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31 CFR Part 103

Exemptions From the Requirement To Report Transactions in Currency and List of Entities Who Are Exempt; Interim Rule and Notice

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA10; 1506–AA11

Amendment to the Bank Secrecy Act Regulations—Exemptions From the Requirement To Report Transactions in Currency

AGENCY: Financial Crimes Enforcement Network, Treasury.

ACTION: Interim rule with request for comments.

SUMMARY: This document contains an interim rule eliminating the requirement to report transactions in currency in excess of $10,000, between depository institutions and certain classes of ''exempt persons'' defined in the rule. The interim rule applies to currency transactions occurring after April 30, 1996. It is adopted as a major step in reducing the burden imposed upon financial institutions by the Bank Secrecy Act and increasing the cost-effectiveness of the counter-money laundering policies of the Department of the Treasury. The interim rule is part of a process to achieve the reduction set by the Money Laundering Suppression Act of 1994 in the number of currency transaction reports filed annually by depository institutions.

DATES: *Effective date.* The interim rule is effective May 1, 1996.

Comment deadline. Comments must be received by August 1, 1996.

Applicability. This interim rule applies to transactions in currency occurring after April 30, 1996.

ADDRESSES: Written comments should be submitted to: Office of Regulatory Policy and Enforcement, Financial Crimes Enforcement Network, Department of the Treasury, 2070 Chain Bridge Road, Vienna, Virginia 22182–2536, *Attention:* Interim CTR Exemption Rule.

Submission of comments. An original and four copies of any comment must be submitted. All comments will be available for public inspection and copying, and no material in any such comments, including the name of any person submitting comments, will be recognized as confidential. Accordingly, material not intended to be disclosed to the public should not be submitted.

Inspection of comments. Comments may be inspected at the Department of the Treasury between 10:00 a.m. and 4:00 p.m., in the Financial Crimes Enforcement Network (''FinCEN'') reading room, on the third floor of the Treasury Annex, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220. Persons wishing to inspect the comments submitted should request an appointment by telephoning (202) 622–0400.

FOR FURTHER INFORMATION CONTACT: Pamela Johnson, Assistant Director, Office of Financial Institutions Policy, FinCEN, at (703) 905–3920; Charles Klingman, Office of Financial Institutions Policy, FinCEN, at (703) 905–3920; Stephen R. Kroll, Legal Counsel, FinCEN, at (703) 905–3590; or Cynthia A. Langwiser, Office of Legal Counsel, FinCEN, at (703) 905–3590.

SUPPLEMENTARY INFORMATION:

I. Introduction

This document adds, as an interim rule, a new paragraph (h) (the ''Interim Rule'') to 31 CFR 103.22. The Interim Rule exempts, from the requirement for the reporting of transactions in currency in excess of $10,000, transactions occurring after April 30, 1996, between depository institutions [1] and certain classes of exempt persons defined in the Interim Rule. The Interim Rule is adopted to implement the terms of 31 U.S.C. 5313(d) (and related provisions of 31 U.S.C. 5313 (f) and (g)), which were added to the Bank Secrecy Act by section 402(a) of the Money Laundering Suppression Act of 1994 (the ''Money Laundering Suppression Act''), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103–325 (September 23, 1994).

II. Background

A. Statutory Provisions

The Bank Secrecy Act, Titles I and II of Pub. L. 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5330, authorizes the Secretary of the Treasury, *inter alia,* to issue regulations requiring financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, and to implement counter-money laundering programs and compliance procedures. Regulations implementing Title II of the Bank Secrecy Act (codified at 31 U.S.C. 5311–5330) appear at 31 CFR Part 103. The authority of the Secretary to administer Title II of the Bank Secrecy Act has been delegated to the Director of FinCEN.

The reporting by financial institutions of transactions in currency in excess of $10,000 has long been a major component of the Department of the Treasury's implementation of the Bank Secrecy Act. The reporting requirement is imposed by 31 CFR 103.22, a rule issued under the broad authority granted to the Secretary of the Treasury by 31 U.S.C. 5313(a) to require reports of domestic coin and currency transactions.

Four new provisions (31 U.S.C. 5313 (d) through (g)) concerning exemptions were added to 31 U.S.C. 5313 by the Money Laundering Suppression Act. Subsection (d)(1) provides that the Secretary of the Treasury shall exempt a depository institution from the requirement to report currency transactions with respect to transactions between the depository institution and the following categories of entities:

(A) Another depository institution.

(B) A department or agency of the United States, any State, or any political subdivision of any State.

(C) Any entity established under the laws of the United States, any State, or any political subdivision of any State, or under an interstate compact between 2 or more States, which exercises governmental authority on behalf of the United States or any such State or political subdivision.

(D) Any business or category of business the reports on which have little or no value for law enforcement purposes.

Subsection (d)(2) states that:

> The Secretary of the Treasury shall 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 of the entities whose transactions with a depository institution are exempt under this subsection from the [currency transaction] reporting requirements. * * *

The companion provisions of 31 U.S.C. 5313(e) authorize the Secretary to permit a depository institution to grant additional, discretionary, exemptions from currency transaction reporting. Subsection (f) places limits on the liability of a depository institution in connection with a transaction that has been exempted from reporting under either subsection (d) or subsection (e) and provides for the coordination of any exemption with other Bank Secrecy Act provisions, especially those relating to the reporting of suspicious transactions. New subsection (g) defines ''depository institution'' for purposes of the new exemption provisions.

Section 402(b) of the Money Laundering Suppression Act states simply that in administering the new statutory exemption procedures:

> the Secretary of the Treasury shall seek to reduce, within a reasonable period of time, the number of reports required to be filed in the aggregate by depository institutions pursuant to section 5313(a) of title 31 * * *

[1] As explained below, the text of the rule itself uses the term ''bank,'' which as defined in 31 CFR 103.11 (c) includes both banks and other classes of depository institutions.

by at least 30 percent of the number filed during the year preceding [September 23, 1994,] the date of enactment of [the Money Laundering Suppression Act].

During the period September 24, 1993 through September 23, 1994, approximately 11.2 million currency transaction reports were filed. Of that number, approximately 10.9 million reports were filed by depository institutions. Thus the statute contemplates a reduction of at least approximately 3.3 million filings per annum.

B. Shortcomings of the Present Exemption System

The enactment of 31 U.S.C. 5313 (d) through (g) reflects a Congressional intention to ''reform * * * the procedures for exempting transactions between depository institutions and their customers.'' *See* H.R. Rep. 103–652, 103d Cong., 2d Sess. 186 (August 2, 1994). The administrative exemption procedures at which the statutory changes are directed are found in 31 CFR 103.22(b)(2) and (c) through (f); those procedures have not succeeded in eliminating routine currency transactions by businesses from the operation of the currency transaction reporting requirement.

Several reasons have been given for this lack of success. The first is the retention by banks of liability for making incorrect exemption determinations. The risk of potential liability is made more serious by the complexity of the administrative exemption procedures (which require banks, for example, to assign dollar limits to each exemption based on the amounts of currency projected to be needed for the customary conduct of the exempt customer's lawful business). Finally, advances in technology have made it less costly for some banks to report all currency transactions rather than to incur the administrative costs (and risks) of exempting customers and then administering the terms of particular exemptions properly.

The problems created by the administrative exemption system include that system's failure to provide the Treasury with information needed for thoughtful administration of the Bank Secrecy Act. Although banks are required to maintain a centralized list of exempt customers and to make that list available upon request, see *31* CFR 103.22 (f) and (g), there is no way short of a bank-by-bank request for lists (with the time and cost such a request would entail both for banks and government) for Treasury to learn the extent to which routine transactions are effectively screened out of the system or (for that matter) the extent to which exemptions have been granted in situations in which they are not justified.

In crafting the 1994 statutory provisions relating to mandatory and discretionary exemptions, Congress sought to alter the burden of liability and uncertainty that the administrative exemption system created. The statutory provisions embraced several categories of transactions that were either already partially exempt or plainly eligible for exemption under the administrative exemption system.[2] In addition, Congress authorized the Treasury to exempt under the mandatory rules, as indicated above, ''[a]ny business or category of business the reports on which have little or no value for law enforcement purposes.'' 31 U.S.C. 5313 (d)(1)(D).

C. Objectives of the Interim Rule

As indicated above, the Interim Rule is the first step in the use of section 402 of the Money Laundering Suppression Act to transform the Bank Secrecy Act provisions relating to currency transaction reporting. That transformation has four objectives.

The first is to reduce the burden of currency transaction reporting. That reduction comes in part through the issuance of a blanket regulatory exemption covering transactions in currency between one depository institution and another within the United States and between depository institutions and government departments and agencies at all levels. But at least an equal (and likely a significantly greater) part of the reduction comes from the decision to treat as being of little interest to law enforcement transactions in currency between depository institutions and corporations whose common stock is listed on certain national stock exchanges.

That decision reflects a second, related objective of the Interim Rule: to begin the process of limiting currency transaction reports to transactions for which the benefits of the reporting requirement (both providing usable information to enforcement officials and creating a deterrent against attempts to misuse the financial system) justify the costs of supplying the information to the Treasury. It is unlikely that reports of routine currency transactions for a company of sufficient size to be traded on a national securities exchange can be of significant use, by themselves, to law enforcement, regulatory, or tax authorities.

The third objective is to focus the Bank Secrecy Act reporting system on transactions that signal matters of clear interest to law enforcement and regulatory authorities. In publishing the final rule relating to the reporting of suspicious transactions under the Bank Secrecy Act, Treasury stated ''its judgment that reporting of suspicious transactions in a timely fashion is a key component of the flexible and cost-efficient compliance system required to prevent the use of the nation's financial system for illegal purposes.'' See 61 FR 4326, 4327 (February 5, 1996). The Interim Rule *re-enforces* the central importance of suspicious transaction reporting to Treasury's counter-money laundering program; expanded suspicious transaction reporting forms a basis for steps to reduce sharply the extent to which routine currency transactions by ongoing businesses are required to be reported. Currency transactions, like non-currency transactions, are required to be reported under the terms of new 31 CFR 103.21, if they constitute suspicious transactions as defined in that section; nothing in the Interim Rule reduces or alters the obligations imposed by 31 CFR 103.21. *See* 31 U.S.C. 5313(f)(2)(B).

The relationship between required suspicious transaction reporting and expanded and simplified exemptions from routine currency transaction reporting is a strong one; each rule forms an integral part of the policy of the other. The substitution of suspicious transaction reporting for routine reporting of all currency transactions by exempt persons in effect defines what a routine transaction for an exempt person is. That is, a routine currency transaction, in the case of an exempt person, is a transaction that does not trigger the suspicious transaction reporting requirements, because the transaction does *not*, for example, give the bank a reason to suspect money laundering, a violation of a reporting requirement, or the absence of a business purpose. *See* 31 CFR 103.21(a)(2) (i)-(iii).

The fourth objective of the Interim Rule is to create an exemption system that works. Thus choices have been made with an eye to achieving ease of administration and comprehensibility—the very factors whose absence hindered the prior administrative exemption process.

[2] Thus, as noted below, transactions in currency between domestic banks are already exempt from reporting, *see* 31 CFR 103.22(b)(1)(ii), and ''[d]eposits or withdrawals, exchanges of currency or other payments and transfers by local or state governments, or the United States or any of its agencies or instrumentalities'' are one of the categories of transactions specifically described as eligible for exemption by banks. *See* 31 CFR 103.22(b)(2)(iii).

FinCEN has attempted to craft a rule that will be easily understood by the banking professionals who must apply it. That meant painting with a broad brush; any general exemption rule will almost certainly include within its terms some results that are not optimal when viewed in isolation.

FinCEN understands that the changeover to the new system will require an initial period of effort by both the Treasury and banking institutions; it is impossible to reduce the volume of currency transaction reports to the extent that the Interim Rule tries to do without creating some small degree of temporary inconvenience as the terms of the system change. FinCEN believes, however, that the transition period will be relatively short and that the new greatly streamlined exemption procedures, once in place, will be self-sustaining and will produce a leaner, less burdensome, and more cost effective exemption system than now exists.

FinCEN is eager to improve the terms of the rule as necessary to eliminate temporary incongruities. Comments on ways in which the rule could be improved in this regard are specifically invited.

D. Additional Relief Under Study

The Interim Rule is the first result of FinCEN's work to put in place the new exemption system contemplated by the provisions of 31 U.S.C. 5313 (d) through (g). The goal of FinCEN's work in this area, like the Congress' goal in shaping the Money Laundering Suppression Act provisions on exemptions, is to reduce the cost of Bank Secrecy Act compliance and to further a fundamental restructuring of the Bank Secrecy Act. The restructuring emphasizes cost-effective collection of only that information that is likely to benefit law enforcement and regulatory authorities.

In solving the issues posed by implementation of the new statutory exemption rules, FinCEN has consulted regularly with banking industry representatives. For example, under the auspices of Bank Secrecy Act Advisory Group it convened a working session of bank officials to discuss possible structures for the new exemption system and the constraints that bank operating procedures posed for broad-scale relief from unnecessary currency transaction reporting.

In this connection, FinCEN is aware that the Interim Rule and any final rule resulting therefrom may well affect the operation of large banks in urban areas more than the operation of smaller community-based institutions, if only because larger companies tend to do business with larger banks and because the Interim Rule does not simplify the exemption system with respect to transactions by privately held companies, large and small, whose banking history and business would also justify a simplified exemption system.

Accordingly, FinCEN is working now on a notice of proposed rulemaking implementing the discretionary exemption authority contained in 31 U.S.C. 5313(e) and will at the appropriate time consult with the banking community in shaping proposals to implement that authority. Meanwhile, banks will still be able to maintain any exemptions properly granted under the current administrative system. Commenters on this Interim Rule are invited to include in their comments any suggestions on the projected second stage of the exemption effort.

III. Specific Provisions

A. 103.22(a). Reports of Currency Transactions

A new sentence is added following the first sentence of paragraph (a) of 31 CFR 103.22 to provide a cross-reference in that paragraph to the provisions of new paragraph (h) added by the Interim Rule.

B. 103.22(h)(1). Currency Transactions of Exempt Persons With Banks Occurring After April 30, 1996

Paragraph (h)(1) states the general effect of the Interim Rule. That is, simply and directly: no currency transaction report is required to be filed by a bank for a transaction in currency by an exempt person occurring after April 30, 1996.

The Interim Rule uses the term ''bank'' rather than ''depository institution'' to define the class of financial institutions to which the Interim Rule applies. Although 31 U.S.C. 5313(d) speaks of exemptions for transactions with ''depository institutions'' (as the latter term is defined in 31 U.S.C. 5313(g)), FinCEN believes that the broad definition of bank contained in 31 CFR 301.11(c) includes all of the categories of institutions included in the statutory ''depository institution'' definition; because the term ''bank'' is familiar to bank officials who work with the Bank Secrecy Act, substitution of a new term whose effect is the same does not appear either necessary or advisable.

The Interim Rule applies only to transactions between exempt persons and banks, to reflect the terms of 31 U.S.C. 5313(d); it does not apply to transactions between exempt persons and financial institutions other than banks. Comments are invited about whether the rule should extend to transactions with such other classes of financial institutions.

Although 31 U.S.C. 5313(d) speaks of ''mandatory'' exemptions, the Interim Rule does not affirmatively prohibit banks from continuing to report routine currency transactions with exempt persons. Treasury believes that the incentives created by the Interim Rule are, as Congress intended them to be, sufficiently great to lead banks to take advantage of the new exemption system to a far greater extent than they took advantage of the prior administrative exemption system.

The Interim Rule, however, is not simply a regulatory relief measure. As indicated above, it is part of a fundamental restructuring of the Bank Secrecy Act's administration. Treasury hopes and expects that banks will be willing to undertake the one-time effort necessary to make the new, substantially different system work.

C. 103.22(h)(2). Exempt Person

Under the Interim Rule, the crucial exemption determinant is whether a particular entity is an ''exempt person.'' That term is defined in new paragraph (h)(2).

The first three categories of exempt persons specified in paragraph (h)(2) are those to whom exemption is required to be granted by 31 U.S.C. 5313(d)(1)(A)–(C).[3]

Banks. The first category of exempt person is banks themselves, with the result that transactions between banks will not require reporting. In most cases, no reporting is required at present for such transactions; 31 CFR 103.22(b)(1)(ii) states flatly that the currency transaction reporting requirement does not ''require reports * * * of transactions between domestic banks.'' The definition is limited to banking operations and transactions within the United States. Thus a transfer of currency by a bank inside the United States to a bank outside the United States is not exempt under the Interim Rule.

Departments and Agencies of the United States and of States and Their Political Subdivisions

The second category of exempt person includes departments and agencies of the United States, of any state, and of any political subdivision of any state.

[3] The language of 31 U.S.C. 5313(d)(1)(A)–(C) is quoted in section IIA of this Supplementary Information section, above.

The definition of ''United States'' used in 31 CFR 103.11 includes not only the states but also the District of Columbia and the various territories and insular possessions of the United States. *See* 31 CFR 103.11(nn); as of August 1, 1996, the definition will also include the Indian lands. *See* 61 FR 7054, 7056 (February 23, 1996). Thus departments and agencies of the governments of these areas are also classified as exempt persons under the definition.

Entities Exercising Governmental Authority

The third category of exempt person includes any entity established under the laws of the United States[4], of any state, or of any political subdivision of any state, or under an interstate compact between two or more states, that exercises governmental authority on behalf of the United States or any such state or political subdivision. Operating rules for making determinations about the governmental entities are included in paragraph (h)(4), discussed below.

Listed Corporations

The fourth category of person subject to mandatory exemption under 31 U.S.C. 5313(d) is ''any business or category of business the reports on which have little or no value for law enforcement purposes.'' Treasury is making use of that provision to treat as an exempt person any corporation whose common stock (i) is listed on the New York Stock Exchange or the American Stock Exchange (but not including stock listed on the Emerging Company Marketplace of the American Stock Exchange), or (ii) has been designated as a Nasdaq National Market Security listed on the Nasdaq Stock Market (but not including stock listed under the separate ''Nasdaq Small-Cap Issues'' category). For convenience, this class of exempt persons is referred to in this discussion as ''listed corporations.''

The ''listed corporation'' formulation has been adopted for several reasons. First, Treasury believes that the formulation is a convenient and accurate way of describing many, if not most, large-scale enterprises that make extensive routine use of currency in their normal business operations. Second, the list of corporations described in the formulation is readily available and is published in general circulation newspapers each morning. Finally, the scale of enterprises listed on the nation's largest securities exchanges, and the variety of internal and external controls to which they are subject—whether as a matter of market discipline or government regulation—make their use for the sort of money laundering or tax evasion marked by anomalous transactions in currency, or that could be detected by a simple examination of currency transaction reports, sufficiently unlikely that the benefits of a uniform formulation far exceed the apparent risks of such a formulation. This is especially true because of the continuing applicability of the suspicious transaction reporting rules to all (non-currency *and* currency) transactions between listed corporations and banks.

The determination whether a company is a corporation for purposes of the Interim Rule depends solely upon the formal manner of its organization; if the company has a corporate charter, it is a corporation, and if it does not, it is not a corporation, for purposes of the Interim Rule. The sort of ''corporate equivalence'' analysis required, for example, for certain purposes to determine an entity's status under the Internal Revenue Code is neither called for nor permitted by the Interim Rule.[5]

At present the Interim Rule applies only to corporations, even though Treasury understands that the equity interests of some partnerships and business trusts are also listed on the named securities exchanges. Comments are invited as to whether the definition of exempt person should be extended to all persons whose equity interests are so listed.

Consolidated Subsidiaries of Listed Corporations

Many, if not most, listed corporations include groups of subsidiary operating corporations whose treatment under the Interim Rule raises significant issues. Such subsidiaries are not named in stock exchange listings, but the policy of the statute and Interim Rule cannot be effectively implemented without the inclusion of such subsidiaries in the exempt person category.

That fact raises an issue of what might be called the ''burden'' of *reducing* regulatory burden. Many definitions of parent-subsidiary relationship are quite technical and of importance only to legal, accounting, and investment specialists; even definitions phrased only in terms of stock ownership often devolve into questions of direct or indirect stock ownership that can be extremely difficult to resolve.

In that context, mindful of the need to provide as simple a formulation as possible, the Interim Rule treats as a subsidiary any corporation that files a consolidated income tax return with a listed corporation. The choice of this standard was not any easy one; its chief rationale is that the fact of consolidation (as opposed to, say, eligibility for consolidation) is relatively easy to determine by asking corporate customers (and by asking corporate officials to ask their tax or accounting departments if necessary).

Franchisees of listed corporations (or of their subsidiaries) are not included within the definition of exempt person, unless such franchisees are independently exempt as listed corporations or listed corporation subsidiaries. A local corporation that holds a McDonald's franchise, for example, is not an exempt person simply because McDonald's Corporation is a listed corporation; a McDonald's outlet owned by McDonald's Corporation directly, on the other hand, would be an exempt person, because McDonald's Corporation's common stock is listed on the New York Stock Exchange.

Still, the definition is not optimal. It introduces a note of complexity into the Interim Rule, and Internal Revenue Service (''IRS'') statistics indicate that at best only 70 to 80 percent of the companies eligible to file consolidated income tax returns with their parent companies actually do so. The success of the Interim Rule in reducing the volume of currency transaction reports will depend in part upon the effectiveness and acceptance of the definition of subsidiary company, and comments are encouraged about the appropriateness of the definition. FinCEN would especially welcome ideas about other formulations, based upon sound banking practice, that bank employees would find easy to apply and that would accomplish the goals of the Interim Rule more effectively than a definition based upon consolidation for income tax filing purposes.

D. 103.22(h)(3). Designation of Exempt Persons

The Interim Rule imposes one condition on a bank's exemption of currency transactions of a customer who satisfies the definition of exempt person. That condition is that a single form be filed designating the exempt person and the bank that recognizes it as such. The designation is to be made by a bank by filing for each exempt person a single Internal Revenue Service

[4] Again, the broad definition of ''United States'' applies.

[5] Again, there may be a limited group of entities, listed on the national securities exchanges but organized abroad, for which such a distinction raises issues of interpretation that cannot be dealt with effectively in the Interim Rule. Guidance is requested on whether such issues exist and, if so, how they should be resolved.

Form 4789 (the form now used by banks and others to report a transaction in currency) that is marked (in the Form's line 36) to indicate its purpose and that provides identifying information about the exempt person and bank involved.

The designation requirement must be satisfied, for existing customers, on or before August 15, 1996. The requirement is a condition subsequent; that is, a bank may recognize a customer as an exempt person on April 30, and stop filing currency transaction reports as permitted by the Interim Rule, even though it does not satisfy the designation requirement for the customer until August 15, 1996.

The designation of new customers as exempt persons must be made no later than 30 days following the first transaction in currency in excess of $10,000 between a bank and the new customer. (Because persons may become new customers during the period April 30–August 15, 1996, a new customer to whom the 30 day designation rule applies is, technically, a customer who satisfies the exempt person definition and who becomes a customer, or who seeks to engage in its first transaction in currency, after July 15, 1996.)

Under the Interim Rule, each bank that deals with an exempt person must satisfy the designation requirement. FinCEN hopes to be able to use the results of the designation filings to compile a list of exempt persons that can itself be published in the Federal Register, as contemplated by 31 U.S.C. 5313(d)(2), in place of the shorter descriptive notice of exempt persons that is published contemporaneously with the publication of the Interim Rule. The designation filings will also be used to review the effectiveness of the Interim Rule (and of any final rule that is derived from it) and the extent to which its terms are understood and used by banks.

E. 103.22(h)(4). Operating Rules for Applying Definition of Exempt Person

The Interim Rule contains several provisions that are designed to assist banks in applying the definition of ''exempt person.''

1. General Rule

As indicated above, every effort has been made to craft a rule that is as simple to understand and to administer as its broad objective will permit. Application of the Interim Rule requires instead that banks simply make one or more determinations about the status of particular customers. The rule does not specify detailed procedures for making or documenting the determinations required. (Indeed, one defect of the administrative exemption system was its need for detailed procedural steps for authorizing exemptions. *See* 31 CFR 103.22(d).) Instead, paragraph (h)(4)(i) explains that banks are expected to perform the same degree of due diligence in determining whether a customer is an exempt person (and documenting that determination) that a reasonable and prudent bank would perform in the conduct of its own business in avoiding losses from fraud or misstatement. In other words, FinCEN's objective is to leave it to bankers, who have already designed business procedures and protocols to deal with similar problems, to adapt their present procedures to achieve the results sought by the Interim Rule.

An assessment of compliance with the terms of the Interim Rule will focus not on whether a bank necessarily makes every judgment perfectly, but on whether it takes the steps a reasonable and prudent banker would take to create systems to apply the Interim Rule's terms. Such an approach is a corollary to the limitations on liability set by 31 U.S.C. 5318(f)(1) and repeated in paragraph (h)(6) of the Interim Rule; under the liability limitations a bank remains subject to penalties if, *inter alia*, it has a reason to believe that a particular customer or transaction does not meet the criteria established for the granting of an exemption.

2. Government Status

Paragraph (h)(4)(ii) permits a bank to determine the status of a customer as a government department, agency, or instrumentality based on its name or community knowledge, much like the so-called ''eyeball test,'' *cf.* Treas. Reg. § 1.6049–4(c)(1)(ii), for the determination of exempt recipient status for the purposes of information reporting and withholding with respect to interest payments under applicable provisions of the Internal Revenue Code.

The determination whether an entity exercises ''governmental authority'' is unfortunately not amenable to such a simple test, and the second sentence of paragraph (h)(4)(ii) states a general definition of governmental authority for use by banks.

3. Status as Listed Corporation

Paragraph (h)(4)(iii) permits a bank to rely on any New York, American, or Nasdaq Stock Market listing published in a newspaper of general circulation. Such listings are easily identified. For example, in the Wall Street Journal, which is published and distributed nationally, the listings are entitled, respectively, ''NEW YORK STOCK EXCHANGE COMPOSITE TRANSACTIONS,'' ''AMERICAN STOCK EXCHANGE COMPOSITE TRANSACTIONS,'' AND ''NASDAQ NATIONAL MARKET ISSUES.'' Because such listings often make use of the trading symbols (abbreviated company names) for each stock, banks may also rely on any commonly accepted or published stock symbol guide in reviewing the newspaper listings to determine if the listings include their customers.

4. Consolidated Return Status

The treatment of a corporation as an exempt person because it is included in the consolidated income tax return of a listed corporation presents one of the more difficult issues of administration in the Interim Rule. The corporations included on any consolidated return are required to be shown on Internal Revenue Service Form 851 (Affiliation Schedule) filed with the return; a bank may rely upon any reasonably authenticated photocopy of Form 851 (or the equivalent thereof for the appropriate tax year) in determining the status of a particular corporation, or it may rely upon any other reasonably authenticated information (for example, an officer's certificate) relating to a corporation's filing status.

F. 103.22(h)(5). Limitation on Exemption

The exemption for transactions by an exempt person applies only with respect to transactions involving that person's own funds. The exemption does not apply to situations in which an exempt person is engaging in a transaction as an agent on behalf of another, beneficial owner of currency. (If the principal for whom the agent is acting is itself an exempt person, the exempt status of the principal is what causes the transaction to be exempt.) In other words, an exempt person cannot lend its status, for a fee or otherwise, to another person's transactions.

G. 103.22(h)(6). Effect of Exemption; Limitation on Liability

The designation requirement applies equally to exempt persons who have previously been the subject of bank-initiated exemptions under the administrative exemption system as it does to other customers.

Once a bank has complied with the terms of the Interim Rule, it is generally protected, by 31 U.S.C. 5313(f) and paragraph (h)(6) of the Interim Rule, from any penalty for failure to file a currency transaction report with respect to a currency transaction by an exempt person. The protection does not apply if

the bank knowingly files false or incomplete information relating to the exempt person (for example on an designation filing) or with respect to the transaction (for example on a suspicious activity report). The protection also does not apply if the bank has reason to believe at the time the exemption is granted that the customer does not satisfy the definition of exempt person or if the transaction is not a transaction of the exempt person.

It is anticipated that the Interim Rule will supersede the administrative exemption system with respect to categories of exempt persons named in the Interim Rule, 60 days after a final rule based on the Interim Rule is published. At that time, transactions in currency with exempt persons after April 30, 1996 will be exempt from reporting by banks only to the extent that the new terms are satisfied.

H. 103.22(h)(7). Obligation To File Suspicious Activity Reports, etc.

The provisions of the Interim Rule create an exemption only with respect to the currency transaction reporting requirement. The Interim Rule does not create any exemption, and in fact has no effect of any kind, on the requirement that banks file suspicious activity reports with respect to transactions, including currency and non-currency transactions, that satisfy the requirements of the rules of FinCEN and the federal bank supervisory agencies relating to suspicious activity reporting.[6] (Indeed, as indicated above, the reduction in currency transaction report volume reflects in part Treasury policy to rely to the greatest extent possible on reports of truly suspicious activity.)

For example, multiple exchanges of small denominations of currency into large denominations of currency or currency transactions that are not (or whose amounts are not) commensurate with the stated business or other activity of the exempt person conducting the transaction, or on whose behalf the transaction is conducted, may indicate the need to file suspicious activity reports with respect to transactions in currency. Similarly a sudden need for currency by a business that never before had such a need can form a basis for the determination that a suspicious activity report is due. In all cases, whether such a report is required is governed by the rules of 31 CFR 103.21, rules on whose application the Interim Rule has no effect.

I. 103.22(h)(8). Revocation

The Interim Rule makes clear that the status of an exempt person as such may be revoked at any time by the Treasury Department. Revocation will be prospective in all cases except those to which the protections of liability conferred by 31 U.S.C. 5313(f) and 31 CFR 103.22(h)(6) do not apply.

IV. Regulatory Matters

A. Executive Order 12866

The Department of the Treasury has determined that this interim rule is not a significant regulatory action under Executive Order 12866.

B. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), Pub. L. 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on balance this interim rule provides the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

C. Administrative Procedure Act

Because the Interim Rule implements the statute and grants significant relief from existing regulatory requirements, it is found to be impracticable to comply with notice and public procedure under 5 U.S.C. 553(b). Because the Interim Rule grants exemptions to current requirements, it may be made effective before 30 days have passed after its publication date. *See* 5 U.S.C. 553(d).

D. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 604) are not applicable to this Interim Rule because the agency was not required to publish a notice of proposed rulemaking under 5 U.S.C. 553 or any other law.

E. Paperwork Reduction Act

This Interim Rule is being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). By expanding the applicable exemptions from an information collection that has been reviewed and approved by the Office of Management and Budget (OMB) under control number 1505–0063, the Interim Rule significantly reduces the existing burden of information collection under 31 CFR 103.22. Thus, although the Interim Rule advances the purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and its implementing regulations, 5 CFR Part 1320, the Paperwork Reduction Act does not require FinCEN to follow any particular procedures in connection with the promulgation of the Interim Rule.

F. Compliance With 5 U.S.C. 801

Prior to the date of publication of this document in the Federal Register, FinCEN will have submitted to each House of the Congress and to the Comptroller General the information required to be submitted or made available with respect to the Interim Rule by the provisions of 5 U.S.C. 801 (a)(1)(A) and (a)(1)(B).

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Banks, banking, Currency, Foreign Banking, Foreign currencies, Gambling, Investigations, Law enforcement, Penalties, Reporting and recordkeeping requirements, Securities, Taxes.

Amendment

For the reasons set forth above in the preamble, 31 CFR Part 103 is amended as set forth below:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for Part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5330.

2. Section 103.22 is amended by adding a new sentence immediately following the first sentence in paragraph (a)(1) and by adding a new paragraph (h) to read as follows:

§ 103.22 Reports of currency transactions.

(a)(1) * * * Transactions in currency by exempt persons with banks occurring after April 30, 1996, are not subject to

[6] *See* 61 FR 4326, 4332, 4338 (February 5, 1996) (FinCEN, Office of the Comptroller of the Currency and Federal Reserve Board); 61 FR 6095, 6100 (February 16, 1996) (Federal Deposit Insurance Corporation and Office of Thrift Supervision); and 61 FR 11526 (March 21, 1996) (National Credit Union Administration).

this requirement to the extent provided in paragraph (h) of this section. * * * * * * * * * *

(h) *No filing required by banks for transactions by exempt persons occurring after April 30, 1996.* (1) *Currency transactions of exempt persons with banks occurring after April 30, 1996.* Notwithstanding the provisions of paragraph (a)(1) of this section, no bank is required to file a report otherwise required by paragraph (a)(1) of this section, with respect to any transaction in currency between an exempt person and a bank that is conducted after April 30, 1996.

(2) *Exempt person.* For purposes of this section, an exempt person is:

(i) A bank, to the extent of such bank's domestic operations;

(ii) A department or agency of the United States, of any state, or of any political subdivision of any state;

(iii) Any entity established under the laws of the United States, of any state, or of any political subdivision of any state, or under an interstate compact between two or more states, that exercises governmental authority on behalf of the United States or any such state or political subdivision;

(iv) Any corporation whose common stock is listed on the New York Stock Exchange or the American Stock Exchange (except stock listed on the Emerging Company Marketplace of the American Stock Exchange) or whose common stock has been designated as a Nasdaq National Market Security listed on the Nasdaq Stock Market (except stock listed under the separate ''Nasdaq Small-Cap Issues'' heading); and

(v) Any subsidiary of any corporation described in paragraph (h)(2)(iv) of this section whose federal income tax return is filed as part of a consolidated federal income tax return with such corporation, pursuant to section 1501 of the Internal Revenue Code and the regulations promulgated thereunder, for the calendar year 1995 or for its last fiscal year ending before April 15, 1996.

(3) *Designation of exempt persons.* (i) A bank must designate each exempt person with whom it engages in transactions in currency, on or before the later of August 15, 1996, and the date 30 days following the first transaction in currency between such bank and such exempt person that occurs after April 30, 1996.

(ii) Designation of an exempt person shall be made by a single filing of Internal Revenue Service Form 4789, in which line 36 is marked ''Designation of Exempt Person'' and items 2–14 (Part I, Section A) and items 37–49 (Part III) are completed. The designation must be made separately by each bank that treats the person in question as an exempt person. (For availability, see 26 CFR 601.602.)

(iii) This designation requirement applies whether or not the particular exempt person to be designated has previously been treated as exempt from the reporting requirements of paragraph (a) of this section under the rules contained in paragraph (b) or (e) of this section.

(4) *Operating rules for designating exempt persons.* (i) Subject to the specific rules of this paragraph (h), a bank must take such steps to assure itself that a person is an exempt person (within the meaning of applicable provisions of paragraph (h)(2) of this section) that a reasonable and prudent bank would take to protect itself from loan or other fraud or loss based on misidentification of a person's status.

(ii) A bank may treat a person as a governmental department, agency, or entity if the name of such person reasonably indicates that it is described in paragraph (h)(2)(ii) or (h)(2)(iii) of this section, or if such person is known generally in the community to be a State, the District of Columbia, a tribal government, a Territory or Insular Possession of the United States, or a political subdivision or a wholly-owned agency or instrumentality of any of the foregoing. An entity generally exercises governmental authority on behalf of the United States, a State, or a political subdivision, for purposes of paragraph (h)(2)(iii) of this section, only if its authorities include one or more of the powers to tax, to exercise the authority of eminent domain, or to exercise police powers with respect to matters within its jurisdiction.

(iii) In determining whether a person is described in paragraph (h)(2)(iv) of this section, a bank may rely on any New York Stock Exchange, American Stock Exchange, or Nasdaq Stock Market listing published in a newspaper of general circulation and on any commonly accepted or published stock symbol guide.

(iv) In determining whether a person is described in paragraph (h)(2)(v) of this section, a bank may rely upon any reasonably authenticated corporate officer's certificate or any reasonably authenticated photocopy of Internal Revenue Service Form 851 (Affiliation Schedule) or the equivalent thereof for the appropriate tax year.

(5) *Limitation on exemption.* A transaction carried out by an exempt person as an agent for another person who is the beneficial owner of the funds that are the subject of a transaction in currency is not subject to the exemption from reporting contained in paragraph (h)(1) of this section.

(6) *Effect of exemption; limitation on liability.* (i) FinCEN may in the future determine by amendment to this part that the exemption contained in this paragraph (h) shall be the only basis for exempting persons described in paragraph (h)(2) of this section from the reporting requirements of paragraph (a) of this section.

(ii) No bank shall be subject to penalty under this part for failure to file a report required by paragraph (a) of this section with respect to a currency transaction by an exempt person with respect to which the requirements of this paragraph (h) have been satisfied, unless the bank:

(A) Knowingly files false or incomplete information with respect to the transaction or the customer engaging in the transaction; or

(B) Has reason to believe at the time the exemption is granted that the customer does not meet the criteria established by this paragraph (h) for treatment of the transactor as an exempt person or that the transaction is not a transaction of the exempt person.

(iii) A bank that files a report with respect to a currency transaction by an exempt person rather than treating such person as exempt shall remain subject with respect to each such report to the rules for filing reports, and the penalties for filing false or incomplete reports, that are applicable to reporting of transactions in currency by persons other than exempt persons. A bank that continues for the period permitted by paragraph (h)(6)(i) of this section to treat a person described in paragraph (h)(2) of this section as exempt from the reporting requirements of paragraph (a) of this section on a basis other than as provided in this paragraph (h) shall remain subject in full to the rules governing an exemption on such other basis and to the penalties for failing to comply with the rules governing such other exemption.

(7) *Obligation to file suspicious activity reports, etc.* Nothing in this paragraph (h) relieves a bank of the obligation, or alters in any way such bank's obligation, to file a report required by § 103.21 with respect to any transaction, including, without limitation, any transaction in currency, or relieves a bank of any other reporting or recordkeeping obligation imposed by this part (except the obligation to report transactions in currency pursuant to paragraph (a) of this section to the extent provided in this paragraph (h)).

(8) *Revocation.* The status of any person as an exempt person under this paragraph (h) may be revoked by

FinCEN by written notice, which may be provided by publication in the Federal Register in appropriate situations, on such terms as are specified in such notice. In addition, and without any action on the part of the Treasury Department:

(i) The status of a corporation as an exempt person pursuant to paragraph (h)(2)(iv) of this section ceases once such corporation ceases to be listed on the applicable stock exchange; and

(ii) The status of a subsidiary as an exempt person under paragraph (h)(2)(v) of this section ceases once such subsidiary ceases to be included in a consolidated federal income tax return of a person described in paragraph (h)(2)(iv) of this section.

* * * * *

Dated: April 16, 1996.

Stanley E. Morris,

Director, Financial Crimes Enforcement Network.

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