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ANTI-MONEY LAUNDERING AND TRADE EMBARGO COMPLIANCE

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I. ANTI-MONEY LAUNDERING AND TRADE EMBARGO COMPLIANCE

A. Anti-Money Laundering

The Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.*, and its regulations, 31 C.F.R. Part 103, require covered businesses to implement anti-money laundering (AML) programs in order to detect and deter efforts to conceal illegal financial activity. The primary federal agency charged with AML rulemaking and enforcement is the Financial Crimes Enforcement Network (FinCEN), which is a bureau within the U.S. Department of the Treasury.

There are four pillars of a comprehensive AML program. Following a self-assessment of the risk of being used for money laundering, a covered business must develop a written program that (1) establishes policies, procedures, and internal controls designed to ensure compliance with anti-money laundering regulations; (2) designates a compliance officer with responsibility for coordinating and monitoring the AML program; (3) provides training for appropriate personnel; and (4) implements a plan for independent review of the AML program.

B. Trade and Financial Transaction Embargoes

Within the U.S. Department of the Treasury, the Office of Foreign Assets Control (OFAC) administers a series of laws that impose trade and financial transaction embargoes, including counter-terrorist financing measures, against hostile nations, companies, and individuals. These economic sanctions are intended to further the foreign policy and national security objectives of the United States. All United States citizens and permanent residents, companies located in the United States, overseas branches of United States companies, and, in certain cases, overseas subsidiaries of United States companies are subject to OFAC's regulation.

OFAC administers several trade and financial transaction embargoes that target Cuba, Iran, Iraq, North Korea, Sudan, and other hostile nations. In addition to targeted countries, OFAC publishes a list of Specially Designated Nationals and Blocked Persons (SDNs) that includes over 6,000 names of companies and individuals who are located throughout the world and are connected to foreign narcotics traffickers, foreign terrorists, and proliferators of weapons of mass destruction. United States citizens and companies are prohibited from engaging in trade and financial transactions with SDNs wherever they are located, and all SDN assets must be blocked (or frozen).

II. PENALTIES AND POTENTIAL LIABILITY

FinCEN may bring an enforcement action for violations of reporting, recordkeeping, and other requirements of the Bank Secrecy Act. The amount of civil penalties may be capped or, depending on the type of violation, may equal the value of the currency involved. Willful violations are punishable by imprisonment and fines.

Depending on the program, criminal penalties for violations of trade and financial transaction embargoes can include fines ranging from $50,000 to $10,000,000 and imprisonment ranging from 10 to 30 years for willful violations. Depending on the program, civil penalties range from $250,000 or twice the amount of each underlying transaction to $1,075,000 for each violation

III. WHAT CLIENTS NEED TO KNOW

Many types of businesses are required by the Bank Secrecy Act to implement an AML program, and all businesses are required to comply with trade and financial transaction embargoes. Some notable, covered industry groups include financial institutions, money services businesses, insurance companies and dealers in precious metals, stones or jewels.

A. Financial Institutions

Many domestic depository institutions, including FDIC-insured banks, commercial banks, credit unions, and trust companies, are subject to AML requirements. As part of its AML program, depository institutions must establish a due diligence program reasonably designed to enable the institution to detect and report money laundering activities occurring through or involving correspondent or private accounts maintained or managed by the institution.

In addition, under our trade embargoes, if a bank is organized or located in the United States, virtually all property that comes within its possession or control and in which there is an interest of a blocked individual or entity must be blocked by operation of law. As a result, certain transactions must be interdicted because the underlying transaction is prohibited. Such transactions are typically rejected, cancelled, or returned after consultation with OFAC. If a bank processes such a transaction, it may be liable for facilitating a prohibited transaction, just as it would be held accountable for processing a blocked transfer.

B. Money Services Businesses

Businesses that offer financial services such as check cashing, money transfers, and sales of money orders and gift cards are "money services businesses" (MSBs). MSBs can range from large companies, such as grocery chains, to small one-owner stores. An MSB must develop, implement, and maintain an AML program reasonably designed to prevent the business from being used to facilitate money laundering.

Although AML regulations require currency transactions to exceed a certain amount before the MSB is required to file a certain type of report, trade and financial transaction embargoes do not contain an exception for de minimis currency transactions. An MSB may be penalized for processing a transaction of any amount if a blocked individual is a party to the transaction. By interdicting and reporting all transactions involving sanctions targets, regardless of the amount, MSBs can prevent a terrorist act or other activity that threatens to undermine the United States' national security and foreign policy objectives.

C. Insurance Companies

An insurance company that issues or underwrites certain covered products is required to implement an AML program reasonably designed to prevent the company from being used to facilitate money laundering. The insurance products covered by the rules include permanent life insurance policies other than group policies, annuity contracts other than group annuity contracts, and any other insurance products with investment or cash value features. The AML regulations do not apply to group insurance products, products offered by charitable organizations, term insurance policies, or reinsurance contracts.

Moreover, if an insurance company receives an application from a blocked individual for a policy, the company is obligated under our trade and financial transaction embargoes not to issue the policy because United States companies are prohibited from providing any services to an SDN. If the SDN sends a deposit along with the application, the company must block the payment. In the event an insurance company discovers that a policy holder has become an SDN, the company should contact OFAC. It is possible that a license could be issued to allow the receipt of premium payments to keep the policy in force. Although it is unlikely that a payment would be permitted to be made to an SDN, it is possible that a payment would be allowed to an innocent third party. However, the policy itself is a blocked contract and all dealings with it must involve OFAC.

D. Dealers in Precious Metals, Stones or Jewels

AML requirements apply to dealers, which are defined as persons engaged in business in the United States that have purchased and sold at least $50,000 of "covered goods" during the preceding calendar year. Covered goods include jewels, precious metals, precious stones, and finished goods (including jewelry and antiques) that derive 50 percent or more of their value from jewels, precious metals, or precious stones contained in or attached to such finished goods.

Although they may be dealers in covered goods, retailers are generally exempted from AML requirements. A retailer is a person who engages within the United States primarily in the sale of covered goods to the public. However, a retailer will nonetheless be subject to AML requirements if it purchases more than $50,000 of covered goods from persons other than dealers and retailers (such as foreign dealers) and also sells more than $50,000 of covered goods (domestically or abroad).

Many dealers are likely to engage in importing and exporting and, therefore, have increased risks under trade and financial transaction embargoes. For example, shipments of rough diamonds between the United States and

countries that do not participate in the Kimberley Process Certification Scheme for rough diamonds (KPCS) generally are prohibited, and shipments between the United States and participating countries are permitted only if they are handled in accordance with the standards, practices, and procedures of the KPCS.

IV. HOW MCGUIREWOODS CAN HELP

Every business has unique attributes and risks to consider in designing, implementing, and testing its AML and trade embargo compliance programs. At McGuireWoods, we put ourselves in the company's position to assess its risks and to understand its needs.

Our AML and trade embargo compliance team includes attorneys with years of white-collar crime and internal investigation experience. We have several former federal prosecutors who are putting their government experience to use by counseling companies on how to comply with federal reporting and recordkeeping requirements and to avoid being used for money laundering and illicit trading and financing. Our AML and trade embargo compliance attorneys:

- Perform thorough legal reviews of AML and trade embargo compliance programs to ensure consistency with applicable federal statutes, regulations, guidance documents, and administrative rulings;
- Provide periodic updates on changes to the Bank Secrecy Act, as well as to trade and financial transaction embargoes;
- Execute independent audits and tests of AML and trade embargo compliance programs;
- Conduct training and educational seminars for appropriate personnel; and
- Represent businesses with government inquiries, audits, and enforcement actions.

For further information or for assistance with your AML and/or trade embargo compliance programs, please contact Jonathan Vogel.

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