of Professional Conduct*. If an attorney reports a client whom he or she has identified as a suspected terrorist to the government, he or she violates Rule 1.6 of the *Rules of Professional Conduct* unless such disclosure is “required by law or court order.” Rule 1.6 (b)(1). As this article will explain in greater detail, except as required by 31 C.F.R. § 103.100, no law yet requires an attorney serving as a settlement agent to verify the identity of the buyer and seller to the transaction; conduct the search of the Treasury’s terrorist list; report the results to the government or withhold from the client that fact that the attorney has matched the client with a name on the list.

Not only does the attorney have an obligation under Rule 1.6 to maintain confidentiality of client information, but he or she also has an obligation to share with the client any important pertinent facts during the course of the relationship. Rule 1.4. What if the government seeks information about a former client? The fact that a lawyer no longer works for a client does not eliminate the lawyer’s duty to protect the former client’s confidences and secrets. See ABA Model Rule 1.6, Comment 21. The United States Supreme Court has declared that the attorney-client privilege survives even the death of the client. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (Office of Independent Counsel not entitled to notes of conversations between Vince Foster, a White House aide, and his lawyer just before Mr. Foster committed suicide). Although a lawyer has no general continuing obligation to provide a former client information relating to the former representation, the lawyer must notify a former client if a third person seeks to obtain material or information relating to the representation if that material or information is still in the lawyer’s custody. Rest. (3d) of the Law Governing Lawyers § 33, comment (h). If an attorney withholds from the client the fact that the attorney has made a suspicious transaction report (STR) to the government, he or she violates the duty to communicate with the client required by Rule 1.4.

An attorney faced with this situation must determine exactly what the law *clearly requires* before undertaking to betray client confidences. A lawyer’s disclosure to OFAC that his or her client’s name appears on a list of known or suspected terrorists maintained by the federal government is more than simply disclosing “client identity.” Such a disclosure involves information that is detrimental or embarrassing to the client. Rule 1.6 (a). As stated above, Rule 1.6 (b)(1) permits disclosure of confidential information if the lawyer reasonably believes disclosure is necessary to comply with the law or a court order.

The duty of confidentiality is also expressed in the attorney-client privilege, which is the oldest privilege for confidential communications known to the common law. “Its purpose is to encourage full and frank communication between attorneys and their clients,” which, in turn, “promotes broader public interests in the observance of law and the administration of justice.” See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Nevertheless, the duties of loyalty and confidentiality are not absolute. The crime-fraud exception renders otherwise

privileged information subject to disclosure when the client made or received the communication with the intent to further an unlawful or fraudulent act, and the client ultimately carries out the crime or the fraud. *See, e.g., In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). Furthermore, and notwithstanding the role of lawyers as zealous advocates on behalf of their clients, existing laws and ethical rules prohibit lawyers in every state from knowingly assisting clients in illegal or fraudulent activity, financial or otherwise. Rule 1.2(c) of the Virginia Rules provides:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

Virginia Rule 1.6 (c) requires a lawyer to promptly report the client's stated intent to commit a crime and the necessary information to prevent the crime. Therefore, if the client acknowledges to the attorney his or her intent to engage in money laundering or terrorist activity, the lawyer must reveal this information to the appropriate law enforcement authorities.

Virginia Rule 8.4 provides that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation,” or commit “a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.” Sections 1956 and 1957 of Title 18 of the *United States Code* provide criminal sanctions for any lawyer who aids in the commission of a money laundering offense. Therefore, to the extent that lawyers knowingly allow their services to be used by clients to facilitate money laundering or other illegal activity, they are violating existing law as well as rules of professional conduct. These existing laws and rules of professional conduct impose devastating personal and professional consequences upon an attorney who crosses the line from counselor to co-conspirator. *See, e.g., United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001); *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001). For attorney discipline cases, see *In the Matter of Carl E. McAfee*, VSB Disc. Bd. No. 87-000-0954 (1991) (suspension of lawyer's license on federal felony convictions of assisting drug dealer/client of concealing currency from Dept. of Treasury and causing bank to not file IRS Form 4789); *In the Matter of Warren H. McNamara, Jr.*, VSB Disc. Bd. No. 94-000-0131 (1993) (suspension of lawyer's license for federal felony convictions involving “structuring” cash payments totaling \$60,000 to avoid cash reporting requirements). However, it is imperative that a clear line be drawn between a co-conspirator in money laundering activity and an innocent person who is unwittingly involved in another's misconduct.

Federal statutes prescribe other reporting requirements applicable to attorneys. Lawyers must report to the Internal Revenue Service the receipt of currency in amounts over \$10,000 on reports (IRS Form 8300) that require the lawyer to disclose the source of the payment and whether that source is a client. 26 U.S.C. § 6050-I. Federal courts have upheld this law against claims that it abridges the attorney-client privilege and the Sixth Amendment right to counsel in criminal cases. *United States v. Goldberger & Dubin P.C.*, 935 F.2d 501 (2d Cir. 1991). The courts have reasoned that generally, identity of clients and

information regarding fees is not privileged,⁹ although when a showing is made that a Form 8300 disclosure *would* reveal the substance of a confidential communication, courts have held that disclosure is *not* required. *In re Grand Jury Proceedings (Anderson)*, 906 F.2d 1485, 1488 (10th Cir. 1990). The statute does not, however, require or suggest that the lawyer, in making such reports, pass judgment on the propriety of the client's conduct.

However, the ethical duty of confidentiality is considerably broader than the evidentiary privilege,¹⁰ and most ethics committees have concluded that client identity is protected information. ABA Informal Op. 1287 (1974) (name, address and telephone number of legal aid clients are “secrets” within the meaning of DR 4-101 because the disclosure of such information to hostile or adversarial third parties is detrimental or embarrassing to clients); Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to funding agency); North Carolina Ethics Op. 21 (1987) (client's identity must be kept confidential where disclosure would be physically or economically detrimental to the client); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to third party). Indeed, confidential protection has even been extended to names of clients who have been involved in criminal activity or who may be useful sources of information for criminal investigations. *In re Burns*, 536 N.E.2d 1206 (Ohio Ct. Com. Pl. 1988) (name of perpetrator who sought legal advice about past crimes is a protected confidence); *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975) (court granted motion to quash grand jury subpoena for address and telephone number of client the IRS believed has information about another person under investigation); Virginia Legal Ethics Opinion 1270 (1989) (lawyer has no obligation to reveal true identity of client being held in jail under assumed name). Thus, case law holding that client identity is not protected under the attorney-client privilege is not controlling on whether a lawyer must protect such information under the ethical duty of confidentiality.

Because of the broad scope and reach of the act and other International Gatekeeper initiatives directed at money laundering by known or suspected terrorists, the ABA created a Task Force on Gatekeeper Regulation and the Profession on February 1, 2002. The task force is charged with analyzing the broad implications of any laws or regulations aimed at thwarting international money laundering and the impact those efforts could have on relationships between lawyers and their clients. Members of the task force continue to meet with representatives of an interagency working group composed of Treasury and DOJ representatives to discuss the implications of proposed regulations.

With the exception of 31 C.F.R. § 103.100, none of the BSA regulations issued to date include “persons involved in real estate settlements or closings.” Absent further guidance from Treasury and FinCEN, it is unclear exactly what, if anything, is required of “persons involved in real estate settlements and closings” and exactly who fits within the definition for purposes of the USA Patriot Act. The act does not elaborate on what is meant by a person “involved” in real estate settlements or closings, and no rule or regulation, proposed or otherwise, defines this term.

Regulations applicable to insurance companies have been issued, however, they do not appear to apply to, nor are they directed at the title insurance industry. *See 67 Fed. Reg.* 60626

(September 26, 2002). This is because FinCEN finds that the most significant money laundering and terrorist financing risks in the insurance industry are found in life insurance and annuity products because they allow a customer to place large amounts of funds into the financial system and seamlessly transfer them to disguise their origin. Therefore, the proposed rule captures only those insurance products with investment features or which possess the ability to store value and transfer that value to another person. The definition of an insurance company under the proposed rule, therefore, includes any person engaged within the United States as a business in: the issuing, underwriting, or reinsuring of a life insurance policy; the issuing, granting, purchasing or disposing of any annuity contract; or the issuing, underwriting or reinsuring of any insurance product with investment features similar to those of a life insurance policy or an annuity contract, or which can be used to store value and transfer that value to another person. Significantly, the proposed rule does not apply to agents or brokers in the insurance industry as FinCEN has concluded that the insurance companies are in the best position to design effective money laundering programs for their products. Thus brokers and agents are not expected to independently establish programs to detect or report money laundering required under the USA Patriot Act. 67 *Fed. Reg.* 60627 (September 26, 2002). Prior to the amendments to the Bank Secrecy Act made by the USA Patriot Act, the only regulatory requirement applicable to insurance companies is the obligation to report on Form 8300 the receipt of cash or certain non-cash instruments totaling more than \$10,000 in one transaction of two or more (structuring) transactions. The new rules can be found at 31 *C.F.R.* § 103.137.

The reporting requirements set out in 31 *C.F.R.*, Part 501, relied upon by some title companies, do not involve attorneys or “persons involved in real estate settlement or closings.” Those rules impose reporting duties on “holders of blocked property” and “financial institutions” the latter being more narrowly defined as “banking institution, domestic bank, United States depository institution, financial institution or U.S financial institution as those terms are defined in the applicable sections. 31 *C.F.R.* § 501.603.

On September 23, 2001, the president, by Executive Order (E.O.) 13224, directed the secretary of state and the secretary of the treasury and other federal agencies to “den[y] financing and financial services to terrorists and terrorist organizations.” 66 *F.R.* 49079, 49081 (Sept. 23, 2001). E.O. 13224 blocks all property and interests in property of the terrorist-related individuals and entities designated under the order. The primary purpose of these initiatives is to identify, block or freeze financial transactions of known or suspected terrorist-related individuals or organizations. Any transaction or dealing with the designated individuals or organizations or with the blocked property or assets is prohibited.

Obviously, attorneys can and should adhere to both the letter and spirit of the Executive Order by refusing to provide services to known or suspected terrorists involving financial transactions that could enable them to make investments, launder money or conceal funds or assets from proper identification and discovery by the appropriate governmental agencies. Aside from the ethical mandate to not assist a client in any matter which is illegal or fraudulent, a lawyer may withdraw from a representation if the client insists on pursuing an objective that the lawyer considers repugnant or imprudent. As stated above,

attorneys are already subject to existing money laundering laws and must make inquiry and exercise due diligence when they receive funds from clients under circumstances where it appears that the money they receive as fees may be tainted. Otherwise, attorneys run the risk that the fees they receive will be forfeited. See *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996) (law firm that “tiptoed” around the most pertinent questions regarding the source of fees received from client/drug dealer required to forfeit fees shown to have been derived from narcotics distribution). However, reporting a client’s transaction to OFAC, and withholding the fact that the attorney has done so, in the absence of a law, which clearly requires it, violates Rules 1.6 and 1.4 of the *Virginia Rules of Professional Conduct*.

According to the February 2003 *Report of the ABA Task Force on Gatekeeper Regulation and the Profession*:

“Regulations pertaining to the real estate industry have been delayed as the Treasury Department is continuing to consult with industry and determine how best to implement this portion of the statute. It is not clear if the proposed regulations will explicitly address or impose STR requirements for lawyers or law firms involved in certain real estate transactions.”¹¹

Recently, the Office of Ethics Counsel contacted OFAC in the United States Treasury Department. When asked whether attorneys and lay settlement agencies *must* routinely run their clients or customers through the names on the Terrorist List (more accurately called the Specially Designated Nationals (SDN) List), the Treasury compliance officer acknowledged that this was not yet a requirement. However, he added, if choosing to forego the search, “you better be right.” He also acknowledged that there was considerable misinformation concerning the AML rules applicable to “persons involved in real estate closings and settlements.” When asked for specific legal authority requiring settlement attorneys to conduct searches and report “matches” to OFAC, the compliance officer indicated that the requirements were implicit from the Executive Orders issued by President Bush that apply to *all* citizens. However, the Executive Orders are general, do not impose specific requirements and leave more specific rule-making to Treasury and other federal agencies. Indeed, those agencies have temporarily exempted persons involved in real estate closings and settlements and are currently seeking public comment on what AML rules can reasonably be applied to that industry.

There are many practical issues in addition to the concern that these requirements, if applied strictly to lawyers, threaten the independent professional relationship, built on trust and loyalty, lawyers must have with their clients. There are many unanswered questions regarding what an attorney should do if he/she files an STR regarding a client. Should the lawyer withdraw from the representation, without explanation? Would this be required under the “no-tipping off” rule? Would withdrawing, even without explanation, constitute “tipping off”? What if the lawyer withdraws from the representation, causing the transaction or representation to proceed in a manner adverse to the client—would the lawyer be liable for breach of contract or malpractice, particularly if the U.S. government takes no action on the STR or otherwise determines that the information does not raise a risk of money laundering? What if the lawyer remains engaged in good faith with the client, and the U.S. government later determines that the client was engaged in money

laundering—is the lawyer at risk of money laundering complicity based on his/her “suspicion” as evidenced by the STR?

One can remain hopeful that the federal government will have second thoughts about conscripting lawyers to fight the war on terrorism. Rather than act as agents for the government, lawyers are necessary to protect clients against government persecution and overzealous regulation. We can do this effectively only if the profession remains independent. The ethical duties of loyalty and confidentiality have withstood the test of time and should not be eroded simply because our nation is at war with terrorists. Lawyers and the organized bar should be concerned about and speak out against rules and regulations that undermine the attorney-client relationship. Increasingly, the federal government has taken control over the regulation of attorneys, a task traditionally reserved to the states. Other examples of significant federal legislation include the Sarbanes-Oxley Act and the Gramm-Leach-Bliley Act. This trend is likely to continue unless the legal profession remains vigilant and challenges unreasonable governmental interference with the attorney-client relationship.

ENDNOTES


1 SEC. 314. COOPERATIVE EFFORTS TO DETER MONEY LAUNDERING.

- (a) COOPERATION AMONG FINANCIAL INSTITUTIONS, REGULATORY AUTHORITIES, AND LAW ENFORCEMENT AUTHORITIES—
- (b) (1) REGULATIONS—The secretary shall, within 120 days after the date of enactment of this act, 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.
- (2) COOPERATION AND INFORMATION SHARING PROCEDURES—The regulations adopted under paragraph (1) may include or create procedures for cooperation and information sharing focusing on—
 - (A) matters specifically related to the finances of terrorist groups, the means by which terrorist groups transfer funds around the world and within the United States, including through the use of charitable organizations, nonprofit organizations, and nongovernmental organizations, and the extent to which financial institutions in the United States are unwittingly involved in such finances and the extent to which such institutions are at risk as a result;
 - (B) the relationship, particularly the financial relationship, between international narcotics traffickers and foreign terrorist organizations, the extent to which their memberships overlap and engage in joint activities, and the extent to which they cooperate with each other in raising and transferring funds for their respective purposes; and
 - (C) means of facilitating the identification of accounts and transactions involving terrorist groups and facilitating the exchange of information concerning such accounts and transactions between financial institutions and law enforcement organizations.
- (3) CONTENTS—The regulations adopted pursuant to paragraph (1) may—
 - (A) require that each financial institution designate one or more persons to receive information concerning, and to monitor accounts of individuals, entities, and organizations identified, pursuant to paragraph (1); and
 - (B) further establish procedures for the protection of the shared information, consistent with the capacity, size, and nature of the institution to which the particular procedures apply.
- (4) RULE OF CONSTRUCTION—The receipt of information by a financial institution pursuant to this section shall not relieve or otherwise modify the obligations of the financial institution with respect to any other person or account.
- (5) USE OF INFORMATION—Information received by a financial institution pursuant to this section shall not be used for any purpose other than identifying and reporting on activities that may involve terrorist acts or money laundering activities.

- (b) COOPERATION AMONG FINANCIAL INSTITUTIONS—Upon notice provided to the secretary, two or more financial institutions and any association of financial institutions may share information with one another regarding individuals, entities, organizations, and countries suspected of possible terrorist or money laundering activities. A financial institution or association that transmits, receives, or shares such information for the purposes of identifying and reporting activities that may involve terrorist acts or money laundering activities shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any state or political subdivision thereof, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure, or any other person identified in the disclosure, except where such transmission, receipt, or sharing violates this section or regulations promulgated pursuant to this section.
- (c) RULE OF CONSTRUCTION—Compliance with the provisions of this title requiring or allowing financial institutions and any association of financial institutions to disclose or share information regarding individuals, entities, and organizations engaged in or suspected of engaging in terrorist acts or money laundering activities shall not constitute a violation of the provisions of title V of the Gramm-Leach-Bliley Act (Public Law 106-102).
- (d) REPORTS TO THE FINANCIAL SERVICES INDUSTRY ON SUSPICIOUS FINANCIAL ACTIVITIES—At least semiannually, the secretary shall
 - (1) publish a report containing a detailed analysis identifying patterns of suspicious activity and other investigative insights derived from suspicious activity reports and investigations conducted by federal, state, and local law enforcement agencies to the extent appropriate; and
 - (2) distribute such report to financial institutions (as defined in section 5312 of title 31, United States Code).

2 SEC. 326. VERIFICATION OF IDENTIFICATION.

- (a) IN GENERAL—Section 5318 of title 31, United States Code, as amended by this title, is amended by adding at the end the following:
- (b) IDENTIFICATION AND VERIFICATION OF ACCOUNTHOLDERS—
 - (1) IN GENERAL—Subject to the requirements of this subsection, the secretary of the treasury shall prescribe regulations setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at a financial institution.
 - (2) MINIMUM REQUIREMENTS—The regulations shall, at a minimum, require financial institutions to implement, and customers (after being given adequate notice) to comply with, reasonable procedures for—
 - (A) verifying the identity of any person seeking to open an account to the extent reasonable and practicable;
 - (B) maintaining records of the information used to verify a person's identity, including name, address, and other identifying information; and
 - (C) consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether a person seeking to open an account appears on any such list.
 - (3) FACTORS TO BE CONSIDERED—In prescribing regulations under this subsection, the secretary shall take into consideration the various types of accounts maintained by various types of financial institutions, the various methods of opening accounts, and the various types of identifying information available.
 - (4) CERTAIN FINANCIAL INSTITUTIONS—In the case of any financial institution the business of which is engaging in financial activities described in section 4(k) of the Bank Holding Company Act of 1956 (including financial activities subject to the jurisdiction of the Commodity Futures Trading Commission), the regulations prescribed by the secretary under paragraph (1) shall be prescribed jointly with each Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act, including the Commodity Futures Trading Commission) appropriate for such financial institution.
 - (5) EXEMPTIONS—The secretary (and, in the case of any financial institution described in paragraph (4), any federal agency described in such paragraph) may, by regulation or order, exempt any financial institution or type of account from the requirements of any regulation prescribed under this subsection in accordance with such standards and procedures as the secretary may prescribe.

- (6) EFFECTIVE DATE—Final regulations prescribed under this subsection shall take effect before the end of the 1-year period beginning on the date of enactment of the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001.
- (c) STUDY AND REPORT REQUIRED—Within six months after the date of enactment of this act, the secretary, in consultation with the federal functional regulators (as defined in section 509 of the Gramm-Leach-Bliley Act) and other appropriate government agencies, shall submit a report to the Congress containing recommendations for—
- (1) determining the most timely and effective way to require foreign nationals to provide domestic financial institutions and agencies with appropriate and accurate information, comparable to that which is required of United States nationals, concerning the identity, address, and other related information about such foreign nationals necessary to enable such institutions and agencies to comply with the requirements of this section;
 - (2) requiring foreign nationals to apply for and obtain, before opening an account with a domestic financial institution, an identification number which would function similarly to a Social Security number or tax identification number; and
 - (3) establishing a system for domestic financial institutions and agencies to review information maintained by relevant government agencies for purposes of verifying the identities of foreign nationals seeking to open accounts at those institutions and agencies.
- 3 See press release dated October 11, 2002, at <http://www.treas.gov/press/releases/po3530.htm>.
- 4 Regulations issued thus far include: Anti-Money Laundering Programs for Financial Institutions, 67 FR 2110 (April 29, 2002); Anti-Money Laundering Programs for Money Services Businesses, 67 FR 21114 (April 29, 2002); Anti-Money Laundering Programs for Mutual Funds, 67 FR 21117 (April 29, 2002); Anti-Money Laundering Programs for Operators of a Credit Card System, 67 FR 21121 (April 29, 2002); Anti-Money Laundering Programs for Unregistered Investment Companies, 67 FR 60617 (September 26, 2002); Anti-Money Laundering Programs for Insurance Companies, 67 FR 60625 (September 26, 2002). See also Customer Identification Programs for Banks, Savings Associations, and Credit Unions, 67 FR 48290 (July 23, 2002); Customer Identification Programs for Certain Banks (Credit Unions, Private Banks and Trust Companies) That Do Not Have A Federal Functional Regulator, 67 FR 48299 (July 23, 2002); Customer Identification Programs for Broker-Dealers, 67 FR 48306 (July 23, 2002); Customer Identification for Mutual Funds, 67 FR 48318 (July 23, 2002); Customer Identification Programs for Futures Commission Merchants and Introducing Brokers, 67 FR 48328 (July 23, 2002).
- 5 **SEC. 352. ANTI-MONEY LAUNDERING PROGRAMS.**
- (a) IN GENERAL—Section 5318(h) of title 31, *United States Code*, is amended to read as follows:
- (b) ANTI-MONEY LAUNDERING PROGRAMS—
- (1) IN GENERAL—In order to guard against money laundering through financial institutions, each financial institution shall establish anti-money laundering programs, including, at a minimum—
 - (A) the development of internal policies, procedures, and controls;
 - (B) the designation of a compliance officer;
 - (C) an ongoing employee training program; and
 - (D) an independent audit function to test programs.
 - (2) REGULATIONS—The secretary of the treasury, after consultation with the appropriate federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act), may prescribe minimum standards for programs established under paragraph (1), and may exempt from the application of those standards any financial institution that is not subject to the provisions of the rules contained in part 103 of title 31, of the *Code of Federal Regulations*, or any successor rule thereto, for so long as such financial institution is not subject to the provisions of such rules.
- (c) EFFECTIVE DATE—The amendment made by subsection (a) shall take effect at the end of the 180-day period beginning on the date of enactment of this act.
- (d) DATE OF APPLICATION OF REGULATIONS; FACTORS TO BE TAKEN INTO ACCOUNT—Before the end of the 180-day period beginning on the date of enactment of this act, the secretary shall prescribe regulations that consider the extent to which the requirements imposed under this section are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.
- 6 The definition of “financial institutions” in the BSA covers persons involved in real estate settlements and closings. Section 5312 (a)(1)(U).
- 7 To view the BSA regulations issued to date go to http://www.fincen.gov/reg_bsaregulations.html
- 8 The regulation requires the following information to be reported to FinCEN if the financial institution finds an account or transaction for a named suspect the name of the individual, entity or organization; the account number or the date and type of each transaction; any Social Security number, taxpayer identification number, passport number, date of birth, address or other identifying information that was provided when the account was opened or when the transaction occurred. 31 C.F.R. § 103.100 (b)(2)(ii)(A)-(C).
- 9 A client's name and identity is generally *not* protected under the attorney-client privilege. See *In re Grand Jury Proceeding*, 680 F.2d 1026, 1027 (5th Cir. 1982). One reason for this is that usually such information is disclosed in the course of litigation or, in non-litigation matters, in the course of the attorney dealing with others. Another reason is that fairness dictates that one should know the identity of his or her adversary.
- 10 *Lee v. Fla. Dep't of Ins. and Treasurer*, 586 So.2d 1185 (Fla. Dist. Ct. App. 1991); *Heartbreak Cabaret v. Cruz & Toledo Restaurant*, 699 F. Supp. 1066 (S.D.N.Y. 1988); *Skokie Gold Standard Liquors v. Joseph*, 452 N.E.2d 804 (Ill. 1st Dist. Ct. App. 1983).
- 11 *Report of the ABA Task Force on Gatekeeper Regulation and the Profession* (February 2003) at 6 which can be found at http://www.abanet.org/crimjust/taskforce/gatekeeperreport-clean_v1.doc 

Clarification

Executive Order 13224 prohibits financial transactions with persons designated by the federal government as known or suspected terrorists. The order applies to all persons in the United States. See Executive Order 13224, Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, Sept. 23, 2001. Signed: September 23, 2001; Federal Register page and date: 66 FR 49079, September 25, 2001.

Real estate settlement attorneys who fail to verify the identity of parties to a real estate transaction and do not check the published lists of known and suspected terrorists maintained by the federal government risk being sanctioned by the federal government. Nothing in the Rules of Professional Conduct would make it improper for a lawyer or law firm to implement a process to verify the identities of the parties and check the lists maintained by the federal government. If a lawyer discovers that a party to the transaction is on the list, he or she should not perform the closing or settlement. Reporting a “match” to the federal government and not informing the client that such action has been taken by the attorney appears to violate Rules 1.6 and 1.3 at least until those actions are “required by law.”