



Office of Thrift Supervision  
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August 5, 2002

**MEMORANDUM FOR: CHIEF EXECUTIVE OFFICERS**

**FROM:** Scott M. Albinson *Scott M. Albinson*

**SUBJECT:** USA Patriot Act Update

As a supplement to our March staff summary of the USA Patriot Act, we would like to provide you with additional detail on three sections of the Act for which Treasury has issued proposed regulations. This summary will highlight:

- Section 326 Customer Identification Program;
- Section 314 Enhanced Cooperative Efforts; and
- Section 312 Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts

We urge all OTS regulated institutions to carefully review the new requirements of the Patriot Act. In particular, the preambles to the regulations contain significant guidance and a careful review will likely address many of your questions.

OTS examiners will begin reviewing for compliance with the new regulations once they become final and revised examination procedures are adopted. The OTS will not independently issue new Patriot Act related regulations. Treasury will publish the new regulations under its BSA authority, 31 CFR § 103. OTS regulated institutions are obligated to comply with all regulations promulgated under 31 CFR § 103. 12 CFR § 563.177 (2002).

**Section 326: Customer Identification Procedures**

Treasury published a proposed rule implementing Section 326 on July 23, 2002. 67 Fed. Reg. 48290. (Copy attached.) The Act requires that final regulations take effect by October 25, 2002. Section 326 mandates that thrifts collect certain information before opening an account, to verify the collected information within a reasonable time and have a board approved Customer Identification program that address all aspects of a thrift's customer due diligence program.

To summarize, Section 326 and the proposed rule require thrifts to:

- Develop mandatory account opening procedures, which at a minimum require collecting a name, address, social security number (or tax payer identification number, or employer identification number) or the equivalent for non-US persons (e.g., passport number and country of issuance or alien identification card number), and date of birth.
- Create procedures to verify the mandatory identification information within a reasonable period of time after opening the account.
- Enact board approved Customer Identification Procedures (“CIP”), which include a review of the thrift’s business plan, identification of money laundering or terrorist financing risks associated with the thrift’s operations, and the appropriate customer identification controls to address those risks. Also, the CIP should address instances when the thrift will refuse to open an account or will close an existing account. The CIP must also include record keeping, which should address maintaining a record of the identifying information provided by the customer.
- Create procedures to determine whether the customer appears on any list of known or suspected terrorists or terrorist organizations provided to the thrift by any Federal government agency.

The mandatory account opening procedures relate only to new accounts or new signatories to already existing accounts. Also, brokered accounts and accounts generated through the Internet or telephone solicitation are covered by the proposed rule. Institutions that generate accounts through these methods should adopt verification procedures that ensure an adequate level of customer identity verification due diligence.

The OTS will expect institutions to review their business operations and to incorporate a board approved CIP that addresses the identified risks. The CIP should encompass all activities of the thrift and its subsidiaries. Thrifts should incorporate their CIP into an overall BSA program, which must include (1) internal policies, procedures, and controls to ensure ongoing compliance; (2) designation of a BSA compliance officer; (3) an ongoing employee training program; and (4) an independent audit process to test programs. All of these requirements apply to the CIP.

Thrifts are reminded to continue to follow their internal Suspicious Activity Reporting procedures.

The proposed regulation includes a 45-day comment period that closes September 6, 2002. Thrifts interested in entering a comment should follow the instructions recited in the attached copy of the proposal.

### **Section 314: Enhanced Cooperative Efforts**

On March 4, 2002, Treasury published a notice of proposed rulemaking and interim rule concerning Section 314 of the Patriot Act. 67 Fed. Reg. 9874. This rulemaking provides a mechanism for law enforcement to communicate with financial institutions and for institutions to

communicate among themselves with regard to possible instances of money laundering or terrorist financing.

#### Part A: Cooperation with Law Enforcement

Under the proposed rule, 67 Fed. Reg. 9879, law enforcement may request basic information about suspect individuals or organizations from financial institutions. The process requires the appropriate criminal enforcement agency to certify to Treasury's Financial Crimes Enforcement Network ("FinCEN") that it has a legitimate basis to believe that the named individual or organization is involved in money laundering or terrorist financing. FinCEN will then request from financial institutions certain information about the named suspects. The communication will specify a period of time for institutions to reply.

The communication will also contain instructions on how to reply in case your search reveals transactions with the named suspect. Typically, a thrift will only need to report the identity of the person, the type of transaction or account (e.g., a deposit account or a mortgage loan), and the identifying information used by the person when opening the account or initiating the transaction. The notification process is not designed to replace a subpoena and you are not obligated to produce records based solely on receiving a communication from FinCEN.

Although the comment period has closed on this proposal, Treasury has not finalized the rule. This rulemaking does not change your current obligation to conduct reviews of accounts and transactions in connection with (i) the "Control List" issued to all OTS-regulated institutions on November 2, 2001, and subsequently supplemented on December 5, 2001 and March 1, 2002 or (ii) the OFAC lists.

#### Part B: Cooperation within the Industry

This part authorizes financial institutions to exchange information within the industry about individuals or entities suspected of money laundering or terrorism. It was implemented by an interim rule issued March 4, 2002. 67 Fed. Reg. 9874 (March 4, 2002). Importantly, you may exchange information only about suspected money laundering or terrorist financing. Also, financial institutions must complete a certificate that lists a designated individual within the organization to receive the information. You may file the certificate electronically from the FinCEN web site ([www.treas.gov/fincen](http://www.treas.gov/fincen)) and can only share information with other institutions that have completed the certificate. Finally, Section 314B contains a "safe harbor" from liability for violation of state privacy statutes for those institutions that share information in a manner consistent with the regulation.

#### **Section 312: Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts**

This section requires thrifts to develop due diligence programs for correspondent accounts for foreign financial institutions and for private banking accounts for non-US persons. We would like to highlight certain aspects of the private banking section.

The private banking enhanced due diligence requirements cover all non-US persons with an aggregate total of \$1 million or more under control by your institution. As defined in the proposed rule, 67 Fed. Reg. 37736, 37743 (May 30, 2002), a non-US person is someone who is neither a citizen or lawful permanent resident of the United States.

If you maintain such accounts then Section 312 requires that at a minimum the thrift:

- Ascertain the identity of all nominal holders and holders' of any beneficial ownership interest in the account, including information on those holders lines of business and source of wealth;
- Ascertain the source of funds deposited into the private banking account;
- Ascertain whether any such holder may be a senior foreign political figure;
- Report any known or suspected violation of law conducted through or involving the private banking account; and
- Conduct enhanced scrutiny of accounts requested or maintained by or on behalf of senior foreign political figure, including the ability to detect if the account is used to launder proceeds of foreign corruption.

Of course, private banking poses a significant risk for money laundering regardless of the citizenship of the account holder. The OTS urges institutions to adopt appropriate due diligence standards for all private banking customers.

Treasury announced an interim final rule on July 23, 2002. 67 Fed. Reg. 48348. (July 23, 2002). (Copy attached.) As part of that issuance, Treasury provided guidance to banks and thrifts about how they should approach compliance with the Section 312 (31 U.S.C. A. § 5312) during the "interim" period before adoption of "final regulations." We encourage you to study this compliance guidance appearing in the preamble. 67 Fed. Reg. at 48350 - 51. The guidance cites best practices sources and further states: "Treasury expects that an institution will accord priority in applying enhanced due diligence to accounts opened on or after July 23,2002." *Id.* at 48351.

As part of the interim rule, Treasury deferred applicability of Section 312 to securities brokers and dealers and other non-bank financial institutions with respect to foreign correspondent accounts. The deferment does not apply to banks and thrifts, or to the private banking section of the rule. Treasury anticipates issuing a final rule by October 25, 2002.

If you have any questions concerning the new proposed regulations or any other BSA related issue, please contact your OTS regional office.

Attachments

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 21**

[Docket No. 02-11]

**FEDERAL RESERVE SYSTEM****12 CFR Parts 208 and 211**

[Docket No. R-1127]

**FEDERAL DEPOSIT INSURANCE CORPORATION****12 CFR Part 326****DEPARTMENT OF THE TREASURY****Office of Thrift Supervision****12 CFR Part 563**

[No. 2002-27]

**NATIONAL CREDIT UNION ADMINISTRATION****12 CFR Part 748****DEPARTMENT OF THE TREASURY****31 CFR Part 103**

RIN 1506-AA31

**Customer Identification Programs for Banks, Savings Associations, and Credit Unions**

**AGENCIES:** The Financial Crimes Enforcement Network, Treasury; Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Office of Thrift Supervision, Treasury; National Credit Union Administration.

**ACTION:** Joint notice of proposed rulemaking.

**SUMMARY:** The Department of the Treasury, through the Financial Crimes Enforcement Network (FinCEN), together with the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) (collectively, the Agencies) are jointly issuing a proposed regulation to implement section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (the Act). Section 326 requires the Secretary of the Treasury

(Secretary) to jointly prescribe with each of the Agencies, the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC), a regulation that, at a minimum, requires financial institutions to implement reasonable procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable; maintain records of the information used to verify the person's identity; and determine whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency. The proposed regulation applies to banks, savings associations, and credit unions.

**DATES:** Written comments on the proposed rule may be submitted on or before September 6, 2002.

**ADDRESSES:** Because paper mail in the Washington area may be subject to delay, commenters are encouraged to e-mail or fax comments. Comments should be sent by one method only. Financial institution commenters are encouraged to submit comments only to their Federal functional regulator. Non-financial institution commenters are encouraged to submit comments only to FinCEN. All comments will be considered by Treasury and the Agencies in formulating the final rule.

**OCC:** Please direct your comments to: Office of the Comptroller of the Currency, 250 E Street, SW., Public Information Room, Mailstop 1-5, Washington, DC 20219, Attention: Docket No. 02-11; FAX number (202) 874-4448; or Internet address: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov). Comments may be inspected and photocopied at the OCC's Public Reference Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect comments by calling (202) 874-5043.

**Board:** Comments should refer to Docket No. R-1127 and may be mailed to Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551; sent by FAX to (202) 452-3819 or (202) 452-3102; or sent by e-mail to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Members of the public may inspect comments in Room MP-500 between 9 a.m. and 5 p.m. on weekdays pursuant to section 261.12 (except as provided in section 261.14) of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

**FDIC:** Comments should be directed to: Executive Secretary, Attention: Comments/OES, Federal Deposit

Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. In addition, comments may be sent by fax to (202) 898-3838, or by electronic mail to [comments@FDIC.gov](mailto:comments@FDIC.gov). Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW., Washington, DC, between 9 a.m. and 4:30 p.m., on business days.

**OTS:** Comments may be mailed to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2002-27; FAX number (202) 906-6518, Attention: No. 2002-27; or Internet address [regs.comments@ots.treas.gov](mailto:regs.comments@ots.treas.gov), Attention: No. 2002-27 and include your name and telephone number. Comments may also be hand delivered to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, No. 2002-27. OTS will post comments and the related index on the OTS Internet Site at [www.ots.treas.gov](http://www.ots.treas.gov). In addition, you may inspect comments at the Public Reading Room, 1700 G St. NW., by appointment. To make an appointment for access, you may call (202) 906-5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906-7755. (Please identify the materials you would like to inspect to assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the business day after the date we receive a request.

**NCUA:** Direct comments to the Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. You may fax comments to (703) 518-6319, or e-mail comments to [regcomments@NCUA.gov](mailto:regcomments@NCUA.gov). To inspect comments, please contact the Office of General Counsel, (703) 518-6540; or the Office of Examination and Insurance, (703) 518-6360.

**FinCEN:** Comments may be mailed to FinCEN, Section 326 Bank Rule Comments, P.O. Box 39, Vienna, VA 22183, or sent to Internet address [regcomments@fincen.treas.gov](mailto:regcomments@fincen.treas.gov) with the caption "Attention: Section 326 Bank Rule Comments" in the body of the text. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m. in the FinCEN Reading Room in Washington,

DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354-6400 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:**

*OCC*: Office of the Chief Counsel (202) 874-3295.

*Board*: Enforcement and Special Investigations Sections: (202) 452-5235; (202) 728-5829; or (202) 452-2961.

*FDIC*: Special Activities Section, Division of Supervision, and Legal Division at (202) 898-3671.

*OTS*: Office of the Chief Counsel, (202) 906-6012.

*NCUA*: Office of General Counsel, (703) 518-6540; or Office of Examination and Insurance, (703) 518-6360.

*Treasury*: Office of the Chief Counsel (FinCEN), (703) 905-3590; Office of the Assistant General Counsel for Enforcement (Treasury), (202) 622-1927; or the Office of the Assistant General Counsel for Banking & Finance (Treasury), (202) 622-0480.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Section 326 of the USA PATRIOT Act*

On October 26, 2001, President Bush signed into law the USA PATRIOT Act, Public Law 107-56. Title III of the Act, captioned "International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001," adds several new provisions to the Bank Secrecy Act (BSA), 31 U.S.C. 5311 *et seq.* These provisions are intended to facilitate the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 326 of the Act adds a new subsection (l) to 31 U.S.C. 5318 that requires the Secretary to prescribe regulations setting forth minimum standards for financial institutions that relate to the identification and verification of any person who applies to open an account.

Section 326 applies to all "financial institutions." This term is defined very broadly in the BSA to encompass a variety of entities including banks, agencies and branches of foreign banks in the United States, thrifts, credit unions, brokers and dealers in securities or commodities, insurance companies, travel agents, pawnbrokers, dealers in precious metals, check-cashers, casinos, and telegraph companies, among many others. See 31 U.S.C. 5312(a)(2).

For any financial institution engaged in financial activities described in section 4(k) of the Bank Holding Company Act of 1956 (section 4(k) institutions), the Secretary is required to

prescribe the regulations issued under section 326 jointly with each of the Agencies, the SEC, and the CFTC (the Federal functional regulators). Final regulations implementing section 326 must be effective by October 25, 2002.

Section 326 of the Act provides that the regulations must contain certain requirements. At a minimum, the regulations must require financial institutions to implement reasonable procedures for (1) verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency.

In prescribing these regulations, the Secretary is directed to 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. The following proposal is being issued jointly by Treasury and the Agencies. It applies only to a financial institution that is a "bank" as defined in 31 CFR 103.11(c) that is subject to regulation by one of the Agencies,<sup>1</sup> and any foreign branch of an insured bank. Regulations governing the applicability of section 326 to other financial institutions, including section 4(k) institutions regulated by the SEC and the CFTC, will be issued separately.

Treasury, the Agencies, the SEC, and the CFTC consulted extensively in the development of all rules implementing section 326 of the Act. All of the participating agencies intend the effect of the rules to be uniform throughout the financial services industry.

The Secretary has determined that the records required to be kept by section 326 of the Act have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, to protect against international terrorism.

In addition, Treasury under its own authority is proposing conforming amendments to 31 CFR 103.34, which currently imposes requirements

<sup>1</sup> Published elsewhere in this separate part of this issue of the *Federal Register* is a separate Treasury proposal implementing section 326 for banks that are not subject to regulation by a Federal functional regulator, including certain state-chartered uninsured trust companies and non-federally insured credit unions.

concerning the identification of bank customers.

*B. Codification of the Joint Proposed Rule*

The substantive requirements of the joint proposed rule will be codified with other Bank Secrecy Act regulations as part of Treasury's regulations in 31 CFR part 103. To minimize potential confusion by affected entities regarding the scope of the joint proposed rule, each of the Agencies is also proposing to add a nonsubstantive provision in its own regulations in either 12 CFR part 21, 12 CFR parts 208 and 211, 12 CFR part 326, 12 CFR part 563, or 12 CFR part 748, that will cross-reference the regulations in 31 CFR part 103. Although no specific text is being proposed at this time, the cross-references will be included in individual final rules published concurrently with the joint final rule issued by Treasury and the Agencies implementing section 326 of the Act.

**II. Section-by-Section Analysis**

*A. Regulations Implementing Section 326*

*Definitions*

*Section 103.121(a)(1) Account.* The proposed rule's definition of "account" is based on the statutory definition of "account" that is used in section 311 of the Act. "Account" means each formal banking or business relationship established to provide ongoing services, dealings, or other financial transactions. For example, a deposit account, transaction or asset account, and a credit account or other extension of credit would each constitute an account.

Section 311 of the Act does not require that this definition be used for regulations implementing section 326 of the Act. However, to the extent possible, Treasury and the Agencies propose to apply consistent definitions for each of the regulations implementing the Act to reduce confusion. "Deposit accounts" and "transaction accounts," which as previously noted, are considered "accounts" for purposes of this rulemaking, are themselves defined terms. In addition, the term "account" is limited to banking and business relationships established to provide "ongoing" services, dealings, or other financial transactions to make clear that this term is not intended to cover infrequent transactions such as the occasional purchase of a money order or a wire transfer.

*Section 103.121(a)(2) Bank.* As discussed above, the proposal adopts the definition of "bank" already used in 31 CFR 103.11(c), which encompasses

virtually all of the financial institutions regulated by the Agencies, including banks, savings associations, and credit unions. Any branch, agency, or representative office of a foreign bank in the United States, as well as any Edge corporation, would be subject to this joint regulation under the existing definition of "bank."<sup>2</sup> However, the definition is modified to include "any foreign branch of an insured bank" to make clear that the procedures required by this regulation must be implemented throughout the bank, no matter where its offices are located. These procedures also apply to bank subsidiaries to the same extent as existing BSA compliance program requirements. We note that securities broker-dealers, futures commission merchants, insurance companies, and investment companies will be subject to forthcoming rules implementing section 326, whether or not they are affiliated with a bank.

*Section 103.121(a)(3) Customer.* The proposed rule defines "customer" to mean any person seeking to open a new account. Accordingly, the term "customer" includes a person applying to open an account, but would not cover a person seeking information about an account, such as rates charged or interest paid on an account, if the person does not actually open an account. "Customer" includes both individuals and other persons such as corporations, partnerships, and trusts. In addition, any person seeking to open an account at a bank, on or after the effective date of the final rule, will be a "customer," regardless of whether that person already has an account at the bank.

The proposed rule also defines a "customer" to include any signatory on an account. Thus, for example, an individual with signing authority over a corporate account is a "customer" within the meaning of the proposed rule. A signatory can become a "customer" when the account is opened or when the signatory is added to an existing account.

The requirements of section 326 of the Act apply to any person "seeking to open a new account." Accordingly, transfers of accounts from one bank to another, that are not initiated by the customer, for example, as a result of a merger, acquisition, or purchase of assets or assumption of liabilities, fall

<sup>2</sup> Section 103.11(c) defines bank to include "each agent, agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below: \* \* \*. (8) a bank organized under foreign law; (9) any national banking association or corporation acting under the provisions of section [25a] of the [Federal Reserve Act] (12 U.S.C. 611-32)."

outside of the scope of section 326, and are not covered by the proposed regulation.<sup>3</sup>

*Section 103.121(a)(4) Federal functional regulator.* The proposed rule defines "Federal functional regulator" by reference to § 103.120(a)(2). Accordingly, this term means each of the Agencies (as well as the SEC and the CFTC)

*Section 103.121(a)(5) Person.* The proposed rule defines "person" by reference to § 103.11(z). This definition includes individuals, corporations, partnerships, trusts, estates, joint stock companies, associations, syndicates, joint ventures, other unincorporated organizations or groups, certain Indian Tribes, and all entities cognizable as legal personalities.

*Section 103.121(a)(6) U.S. Person.* Under the proposed rule, for an individual, "U.S. person" means a U.S. citizen. For persons other than an individual, "U.S. person" means an entity established or organized under the laws of a State or the United States. A non-U.S. person is defined in § 103.121(a)(7) as a person who does not satisfy these criteria.

*Section 103.121(a)(8) Taxpayer identification number.* The proposed rule continues the provision in current § 103.34(a)(4), which provides that the provisions of section 6109 of the Internal Revenue Code and the regulations of the Internal Revenue Service thereunder determine what constitutes a taxpayer identification number.

#### Customer Identification Program: Minimum Requirements

*Section 103.121(b)(1) General Rule.* Section 326 of the Act requires Treasury and the Agencies to jointly issue a regulation that establishes minimum standards regarding the identity of any customer who applies to open an account. Section 326 then prescribes three procedures that Treasury and the Agencies must require institutions to implement as part of this process: (1) Identification and verification of persons seeking to open an account; (2) recordkeeping; and (3) comparison with government lists.

Rather than imposing the same list of specific requirements on every bank, regardless of its circumstances, the proposed regulation requires all banks to implement a Customer Identification

<sup>3</sup> However, there may be situations involving the transfer of accounts where it would be appropriate for a bank to verify the identity of customers associated with the accounts that it is acquiring. Therefore, Treasury and the Agencies expect procedures for transfers of accounts to be part of a bank's existing BSA program.

Program (CIP) that is appropriate given the bank's size, location, and type of business. The proposed regulation requires a bank's CIP to contain the statutorily prescribed procedures, describes these procedures, and details certain minimum elements that each of the procedures must contain.

In addition, the proposed rule requires that the CIP be written and that it be approved by the bank's board of directors or a committee of the board. This latter requirement highlights the responsibility of a bank's board of directors to approve and exercise general oversight over the bank's CIP.

Under the proposed regulation, the CIP must be incorporated into the bank's anti-money laundering (BSA) program.<sup>4</sup> A bank's BSA program must include (1) internal policies, procedures, and controls to ensure ongoing compliance; (2) designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. Each of these requirements also applies to a bank's CIP.

Unlike other sections of 31 CFR 103, the proposed regulation explicitly states that the CIP must be a part of a bank's BSA program. This language is included to make clear that the CIP is not a separate program. However, this statement should not be read to create any negative inference about a bank's need to establish and maintain a BSA program that is designed to ensure compliance with all other sections of 31 CFR 103.

*Section 103.121(b)(2) Identity Verification Procedures.* Under section 326 of the Act, the regulations issued by Treasury and the Agencies must require banks to implement and comply with reasonable procedures for verifying the identity of any person seeking to open an account, to the extent reasonable and practicable. The proposed regulation implements this requirement by providing that each bank must have risk-based procedures for verifying the identity of a customer that take into consideration the types of accounts that banks maintain, the different methods of opening accounts, and the types of identifying information available. These procedures must enable the bank to form a reasonable belief that it knows the true identity of the customer.

Under the proposed regulation, a bank must first have procedures that specify

<sup>4</sup> All insured depository institutions currently must have a BSA program. See 12 CFR 21.21 (OCC), 12 CFR 208.63 (Board), 12 CFR 326.8 (FDIC), 12 CFR 563.177 (OTS), and 12 CFR 748.2 (NCUA). In addition, all financial institutions are required by 31 U.S.C. 5318(h) to develop and implement an anti-money laundering program.

the identifying information that the bank must obtain from any customer. The proposed regulation also sets forth certain, minimal identifying information that a bank must obtain prior to opening an account or adding a signatory to an account. Second, the bank must have procedures describing how the bank will verify the identifying information provided. The bank must have procedures that describe when it will use documents for this purpose and when it will use other methods, either in addition or as an alternative to using documents for the purpose of verifying the identity of a customer.

While a bank's CIP must contain the identity verification procedures set forth above, these procedures are to be risk-based. For example, a bank need not verify the identifying information of an existing customer seeking to open a new account, or who becomes a signatory on an account, if the bank (1) previously verified the customer's identity in accordance with procedures consistent with this regulation, and (2) continues to have a reasonable belief that it knows the true identity of the customer. The proposal requires a bank to exercise reasonable efforts to ascertain the identity of each customer.

Although the main purpose of the Act is to prevent and detect money laundering and the financing of terrorism, Treasury and the Agencies anticipate that the proposed regulation will ultimately benefit consumers. In addition to deterring money laundering and terrorist financing, requiring every bank to establish comprehensive procedures for verifying the identity of customers should reduce the growing incidence of fraud and identity theft involving new accounts.<sup>5</sup>

**Section 103.121(b)(2)(i) Information Required.** The proposed regulation provides that a bank's CIP must contain procedures that specify the identifying information the bank must obtain from a customer. At a minimum, a bank must obtain from each customer the following information prior to opening an account or adding a signatory to an account: name; address; for individuals, date of birth; and an identification number, described in greater detail below. To

satisfy the requirement that a bank obtain the address of a customer, Treasury and the Agencies expect a bank to obtain both the address of an individual's residence and, if different, the individual's mailing address. For customers who are not individuals, the bank should obtain an address showing the customer's principal place of business and, if different, the customer's mailing address.

For U.S. persons a bank must obtain a U.S. taxpayer identification number (e.g., social security number, individual taxpayer identification number, or employer identification number). For non-U.S. persons a bank must obtain one or more of the following: a taxpayer identification number; passport number and country of issuance; alien identification card number; or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard. The basic information that banks would be required to obtain under this proposed regulation reflects the type of information that financial institutions currently obtain in the account-opening process and is similar to the identifying information currently required for each deposit or share account opened (see 31 CFR 103.34(a)(1)). The proposed regulation uses the term "similar safeguard" to permit the use of any biometric identifiers that may be used in addition to, or instead of, photographs.

Treasury and the Agencies recognize that a new business may need access to banking services, particularly a bank account or an extension of credit, before it has received an employer identification number from the Internal Revenue Service. For this reason, the proposed regulation contains a limited exception to the requirement that a taxpayer identification number must be provided prior to establishing or adding a signatory to an account. Accordingly, a CIP may permit a bank to open or add a signatory to an account for a person other than an individual (such as a corporation, partnership, or trust) that has applied for, but has not received, an employer identification number. However, in such a case, the CIP must require that the bank obtain a copy of the application before it opens or adds a signatory to the account and obtain the employee identification number within a reasonable period of time after an account is established or a signatory is added to an account. Currently, the IRS indicates that the issuance of an employer identification number can take up to five weeks. This length of time, coupled with when the person

applied for the employer identification number, should be considered by the bank in determining the reasonable period of time within which the person should provide its employer identification number to the bank.

**Section 103.121(b)(2)(ii) Verification.** The proposed regulation provides that the CIP must contain risk-based procedures for verifying the information that the bank obtains in accordance with § 103.121(b)(2)(i), within a reasonable period of time after the account is opened. Treasury and the Agencies considered proposing that a customer's identity be verified before an account is opened or within a specific time period after the account is opened. However, we recognize that such a position would be unduly burdensome for both banks and customers and therefore contrary to the plain language of the statute, which states that the procedures must be both reasonable and practicable. The amount of time it will take an institution to verify identity may depend upon the type of account opened, whether the customer is physically present when the account is opened, and the type of identifying information available. In addition, although an account may be opened, it is common practice among banks to place limits on the account, such as by restricting the number of transactions or the dollar value of transactions, until a customer's identity is verified. Therefore, the proposed regulation provides a bank with the flexibility to use a risk-based approach to determine how soon identity must be verified.<sup>6</sup>

**Section 103.121(b)(2)(ii)(A) Verification Through Documents.** The CIP must contain procedures describing when the bank will verify identity through documents and setting forth the documents that the bank will use for this purpose. For individuals, these documents may include: unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard. For corporations, partnerships, trusts, and other persons that are not individuals, these may be documents showing the existence of the entity, such as registered articles of incorporation, a government-issued business license, partnership agreement, or trust instrument.

**Section 103.121(b)(2)(ii)(B) Non-Documentary Verification.** The proposed regulation provides that a

<sup>5</sup> Last year, over 86,000 complaints were logged into the Identity Theft Complaint database established by the Federal Trade Commission (FTC). Forms of identity theft commonly reported included (1) credit card fraud, where one or more new credit cards were opened in the victim's name; (2) bank fraud, where a new bank account was opened in the victim's name; and (3) fraudulent loans, where a loan had been obtained in the victim's name. See Statement of J. Howard Beales, Director, Bureau of Consumer Protection, FTC, to the Senate Committee on the Judiciary, Subcommittee on Technology, March 20, 2002.

<sup>6</sup> It is possible that a bank would, however, violate other laws by permitting a customer to transact business prior to verifying the customer's identity. See, e.g., 31 CFR 500, prohibiting transactions involving designated foreign countries or their nationals.

bank's CIP also must contain procedures describing non-documentary methods the bank will use to verify identity and when these methods will be used in addition to, or instead of, relying on documents. For example, the procedures must address situations where an individual is unable to present an unexpired government-issued identification document that bears a photograph or similar safeguard; the bank is not familiar with the documents presented; the account is opened without obtaining documents; the account is not opened in a face-to-face transaction; and the type of account increases the risk that the bank will not be able to verify the true identity of the customer through documents.

Treasury and the Agencies believe that banks typically require documents to be presented when an account is opened face-to-face. Although customers usually satisfy these requirements by presenting government-issued identification documents bearing a photograph, such as a driver's license or passport, Treasury and the Agencies recognize that some customers legitimately may be unable to present those customary forms of identification when opening an account. For example, an elderly person may not have a valid driver's license or passport. Under these circumstances, Treasury and the Agencies expect that banks will provide products and services to those customers and verify their identities through other methods. Similarly, a bank may be unable to obtain original documents to verify a customer's identity when an account is opened by telephone, by mail, and over the Internet. Thus, when an account is opened for a customer who is not physically present, a bank will be permitted to use other methods of verification, to the extent set forth in the CIP.

While other verification methods must be used when a bank cannot examine original documents, Treasury and the Agencies also recognize that original identification documents, including those issued by a government entity, may be obtained illegally and may be fraudulent. In light of the recent increase in identity fraud, banks are encouraged to use other verification methods, even when a customer has provided original documents.

Obtaining sufficient information to verify a customer's identity can reduce the risk that a bank will be used as a conduit for money laundering and terrorist financing. The risk that the bank will not know the customer's true identity will be heightened for certain types of accounts, such as accounts

opened in the name of a corporation, partnership, or trust that is created or conducts substantial business in jurisdictions that have been designated by the United States as a primary money laundering concern or have been designated as non-cooperative by an international body. As a bank's identity verification procedures should be risk-based, they should identify types of accounts that pose a heightened risk, and prescribe additional measures to verify the identity of any person seeking to open an account and the signatory for such accounts.

The proposed regulation gives examples of other non-documentary verification methods that a bank may use in the situations described above. These methods could include contacting a customer after the account is opened; obtaining a financial statement; comparing the identifying information provided by the customer against fraud and bad check databases to determine whether any of the information is associated with known incidents of fraudulent behavior (negative verification); comparing the identifying information with information available from a trusted third party source, such as a credit report from a consumer reporting agency (positive verification); and checking references with other financial institutions. The bank also may wish to analyze whether there is logical consistency between the identifying information provided, such as the customer's name, street address, ZIP code, telephone number, date of birth, and social security number (logical verification).<sup>7</sup>

*Section 103.121(b)(2)(iii) Lack of Verification.* The proposed regulation also states that a bank's CIP must include procedures for responding to circumstances in which the bank cannot form a reasonable belief that it knows the true identity of a customer.

Generally, a bank should only maintain an account for a customer when it can form a reasonable belief that it knows the customer's true identity.<sup>8</sup> Thus, a bank should have procedures that specify the actions that it will take when it cannot form a reasonable belief that it knows the true identity of a customer, including when an account should not be opened. In addition, a bank's CIP should have procedures that

address the terms under which a customer may conduct transactions while a customer's identity is being verified. The procedures also should specify at what point, after attempts to verify a customer's identity have failed, a customer's account that has been opened should be closed. Finally, if a bank cannot form a reasonable belief that it knows the identity of a customer, the procedures should also include determining whether a Suspicious Activity Report should be filed in accordance with applicable law and regulation.

*Section 103.121(b)(3) Recordkeeping.* Section 326 of the Act requires reasonable procedures for maintaining records of the information used to verify a person's name, address, and other identifying information. The proposed regulation sets forth recordkeeping procedures that must be included in a bank's CIP. Under the proposal, a bank is required to maintain a record of the identifying information provided by the customer. Where a bank relies upon a document to verify identity, the bank must maintain a copy of the document that the bank relied on that clearly evidences the type of document and any identifying information it may contain.<sup>9</sup> The bank also must record the methods and result of any additional measures undertaken to verify the identity of the customer. Last, the bank must record the resolution of any discrepancy in the identifying information obtained. The bank must retain all of these records for five years after the date the account is closed.

Treasury and the Agencies emphasize that the collection and retention of information about a customer, such as an individual's race or sex, as an ancillary part of collecting identifying information do not relieve a bank from its obligations to comply with anti-discrimination laws or regulations, such as the prohibition in the Equal Credit Opportunity Act against discrimination in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, age, or other prohibited classifications.

Nothing in this proposed regulation modifies, limits or supersedes section 101 of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229, 114 Stat. 464 (15 U.S.C. 7001) (E-Sign Act). Thus, a bank may use electronic records to satisfy the requirements of this regulation, as long as the records are accurate and remain

<sup>7</sup> Treasury and the Agencies understand that most banks currently make use of technology that permits instantaneous negative, positive, and logical verification of identity.

<sup>8</sup> There are some exceptions to this basic rule. For example, a bank may maintain an account, at the direction of a law enforcement or intelligence agency, although the bank does not know the true identity of a customer.

<sup>9</sup> The bank need not keep a separate record of the identifying information provided by the customer if this information clearly appears on the copy of the document maintained by the bank.

accessible in accordance with 31 CFR 103.38(d).

*Section 103.121(b)(4) Comparison with Government Lists.* Section 326 of the Act also requires reasonable procedures for determining whether the customer appears on any list of known or suspected terrorists or terrorist organizations provided to the bank by any government agency. The proposed rule implements this requirement and clarifies that the requirement applies only with respect to lists circulated by the Federal government.

In addition, the proposed rule states that the procedures must ensure that the bank follows all Federal directives issued in connection with such lists. This provision makes clear that a bank must have procedures for responding to circumstances when the bank determines that a customer is named on a list.

*Section 103.121(b)(5) Customer Notice.* Section 326 of the Act states that customers of financial institutions shall be required to comply with the identity verification procedures described above "after being given adequate notice." Therefore, a bank's CIP must include procedures for providing bank customers with adequate notice that the bank is requesting information to verify their identity. A bank may satisfy the notice requirement by generally notifying its customers about the procedures the bank must comply with to verify their identities. For example, the bank may post a sign in its lobby or provide customers with any other form of written or oral notice. If an account is opened electronically, such as through an Internet website, the bank may also provide notice electronically.

*Section 103.121(c) Exemptions.* Section 326 states that the Secretary (and, in the case of section 4(k) institutions, the appropriate Federal functional regulator, as defined in section 103.120(a)(2)), may by regulation or order, exempt any financial institution or type of account from the requirements of this regulation in accordance with such standards and procedures as the Secretary may prescribe.

Under the proposed rule, the appropriate Federal functional regulator, with the concurrence of Treasury, may by order or regulation exempt any bank or type of account from the requirements of this section. In issuing such exemptions, the Federal functional regulator and the Treasury shall consider whether the exemption is consistent with the purposes of the Bank Secrecy Act, consistent with safe and sound banking, and in the public interest. The Federal functional

regulator and Treasury also may consider other necessary and appropriate factors.

*Section 103.121(d) Other Information Requirements Unaffected.* This section provides that nothing in section 103.121 shall be construed to relieve a bank of its obligations to obtain, verify, or maintain information in connection with an account or transaction that is required by another provision in part 103. For example, if an account is opened with a deposit of more than \$10,000 in cash, the bank opening the account must comply with the customer identification requirements in section 103.121, as well as with the provisions of section 103.22, which require that certain information concerning the transaction be reported by filing a Cash Transaction Report (CTR).

#### *B. Conforming Amendments to 31 CFR 103.34*

Current section 103.34(a) sets forth customer identification requirements when certain types of deposit accounts are opened. Generally, sections 103.34(a)(1) and (2) require a bank, within 30 days after certain deposit accounts are opened, to secure and maintain a record of the taxpayer identification number of the customer involved. If the bank is unable to obtain the taxpayer identification number within 30 days (or a longer time if the person has applied for a taxpayer identification number), it need take no further action under section 103.34 concerning the account if it maintains a list of the names, addresses, and account numbers of the persons for which it was unable to secure taxpayer identification numbers, and provides that information to the Secretary upon request. In the case of a non-resident alien, the bank is required to record the person's passport number or a description of some other government document used to determine identification. Treasury and the Agencies believe that the requirements of section 103.34(a)(1) and (2) are inconsistent with the intent and purpose of section 326 of the Act and incompatible with proposed section 103.121.

Section 103.34(a)(3) currently provides that a bank need not obtain a taxpayer identification number with respect to specified categories of persons<sup>10</sup> opening certain deposit

<sup>10</sup> The exemption applies to (i) agencies and instrumentalities of Federal, State, local, or foreign governments; (ii) judges, public officials, or clerks of courts of record as custodians of funds in controversy or under the control of the court; (iii) aliens who are ambassadors; ministers; career diplomatic or consular officers; naval, military, or

accounts. This proposed rule does not contain any exemptions from the CIP requirements.

Treasury and the Agencies are requesting comments on whether any of these exemptions should apply in the context of the proposed CIP requirements in light of the intent and purpose of section 326 of the Act.

Section 103.34(a)(4) provides that section 6109 of the Internal Revenue Code and the rules and regulations of the Internal Revenue Service (IRS) promulgated thereunder shall determine what constitutes a taxpayer identification number. This provision is continued in proposed section 103.121(a)(8). Section 103.34(a)(4) also provides that IRS rules shall determine whose number shall be obtained in the case of multiple account holders. Treasury and the Agencies believe that this provision is inconsistent with section 326 of the Act, which requires that banks verify the identity of "any" person seeking to open an account.

For these reasons, Treasury, under its own authority, is proposing to repeal section 103.34(a).

Section 103.34(b) sets forth certain recordkeeping requirements for banks. Among other things, section 103.34(b)(1) requires a bank to keep "any notations, if such are normally made, of specific identifying information verifying the identity of [a person with signature authority over an account] (such as a driver's license number or credit card number)." Treasury and the Agencies believe that the quoted language in section 103.34(b)(1) is inconsistent with the requirements of proposed section 103.121. For this reason, Treasury, under its own authority, is proposing to delete the quoted language.

#### *C. Technical Amendment to 31 CFR 103.11(j)*

Section 103.11(j), which defines the term "deposit account," contains an

other attaches of foreign embassies and legations; and members of their immediate families; (iv) aliens who are accredited representatives of certain international organizations, and their immediate families; (v) aliens temporarily residing in the United States for a period not to exceed 180 days; (vi) aliens not engaged in a trade or business in the United States who are attending a recognized college or university, or any training program supervised or conducted by an agency of the Federal Government; (vii) unincorporated subordinate units of a tax exempt central organization that are covered by a group exemption letter; (viii) a person under 18 years of age, with respect to an account opened at part of a school thrift savings program, provided the annual interest is less than \$10; (ix) a person opening a Christmas club, vacation club, or similar installment savings program, provided the annual interest is less than \$10; and (x) non-resident aliens who are not engaged in a trade or business in the United States.

obsolete reference to the definition of "transaction account," which is defined in section 103.11(hh). Under its own authority, Treasury is proposing to correct this reference.

### III. Request for Comments

Treasury and the Agencies invite comment on all aspects of this rulemaking, and specifically seek comment on the following issues:

1. Whether the proposed definition of "account" is appropriate and whether other examples of accounts should be added to the regulatory text.

2. How the proposed regulation should apply to various types of accounts that are designed to allow a customer to transact business immediately.

3. Whether the definition of "bank" in the proposed regulation should be amended with respect to the foreign branches of banks by (i) excluding foreign branches or (ii) clarifying that a foreign branch must comply only to the extent that the bank's program does not contravene applicable local law.

Treasury and the Agencies request that commenters cite and describe any potentially conflicting foreign laws that may apply to the foreign branches of banks.

Comment is requested on this issue because Treasury and the Agencies recognize that interpreting the BSA to apply to the foreign branch of a U.S. depository institution could cause practical and legal problems for that institution if the branch has a conflicting obligation under applicable local law. The regulation, if adopted as proposed, may place a foreign branch in a position of potentially violating local law by implementing aspects of its bank's CIP, which is described more fully in the Supplemental Information, above.

4. Ways that banks can comply with the requirement that a bank obtain both the address of an individual's residence, and, if different, the individual's mailing address in situations involving individuals who lack a permanent address.

5. Whether non-U.S. persons that are not individuals will be able to provide a bank with the identifying information required in section 103.121(b)(2)(i)(D)(2), or whether other categories of identifying information should be added to this section to permit non-U.S. persons that are not individuals to open accounts.

Commenters on this issue should suggest other means of identification that banks currently use or should use.

6. Whether the proposed regulation will subject banks to conflicting State

laws. Treasury and the Agencies request that commenters cite and describe any potentially conflicting State laws.

7. The extent to which the verification procedures required by the proposed regulation make use of information that banks currently obtain in the account opening process. Treasury and the Agencies note that the legislative history of section 326 indicates that Congress intended "the verification procedures prescribed by Treasury [to] make use of information currently obtained by most financial institutions in the account opening process." See H.R. Rep. No. 107-250, pt. 1, at 63 (2001).

8. Whether any of the exemptions from the customer identification requirements contained in current section 103.34(a)(3) should be continued in section 103.121(c). In this regard, Treasury and the Agencies request that commenters address the standards set forth in proposed section 103.121(c) (as well as any other appropriate factors).

### IV. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OCC, Board, FDIC, and OTS to use plain language in all proposed and final rules published after January 1, 2000. Therefore, these agencies specifically invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

### V. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" unless the agency certifies that the rule will not have a "significant economic

impact on a substantial number of small entities." 5 U.S.C. 603, 605(b).<sup>11</sup>

The Agencies have reviewed the impact of this proposed rule on small banks. Treasury and the Agencies certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The requirements of the proposed rule closely parallel the requirements for customer identification programs mandated by section 326 of the Act.

Moreover, Treasury and the Agencies believe that banks already have implemented prudential business practices and anti-money laundering programs that involve the key controls that would be required in a customer identification program in accordance with the proposed regulation. First, all banks already undertake extensive measures to verify the identity of their customers as a matter of good business practice. In addition, banks already must have anti-money laundering programs that include procedures for identification, verification, and documentation of customer information.<sup>12</sup>

Second, banks already should have compliance programs in place to check lists provided by the Federal government of known and suspected terrorists and terrorist organizations. Currently, banks are prohibited from engaging in transactions involving certain foreign countries or their nationals under rules issued by the Office of Foreign Assets Control (OFAC). See 31 CFR 500. Banks should already have compliance programs in place to ensure that they do not violate OFAC rules. Treasury and the Agencies understand that many banks, including small banks, have instituted programs to check other lists provided to them by the Federal government following the events of September 11, 2001. Treasury and the Agencies believe that all banks have access to a variety of resources, such as computer software packages, that enable them to check lists provided by the Federal government.

Third, Treasury and the Agencies believe the provision in the proposed rule that requires a bank to provide adequate notice to its customers that it is requesting information to verify their

<sup>11</sup> The RFA defines the term "small entity" in 5 U.S.C. 601 by reference to the definitions published by the Small Business Administration (SBA). The SBA has defined a "small entity" for banking purposes as a bank or savings institution with less than \$150 million in assets. See 13 CFR 121.201. The NCUA defines "small credit union" as those under \$1 million in assets. Interpretive Ruling and Policy Statement No. 87-2, Developing and Reviewing Government Regulations (52 FR 35231, September 18, 1987).

<sup>12</sup> See footnote 3.

identity will impose minimal costs on banks. Banks may elect to satisfy that requirement through a variety of low-cost measures, such as by posting a sign in the bank's lobby or providing any other form of written or oral notice.

The recordkeeping requirements similarly may impose some costs on banks, if, for example, some of the information that must be maintained as a consequence of implementing customer identification programs is not already retained. Treasury and the Agencies believe that the compliance burden, if any, is minimized for banks, including small banks, because the proposed regulation vests a bank with the discretion to design and implement appropriate recordkeeping procedures, including allowing banks to maintain electronic records in lieu of (or in combination with) paper records.

Finally, Treasury and the Agencies believe that the flexibility incorporated into the proposed rule will permit each bank to tailor its CIP to fit its own size and needs. In this regard, Treasury and the Agencies believe that expenditures associated with establishing and implementing a CIP will be commensurate with the size of a bank. If a bank is small, the burden to comply with the proposed rule should be *de minimis*.

## VI. Paperwork Reduction Act

The proposed rule contains recordkeeping and disclosure requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). In summary, the proposed rule requires banks to implement reasonable procedures to (1) maintain records of the information used to verify the person's identity and (2) provide notice of these procedures to customers. These recordkeeping and disclosure requirements are required under section 326 of the Act.

The proposed rule applies only to a financial institution that is a "bank" as defined in 31 CFR 103.11(c),<sup>13</sup> and any foreign branch of an insured bank. The proposed rule requires each bank to establish a written CIP that must include recordkeeping procedures (proposed section 103.121(b)(3)) and procedures for providing customers with notice that the bank is requesting information to verify their identity (proposed section 103.121(b)(5)).

The proposed rule requires a bank to maintain a record of (1) the identifying information provided by the customer, the type of identification document(s) reviewed, if any, the identification

number of the document(s), and a copy of the identification document(s); (2) the means and results of any additional measures undertaken to verify the identity of the customer; and (3) the resolution of any discrepancy in the identifying information obtained. These records must be maintained at the bank for five years after the date the account is closed (proposed section 103.121(b)(3)). Treasury and the Agencies believe that little burden is associated with the recordkeeping requirements outlined in proposed section 103.121(b)(2), because such recordkeeping is a usual and customary business practice. In addition, banks already must keep similar records to comply with existing regulations in 31 CFR part 103 (*see, e.g.*, 31 CFR 103.34, requiring certain records for each deposit or share account opened).

The proposed rule also requires banks to give customers "adequate notice" of the identity verification procedures (proposed section 103.121(b)(5)). A bank may satisfy the notice requirement by posting a sign in the lobby or providing customers with any other form of written or oral notice. If the account is opened electronically, the bank may provide the notice electronically. Treasury and the Agencies believe that nominal burden is associated with the disclosure requirement outlined in proposed section 103.121(b)(5). This section requires a bank to notify its customers about the procedures the bank has implemented to verify their identities. However, a bank may choose among a variety of methods of providing adequate notice and may select the least burdensome method, given the circumstances under which customers seek to open new accounts.

A person is not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The collection of information requirements contained in the proposed rule have been submitted to the OMB by Treasury in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

The institutions subject to these requirements include national banks and Federal branches and agencies (OCC financial institutions); state member banks and branches and agencies of foreign banks (Board financial institutions); insured state nonmember banks (FDIC financial institutions); savings associations (OTS financial institutions); and federally insured credit unions (NCUA financial institutions).

*Estimated number of OCC financial institutions: 2,289.*

*Estimated number of Board financial institutions: 1,188.*

*Estimated number of FDIC financial institutions: 5,500.*

*Estimated number of OTS financial institutions: 1,020.*

*Estimated number of NCUA financial institution: 9,944.*

*Estimated average annual burden for the recordkeeping requirements of the proposed rule per each financial institution respondent: 10 hours.*

*Estimated average annual burden for the disclosure requirements of the proposed rule per each financial institution respondent: 1 hour.*

*Estimated total annual recordkeeping and disclosure burden: 219,351 hours.*

Treasury and the Agencies request public comment on all aspects of the recordkeeping and disclosure requirements contained in this proposed rule, including how burdensome it would be for banks to comply with these requirements. Also, Treasury and the Agencies request comment on whether the banks are currently maintaining the records requested in proposed section 103.121(b)(2). Treasury and the Agencies also invite comment on:

(1) Whether the collections of information contained in the notice of proposed rulemaking are necessary for the proper performance of each agency's functions, including whether the information has practical utility;

(2) The accuracy of each agency's estimate of the burden of the proposed information collections;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the information collections on respondents, including the use of automated collection techniques or other forms of information technology; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of services to provide information.

Comments concerning the recordkeeping and disclosure requirements in the proposed rule should be sent (preferably by fax (202-395-6974)) to Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 (or by the Internet to [jlackeyj@omb.eop.gov](mailto:jlackeyj@omb.eop.gov)), with a copy to FinCEN by mail or the Internet at the addresses previously specified.

<sup>13</sup> This definition includes banks, thrifts, and credit unions.

## VII. Executive Order 12866

Treasury, the OCC, and OTS have determined that this proposal is not a "significant regulatory action" under Executive Order 12866. The rule follows closely the requirements of section 326 of the Act.

Treasury, the OCC, and OTS believe that national banks and savings associations already have procedures in place that fulfill most of the requirements of the proposed regulation. First, the procedures are a matter of good business practice. Second, national banks and savings associations already are required to have BSA compliance programs that address many of the requirements detailed in this notice of proposed rulemaking. Third, banks and savings associations should already have compliance programs in place to ensure they comply with OFAC rules prohibiting transactions with certain foreign countries or their nationals.

Treasury, the OCC, and OTS invite national banks, the thrift industry, and the public to provide any cost estimates and related data that they think would be useful in evaluating the overall costs of the rule.

For these reasons, and for the reasons discussed elsewhere in this preamble, Treasury, the OCC, and OTS believe that the burden stemming from this rulemaking will not cause the proposed rule to be a "significant regulatory action."

### Lists of Subjects in 31 CFR Part 103

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

### Authority and Issuance

For the reasons set forth in the preamble, part 103 of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

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

1. The authority citation for part 103 is revised to read as follows:

**Authority:** 12 U.S.C. 1786(q), 1818, 1829b and 1951–1959; 31 U.S.C. 5311–5332; title III, secs. 312, 313, 314, 319, 326, 352, Pub L. 107–56, 115 Stat. 307.

2. Section 103.11(j) is amended by removing "paragraph (q)" and adding "paragraph (hh)".

3. Section 103.34 is amended as follows:

- a. By removing paragraph (a);
- b. By redesignating paragraph (b) introductory text and paragraphs (b)(1) through (b)(13) as introductory text and paragraphs (a) through (m), respectively.
- c. In newly redesignated introductory text, by removing ", in addition," in the first sentence; and
- d. In newly redesignated paragraph (a), by removing ", including any notations, if such are normally made, of specific identifying information verifying the identity of the signer (such as a driver's license number or credit card number)".

4. Subpart I of part 103 is amended by adding new § 103.121 to read as follows:

#### § 103.121 Customer Identification Programs for banks, savings associations, and credit unions.

(a) *Definitions.* For purposes of this section:

(1) *Account* means each formal banking or business relationship established to provide ongoing services, dealings, or other financial transactions. For example, a deposit account, a transaction or asset account, and a credit account or other extension of credit would each constitute an account.

(2) *Bank* means a bank, as that term is defined in § 103.11(c), that is subject to regulation by a Federal functional regulator, and any foreign branch of an insured bank.

(3) *Customer* means:

(i) Any person seeking to open a new account; and

(ii) Any signatory on the account at the time the account is opened, and any new signatory added thereafter.

(4) *Federal functional regulator* has the same meaning as provided in § 103.120(a)(2).

(5) *Person* has the same meaning as provided in § 103.11(z).

(6) *U.S. person* means:

(i) A U.S. citizen; or

(ii) A corporation, partnership, trust, or person (other than an individual) that is established or organized under the laws of a State or the United States.

(7) *Non-U.S. person* means a person that is not a *U.S. person*.

(8) *Taxpayer identification number.* The provisions of section 6109 of the Internal Revenue Code of 1986 (26 U.S.C. 6109) and the regulations of the Internal Revenue Service promulgated thereunder shall determine what constitutes a taxpayer identification number.

(b) *Customer Identification Program: minimum requirements.* (1) *In general.* A bank must implement a written Customer Identification Program

(Program) that, at a minimum, includes each of the components of this section. The Program should be tailored to the bank's size, location and type of business. The bank's board of directors or a committee of the board must approve the Program. The Program must be a part of the bank's anti-money laundering program required under the regulations implementing 31 U.S.C. 5318(h), 12 U.S.C. 1818(s), and 12 U.S.C. 1786(q)(1).

(2) *Identity verification procedures.*

The Program must include procedures for verifying the identity of each customer, to the extent reasonable and practicable. The procedures must be based on the bank's assessment of the risks presented by the various types of accounts maintained by the bank, the various methods of opening accounts provided by the bank, and the type of identifying information available, and must enable the bank to form a reasonable belief that it knows the true identity of the customer.

(i) *Information required.* (A) *In general.* The Program must contain procedures that specify the identifying information that the bank must obtain from each customer. Except as permitted by paragraph (b)(2)(i)(B) of this section, at a minimum, a bank must obtain the following information prior to opening or adding a signatory to an account:

(1) Name;

(2) For individuals, date of birth;

(3) (i) For individuals, residence and, if different, mailing address; or

(ii) For persons other than individuals, such as corporations, partnerships, and trusts: principal place of business and, if different, mailing address;

(4) (i) For U.S. persons, a U.S. taxpayer identification number (e.g., social security number, individual taxpayer identification number, or employer identification number); or

(ii) For non-U.S. persons, one or more of the following: a U.S. taxpayer identification number; passport number and country of issuance; alien identification card number; or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

(B) *Limited exception.* The Program may permit the bank to open or add a signatory to an account for a person other than an individual (such as a corporation, partnership, or trust) that has applied for, but has not received, an employer identification number. However, in such a case, the bank must obtain a copy of the application before

it opens or adds a signatory to the account and obtain the employer identification number within a reasonable period of time after it opens or adds a signatory to the account.

(ii) *Verification.* The Program must contain risk-based procedures for verifying the information obtained pursuant to paragraph (b)(2)(i)(A) of this section within a reasonable time after the account is established or a signatory is added to the account. A bank need not verify the information about an existing customer seeking to open a new account or who becomes a signatory on an account, if the bank previously verified the customer's identity in accordance with procedures consistent with this section, and continues to have a reasonable belief that it knows the true identity of the customer.

(A) *Verification through documents.* The Customer Identification Program must contain procedures describing when the bank will verify identity through documents and setting forth the documents that the bank will use for this purpose. These documents may include:

(1) For individuals: unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard; and

(2) For corporations, partnerships, trusts and persons other than individuals: documents showing the existence of the entity, such as registered articles of incorporation, a government-issued business license, partnership agreement, or trust instrument.

(B) *Non-documentary verification methods.* The Program must contain procedures that describe non-documentary methods the bank will use to verify identity and when these methods will be used in addition to, or instead of, relying on documents. These procedures must address situations where an individual is unable to present an unexpired government-issued identification document that bears a photograph or similar safeguard; the bank is not familiar with the documents presented; the account is opened without obtaining documents; the account is not opened in a face-to-face transaction; and the type of account increases the risk that the bank will not be able to verify the true identity of the customer through documents. Other verification methods may include contacting a customer; independently verifying documentary information through credit bureaus, public databases, or other sources; checking references with other financial

institutions; and obtaining a financial statement.

(iii) *Lack of verification.* The Program must include procedures for responding to circumstances in which the bank cannot form a reasonable belief that it knows the true identity of a customer.

(3) *Recordkeeping.* (i) The Program must include procedures for maintaining a record of all information obtained under the procedures implementing paragraph (b)(1) of this section. The record must include:

(A) All identifying information provided by a customer pursuant to paragraphs (b)(2)(i)(A) and (B) of this section;

(B) A copy of any document that was relied on pursuant to paragraph (b)(2)(ii)(A) of this section that clearly evidences the type of document and any identification number it may contain;

(C) The methods and result of any measures undertaken to verify the identity of the customer pursuant to paragraph (b)(2)(ii)(B) of this section; and

(D) The resolution of any discrepancy in the identifying information obtained.

(ii) The bank must retain all records for five years after the date the account is closed.

(4) *Comparison with government lists.* The Program must include procedures for determining whether the customer appears on any list of known or suspected terrorists or terrorist organizations provided to the bank by any federal government agency. The procedures must also ensure that the bank follows all federal directives issued in connection with such lists.

(5) *Customer notice.* The Program must include procedures for providing bank customers with adequate notice that the bank is requesting information to verify their identity.

(c) *Exemptions.* The appropriate Federal functional regulator with the concurrence of the Secretary, may by order or regulation, exempt any bank or type of account from the requirements of this section. In issuing such exemptions, the Federal functional regulator and the Secretary shall consider whether the exemption is consistent with the purposes of the Bank Secrecy Act and with safe and sound banking, and is in the public interest. The Federal functional regulator and the Secretary also may consider other appropriate factors.

(d) *Other information requirements unaffected.* Nothing in this section shall be construed to relieve a bank of its obligation to comply with any other provision in this part concerning information that must be obtained,

verified, or maintained in connection with any account or transaction.

Dated: July 15, 2002.

**James F. Sloan,**

*Director, Financial Crimes Enforcement Network.*

Dated: July 2, 2002.

**John D. Hawke, Jr.,**

*Comptroller of the Currency.*

By order of the Board of Governors of the Federal Reserve System, July 10, 2002.

**Jennifer J. Johnson,**

*Secretary of the Board.*

By order of the Board of Directors of the Federal Deposit Insurance Corporation this 3rd day of July, 2002.

**Valerie J. Best,**

*Assistant Executive Secretary.*

Dated: July 5, 2002. In concurrence, by the Office of Thrift Supervision.

**James E. Gilleran,**

*Director.*

Dated: July 3, 2002.

**Becky Baker,**

*Secretary of the Board, National Credit Union Administration.*

[FR Doc. 02-18191 Filed 7-22-02; 8:45 am]

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

RIN 1506-AA31

#### **Financial Crimes Enforcement Network; Customer Identification Programs for Certain Banks (Credit Unions, Private Banks and Trust Companies) That Do Not Have a Federal Functional Regulator**

**AGENCIES:** The Financial Crimes Enforcement Network, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FinCEN is issuing a proposed regulation to implement section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (the Act) for credit unions and trust companies that do not have a federal functional regulator. The proposed rule provides the same rules for these financial institutions as are provided in a companion notice of proposed rulemaking being issued jointly by FinCEN and the Federal bank regulators published elsewhere in this separate part of this issue of the **Federal Register**.

**DATES:** Written comments on the proposed rule may be submitted on or before September 6, 2002.

**ADDRESSES:** Because paper mail in the Washington area may be subject to

**DEPARTMENT OF THE TREASURY****31 CFR Part 103**

RIN 1506-AA29

**Financial Crimes Enforcement Network; Anti-Money Laundering Programs; Special Due Diligence Programs for Certain Foreign Accounts****AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.**ACTION:** Interim final rule.

**SUMMARY:** Treasury and FinCEN are issuing an interim final rule temporarily deferring for certain financial institutions (as defined in the Bank Secrecy Act) the application of the requirements contained in section 5318(i) of title 31, United States Code, added by section 312 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001 (the Act). Section 5318(i) requires U.S. financial institutions to establish due diligence policies, procedures, and controls reasonably designed to detect and report money laundering through correspondent accounts and private banking accounts that U.S. financial institutions establish or maintain for non-U.S. persons. Section 312 takes effect on July 23, 2002, whether or not Treasury has issued a final rule implementing that provision. Additionally, this interim final rule provides guidance, pending issuance of a final rule, to those financial institutions for which compliance with section 5318(i) has not been deferred.

**DATES:** This interim final rule is effective July 23, 2002. Written comments may be submitted on or before August 22, 2002.

**ADDRESSES:** Submit comments (preferably an original and four copies) to FinCEN, P.O. Box 39, Vienna, VA 22183, Attn: Section 312 Interim Regulations. Comments may also be submitted by electronic mail to [regcomments@fincen.treas.gov](mailto:regcomments@fincen.treas.gov) with the caption in the body of the text, "Attention: Section 312 Interim Regulations." Comments may be inspected at FinCEN between 10 a.m. and 4 p.m. in the FinCEN Reading Room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354-6400 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:** Office of the Assistant General Counsel for Banking & Finance (Treasury), (202) 622-0480; the Office of the Assistant

General Counsel for Enforcement (Treasury), (202) 622-1927; or the Office of the Chief Counsel (FinCEN), (703) 905-3590 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** Treasury and FinCEN are exercising the authority under 31 U.S.C. 5318(a)(6) to temporarily defer the application of 31 U.S.C. 5318(i) to certain financial institutions pending issuance by Treasury and FinCEN of a final rule outlining the scope of coverage, duties, and obligations under that provision. Additionally, for those financial institutions for which compliance with section 5318(i) has not been deferred entirely, interim guidance is provided for compliance with the statute pending issuance of a final rule. Although this interim final rule and the guidance contained herein may be relied upon by financial institutions until superseded by a final regulation or subsequent guidance, no inference may be drawn from this rule concerning the scope and substance of the final regulation that Treasury will issue concerning section 5318(i).

**I. Background**

Section 312 of the Act adds new subsection (i) to 31 U.S.C. 5318, the Bank Secrecy Act (BSA). This provision requires each U.S. financial institution that establishes, maintains, administers, or manages a private banking account or a correspondent account in the United States for a non-U.S. person to take certain anti-money laundering measures with respect to such accounts. In particular, financial institutions must establish appropriate, specific, and, where necessary, enhanced, due diligence policies, procedures and controls that are reasonably designed to enable the financial institution to detect and report instances of money laundering through those accounts.

In addition to this general requirement, which applies to all correspondent and private banking accounts for non-U.S. persons, section 312 of the Act specifies additional standards for correspondent accounts maintained for certain foreign banks. For a correspondent account maintained for a foreign bank operating under an offshore license or a license granted by a jurisdiction designated as being of concern for money laundering, a financial institution must take reasonable steps to identify the owners of the foreign bank, to conduct enhanced scrutiny of the correspondent account to guard against money laundering, and to ascertain whether the foreign bank provides correspondent accounts to other foreign banks and, if

so, to conduct appropriate related due diligence.

Section 312 also sets forth minimum standards for the due diligence requirements for a private banking account for a non-U.S. person. Specifically, a financial institution must take reasonable steps to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, the private banking account, as necessary to guard against money laundering. The institution must also conduct enhanced scrutiny of private banking accounts requested or maintained by or on behalf of senior foreign political figures (or their family members or close associates). Enhanced scrutiny must be reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

Section 312(b)(2) provides that subsection 5318(i) takes effect on July 23, 2002, regardless of whether Treasury has issued a final rule by that date. Furthermore, it indicates that subsection 5318(i) applies to all accounts, regardless of when they were opened.

**1. The Proposed Rule**

On May 30, 2002, Treasury and FinCEN published in the **Federal Register** a proposed rule implementing section 312. See 67 FR 37,736 (May 30, 2002). In that proposed rule, Treasury sought to take the broad statutory mandate of section 312 and translate it into specific regulatory directives for financial institutions to apply. Like the statute itself, the rule proposed by Treasury is far reaching, seeking to require a wide range of U.S. financial institutions<sup>1</sup> to apply due diligence and enhanced due diligence procedures to a diverse array of foreign financial institutions<sup>2</sup> that maintain "correspondent accounts" or "private

<sup>1</sup> Treasury proposed that the following financial institutions would be covered by the regulation: An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h))); a commercial bank; an agency or branch of a foreign bank in the United States; a federally insured credit union; a thrift institution; a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*); a broker or dealer registered, or required to register, with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); a futures commission merchant registered, or required to register, under, and an introducing broker as defined in § 1a23 of, the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); a casino (as defined in § 103.11(n)(5)); a mutual fund (as defined in § 103.130); a money services business (as defined in § 103.11(uu)); and an operator of a credit card system (as defined in § 103.135).

<sup>2</sup> Foreign financial institutions include foreign banks and any other foreign person that, if organized in the United States, would be required to establish an anti-money laundering program pursuant to §§ 103.120 through 103.169 of this part.

banking accounts" in the U.S. The proposed rule sets forth a series of due diligence procedures that financial institutions covered by the rule may, and in many cases must, apply to correspondent accounts and private banking accounts. Because section 5318(i) takes effect on July 23, 2002, regardless of whether Treasury has issued a final implementing regulation, Treasury imposed a 30-day period in which public comments on the proposed rule would be accepted.

## 2. The Final Rule

A final rule implementing section 312 cannot reasonably be completed by the statutory effective date of July 23, 2002. Without question, the proposed rule implementing section 312 is the furthest reaching proposed regulation issued under Title III of the Act thus far. The requirements placed on financial institutions under this provision are significant, and commenters have raised substantial and important concerns about the scope of the regulation as well as the major definitions applicable to this section. For example, commenters consistently noted that the definitions of "correspondent account," "covered financial institution," and "foreign financial institution," were overly broad and difficult to implement. Likewise, commenters expressed concerns regarding the definition of "senior foreign political figure." Moreover, the statute does not define many important terms with respect to financial institutions other than banks, leaving the task for Treasury and FinCEN. Additional time is necessary to consider carefully these definitions and the text of the proposed rule in light of comments received to determine whether these terms should be further defined with respect to each financial institution.

Treasury anticipates issuing a final rule no later than October 25, 2002.

## 3. Deferral of Application to Certain Financial Institutions

Although section 312 is self-executing, in the absence of a final rule, many classes of financial institutions, in particular, non-bank financial institutions, would not have clear notice of, or guidance regarding, their compliance obligations. More pointedly, without regulations defining key terms for financial institutions other than banks, these financial institutions would not have sufficient guidance to comply with all facets of section 312. This situation necessarily stems from the fact that the statute seeks to cover a diverse universe of financial institutions and seeks to address a multitude of

issues arising from the panoply of financial relationships that can exist with various foreign financial institutions. Treasury's role in this process is to draft a regulation, after obtaining public comment, that provides clear and unequivocal direction to financial institutions covered by the provision. Without clarifying appropriate terms for the various industries, enforcement of section 5318(i) against the full range of financial institutions proposed to be covered by section 312 will be difficult. Therefore, deferral is necessary and appropriate.

Nor would it be appropriate for Treasury to insist on compliance with the terms of the proposed rule pending the completion of a final rule. We are still reviewing and analyzing the comments received and formulating the terms and scope of the final rule. Were Treasury to require strict compliance with the proposed rule, not only would it undermine the administrative process, but also it might require financial institutions to incur substantial costs to comply with provisions of the proposed rule that may be altered or eliminated.<sup>3</sup> Without suggesting that such changes will be made, such a result is untenable.

Accordingly, invoking the authority under section 5318(a)(6) of the BSA, this interim final rule defers the application of all provisions of section 5318(i) to financial institutions other than banks, securities brokers and dealers, futures commission merchants, and introducing brokers.<sup>4</sup> Banks must comply with all provisions of section 5318(i). Securities brokers and dealers, futures commission merchants, and introducing brokers must comply with the provisions of section 5318(i) relating to due diligence and enhanced due diligence for "private banking accounts," but they are exempted from provisions related to correspondent accounts. The reason for this distinction is a practical one—the Act does not define a "correspondent account" for financial institutions other than banks, and Treasury needs time to consider whether the definition in the proposed rule is appropriate. In contrast, the definition of a private banking account in section 5318(i) is not limited to banks and is both applicable and commonly understood with the securities and futures industries. Moreover, to the extent these financial institutions offer this type of account,

<sup>3</sup> *Cf. CFTC v. Schor*, 478 U.S. 833, 845 (1986) (noting the important distinction between a proposed rule and a final rule drafted based on a review of public comment).

<sup>4</sup> "Introducing brokers" refers to those registered, or required to register, with the Commodity Futures Trading Commission.

the risks of money laundering are similar to the risks posed by banks offering such accounts. As a result, they will be required to comply with the provisions of section 5318(i) regarding private banking accounts pending Treasury's issuance of a final rule, consistent with the guidance set forth below.

In summary:

- Banks must comply with section 5318(i) pending Treasury's issuance of a final rule. For the purposes of this interim final rule, these include: An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));<sup>5</sup> a commercial bank; an agency or branch of a foreign bank in the United States; a federally insured credit union; a thrift institution; and a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*).<sup>6</sup>

- Securities brokers and dealers registered, or required to register, with the Securities and Exchange Commission (SEC), and futures commission merchants and introducing brokers registered, or required to register, with the Commodity Futures Trading Commission (CFTC) must comply with provisions relating to private banking accounts, but their compliance with the remaining provisions of section 5318(i) is deferred.

- Financial institutions subject to deferment of all obligations under section 5318(i) include: Casinos; money services businesses; mutual funds; operators of credit card systems; and all remaining financial institutions defined in the BSA that are not banks, securities brokers and dealers, futures commission merchants, or introducing brokers.<sup>7</sup>

<sup>5</sup> This group of covered entities was drawn from the list of "covered financial institutions" in the proposed rule. Treasury is evaluating whether to add uninsured national trust banks to this list at the final rule stage as these entities are currently required to have anti-money laundering programs. See 12 CFR 21.21. Treasury also will consider whether non-federally regulated, state chartered, uninsured trust companies and trust banks, and non-federally insured credit unions should be added to the list to the extent that they maintain correspondent or private banking accounts for non-U.S. persons.

<sup>6</sup> For purposes of complying with section 5318(i) pending Treasury's issuance of a final rule, foreign branches of insured banks are deemed to be foreign banks rather than covered financial institutions.

<sup>7</sup> The remaining financial institutions include: dealers in precious metals, stones, or jewels; pawnbrokers; loan or finance companies; private bankers; trust companies; state chartered credit unions that are not federally regulated; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; investment companies; commodity pool operators; and commodity trading advisors.

## II. Compliance Obligations Pending Publication of the Final Rule

Under the Act, Treasury is authorized to interpret and administer section 312. This interim final rule provides guidance to those financial institutions for which the application of section 5318(i) has not been deferred. Pending issuance of a final rule, Treasury expects compliance with section 5318(i) as set forth below. Treasury does not expect compliance with the terms and conditions of the proposed rule except to the extent they coincide with the express requirements of the statute. However, the interim compliance measures set forth in this guidance should not be construed as an indication of the obligations that will be imposed by the final rule.

### 1. Due Diligence for Correspondent Accounts—Banks Only

With respect to correspondent accounts, section 5318(i)(1) requires U.S. financial institutions to establish due diligence policies, procedures, and controls reasonably designed to detect and report money laundering through correspondent accounts established, maintained, administered, or managed in the United States for a foreign financial institution. In the interim period before the issuance of a final rule, a due diligence program under section 5318(i)(1) will be reasonable in Treasury's view if it focuses compliance efforts on the correspondent accounts that pose a high risk of money laundering based on an overall assessment of the money laundering risks posed by the foreign correspondent institution. It is the expectation of Treasury that a bank will accord priority to conducting due diligence on high-risk foreign banks for which it maintains correspondent deposit accounts or their equivalents, and will focus foremost on correspondent accounts used to provide services to third parties. Treasury also expects banks to give priority to conducting due diligence on high-risk correspondent accounts maintained for foreign financial institutions other than foreign banks, such as money transmitters. In all cases, Treasury expects that a bank will accord priority in applying due diligence to accounts opened on or after July 23, 2002.

Treasury acknowledges that, as a practical matter, banks will be unable to craft and implement final comprehensive due diligence policies and procedures pursuant to the dictates of section 5318(i)(1) until Treasury issues a final rule. However, in the interim, a reasonable due diligence policy, in Treasury's view, is one that

comports with existing best practices standards for banks that maintain correspondent accounts for foreign banks,<sup>8</sup> and evidences good faith efforts to incorporate due diligence procedures for correspondent accounts maintained for foreign financial institutions posing an increased risk of money laundering.

### 2. Enhanced Due Diligence for High Risk Foreign Banks—Banks Only

Section 5318(i)(2) requires U.S. financial institutions to establish enhanced due diligence policies and procedures applicable when opening or maintaining a correspondent account in the United States for certain foreign banks designated as high risk. Sections 5318(i)(2)(B)(i) through (iii) further specify requirements that must be incorporated into a financial institution's enhanced due diligence policies and procedures.

An enhanced due diligence program will be reasonable under section 5318(i)(2)(B), in Treasury's view, if first, it comports with existing best practice standards for banks that maintain correspondent accounts for foreign banks.<sup>9</sup> Second, the program must also focus enhanced due diligence measures on those correspondent accounts that are maintained by a foreign correspondent bank deemed high risk by section 5318(i)(2)(A) posing a particularly high risk of money laundering based on the bank's overall assessment of the risk posed by the foreign correspondent bank. As with the previous provision, it is the expectation of Treasury that a bank will accord priority in applying enhanced due diligence to accounts opened on or after July 23, 2002.

Within these priorities, as required by the statute, banks must take reasonable steps to comply with directives described in sections 5318(i)(2)(B)(i) through (iii). For purposes of section 5318(i)(2)(B)(i), an owner is deemed to be any person who directly or indirectly owns, controls, or has voting power over 5 percent or more of any class of securities of a foreign bank, the shares of which are not publicly traded.

<sup>8</sup> See, e.g., New York Clearing House Association, L.L.C., "Guidelines for Counter Money Laundering Policies and Procedures in Correspondent Banking," (March 2002) at [www.nych.org](http://www.nych.org); Basel Committee on Banking Supervision, "Customer Due Diligence for Banks" (October 2001) at [www.bis.org](http://www.bis.org). A due diligence program that does not adopt all of the best practices and standards described in industry and other available guidance also could be considered reasonable if there is a justifiable basis for not adopting a particular best practice or standard, based on the particular type of accounts held by the institution.

<sup>9</sup> See *supra* note 7.

### 3. Due Diligence for Private Banking Accounts—Banks, Securities Brokers and Dealers, Futures Commission Merchants, and Introducing Brokers

Sections 5318(i)(1) and (3) set forth due diligence requirements for U.S. financial institutions that maintain private banking accounts in the United States for non-U.S. persons.<sup>10</sup> Under the Act, a private banking account is an account (or any combination of accounts) that requires minimum aggregate deposits of at least \$1 million, that is established for one or more individuals, and that is assigned to or administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as liaison between the financial institution and the direct or beneficial owner of the account. Section 5318(i)(3)(A) requires financial institutions, as needed to guard against money laundering, to take reasonable steps to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account. Additionally, the statute requires enhanced scrutiny of private banking accounts maintained by or on behalf of senior foreign political figures, an immediate family member, or close associate, to guard against laundering the proceeds of foreign corruption.

As with the requirements for correspondent accounts, a private banking due diligence program under sections 5318(i)(1) and (3) must be reasonably designed to detect and report money laundering and the existence of the proceeds of foreign corruption. Treasury believes that a due diligence private banking program would be reasonable, pending adoption of final regulations to implement section 5318(i), if the program is focused on those private banking accounts that present a high risk of money laundering. A program that is consistent with applicable government guidance on private banking accounts, such as the guidance on sound practices for private banking issued by the Federal Reserve (SR 97-19 (SUP) "Private Banking Activities" (June 30, 1997) at [www.federalreserve.gov](http://www.federalreserve.gov)) and the guidance on enhanced scrutiny for transactions that may involve the proceeds of foreign corruption issued jointly by Treasury, the bank regulators, and the State Department in January 2001 (at <http://www.treas.gov/press/releases/docs/guidance.htm>) would be reasonable, so long as it incorporates the

<sup>10</sup> For purposes of this interim final rule, a non-U.S. person means an individual who is neither a United States citizen nor a lawful permanent resident as defined in 26 U.S.C. 7701(b)(6).

requirements of section 5318(i)(3).<sup>11</sup> Treasury expects that an institution will accord priority in applying enhanced due diligence to accounts opened on or after July 23, 2002.

### III. Analysis of the Interim Final Rule

#### A. Banks, Savings Associations, and Credit Unions—Section 103.181

The following financial institutions are not subject to the deferral contained in this interim final rule and must take steps, in light of the guidance provided above, to comply with the requirements of section 5318(i) pending issuance of a final implementing regulation: An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h))); a commercial bank; an agency or branch of a foreign bank in the United States; a federally insured credit union; a thrift institution; and a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*).

#### B. Securities Brokers and Dealers, Futures Commission Merchants, and Introducing Brokers—Section 103.182

Securities brokers and dealers registered, or required to register, with the SEC, and futures commission merchants and introducing brokers registered, or required to register, with the CFTC under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) are subject to the requirements of section 5318(i) relating to due diligence and enhanced due diligence relating to private banking accounts. They must take steps, in light of the guidance provided above, to comply with the requirements of section 5318(i) relating to private banking accounts pending issuance of a final implementing regulation. Treasury and FinCEN are exercising the authority under BSA section 5318(a)(6) to temporarily defer the application of all other requirements contained in section 5318(i) for securities brokers and dealers, futures commission merchants, and introducing brokers.

#### C. All Other BSA Financial Institutions—Section 103.183

Treasury and FinCEN are exercising the authority under BSA section 5318(a)(6) to temporarily defer the application of all requirements

contained in section 5318(i) for all other financial institutions. This temporary deferral applies to casinos; money services businesses; mutual funds; operators of credit card systems; dealers in precious metals, stones, or jewels; pawnbrokers; loan or finance companies; private bankers;<sup>12</sup> trust companies; state chartered credit unions that are not federally insured; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; investment companies; commodity pool operators; and commodity trading advisors.

This temporary deferral does not in any way relieve any financial institution from compliance with the existing anti-money laundering and anti-terrorism requirements imposed by law, regulation, or rule of a self-regulatory organization. Quite to the contrary, the obligations contemplated by section 312 will serve to augment and improve the existing anti-money laundering activities of financial institutions. To that end, Treasury and FinCEN expect financial institutions proposed to be subject to the regulation implementing section 312 to begin immediately the process of evaluating their due diligence procedures when correspondent accounts or private banking accounts are opened or maintained on behalf of non-U.S. persons.

### IV. Administrative Procedure Act

The provisions of 31 U.S.C. 5318(i), requiring due diligence programs for certain foreign accounts, become effective July 23, 2002. This interim rule exempts certain financial institutions from these requirements and provides interim compliance guidance for those financial institutions not exempted. Accordingly, good cause is found to dispense with notice and public procedure as unnecessary and contrary to the public interest, pursuant to 5 U.S.C. 553(b)(B), and to make the provisions of the interim rule effective in less than 30 days pursuant to 5 U.S.C. 553(d)(1) and (3).

### V. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this interim final rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

<sup>12</sup> A private banker under the BSA refers to state chartered banking entities that are not organized as a corporation. Generally, such entities are organized as partnerships. A private banker does not refer to those who offer private banking accounts.

### VI. Executive Order 12866

This interim final rule is not a “significant regulatory action” as defined in Executive Order 12866. Accordingly, a regulatory assessment is not required.

#### List of Subjects in 31 CFR Part 103

Banks, Banking, Brokers, Counter money laundering, Counter-terrorism, Currency, Foreign banking, Reporting and recordkeeping requirements.

#### Authority and Issuance

For the reasons set forth in the preamble, 31 CFR part 103 is amended as follows:

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

1. The authority citation for part 103 is revised to read as follows:

**Authority:** 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5332; title III, secs. 312, 314, 352, Pub. L. 107–56, 115 Stat. 307.

2. Add new undesignated centerheading “Anti-Money Laundering Programs” to subpart I immediately before § 103.120.

3. Add new undesignated centerheading and §§ 103.181 through 103.183 to subpart I to read as follows:

#### Special Due Diligence for Correspondent Accounts and Private Banking Accounts

Sec.

103.181 Special due diligence programs for banks, savings associations, and credit unions.

103.182 Special due diligence programs for securities brokers and dealers, futures commission merchants, and introducing brokers.

103.183 Deferred due diligence programs for other financial institutions.

#### Special Due Diligence for Correspondent Accounts and Private Banking Accounts

##### § 103.181 Special due diligence programs for banks, savings associations, and credit unions.

The requirements of 31 U.S.C. 5318(i) shall apply, effective July 23, 2002, to a financial institution that is:

- (a) An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));
- (b) A commercial bank;
- (c) An agency or branch of a foreign bank in the United States;
- (d) A federally insured credit union;
- (e) A thrift institution; or
- (f) A corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*).

<sup>11</sup> See also, Wolfsberg Group, “Global Anti-Money-Laundering Guidelines for Private Banking: Wolfsberg AML Principles” (1st Revision May 2002) at [www.wolfsberg-principles.com](http://www.wolfsberg-principles.com). A program that does not follow all of the best practices outlined in this government guidance would be reasonable if there is a justifiable basis, based on the particular circumstances of the institution involved, for not following these practices.

**§ 103.182 Special due diligence programs for securities brokers and dealers, futures commission merchants, and introducing brokers.**

(a) *Private banking accounts.* The requirements of 31 U.S.C. 5318(i) relating to due diligence and enhanced due diligence for private banking accounts shall apply, effective July 23, 2002, to a financial institution that is:

(1) A broker or dealer registered, or required to register, with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); or

(2) A futures commission merchant or introducing broker registered, or required to register, with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

(b) *Correspondent accounts.* A financial institution described in paragraph (a) of this section is exempt from the requirements of 31 U.S.C. 5318(i) relating to due diligence and enhanced due diligence for certain correspondent accounts.

(c) *Other compliance obligations of financial institutions unaffected.*

Nothing in this section shall be construed to relieve a financial institution from its responsibility to comply with any other applicable requirement of law or regulation, including title 31 of the United States Code and this part.

**§ 103.183 Deferred due diligence programs for other financial institutions.**

(a) *Exempt financial institutions.* Except as provided in § 103.181 and

§ 103.182, a financial institution defined in 31 U.S.C. 5312(a)(2) and (c)(1) or § 103.11(n) is exempt from the requirements of 31 U.S.C. 5318(i).

(b) *Other compliance obligations of financial institutions unaffected.*

Nothing in this section shall be construed to relieve a financial institution from its responsibility to comply with any other applicable requirement of law or regulation, including title 31 of the United States Code and this part.

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