

## DEPARTMENT OF THE TREASURY

## 31 CFR Part 103

RIN 1506-AA90

**Financial Crimes Enforcement Network; Proposed Amendments to the Bank Secrecy Act Regulations—Exemptions From the Requirement To Report Transactions in Currency; Comment Request**

**AGENCY:** Financial Crimes Enforcement Network (“FinCEN”), Department of the Treasury.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** FinCEN is proposing to amend the Bank Secrecy Act (BSA) regulation that allows depository institutions to exempt transactions of certain persons from the requirement to report transactions in currency in excess of \$10,000. Modification of the currency transaction report exemption procedures is a part of the Department of the Treasury’s continuing effort to increase the efficiency and effectiveness of its anti-money laundering and counter-terrorist financing policies.

**DATES:** Written comments are welcome and must be received on or before June 23, 2008.

**ADDRESSES:** Those submitting comments are encouraged to do so via the Internet. Comments submitted via the Internet may be submitted at <http://www.regulations.gov/search/index.jsp> with the caption in the body of the text, “Attention: Currency Transaction Report Exemptions Rule and Form Amendments.” Comments may also be submitted by written mail to: Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, VA 22183, Attention: Currency Transaction Report Exemptions Rule and Form Amendments. Please submit comments by one method only. All comments submitted in response to this notice of proposed rulemaking will become a matter of public record, therefore, you should submit only information that you wish to make available publicly.

*Inspection of comments:* Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905-5034 (Not a toll free call). In general, FinCEN will make all comments publicly available by posting them on <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** The FinCEN regulatory helpline at (800) 949-2732 and select Option 3.

**SUPPLEMENTARY INFORMATION:****I. Introduction**

Currency transaction reports (CTRs) provide unique, objective, and timely information that is highly useful to a growing number of federal, state, and local law enforcement agencies. For example, CTRs provide information that is often unavailable from other sources, such as information on a non-account holder who conducts a transaction in currency for more than \$10,000. Criminal investigators have found CTR data particularly useful in identifying leads for further investigation and corroborating already gathered information. Law enforcement officials have noted that no other source of information enables them to “map” the financial links between members of a criminal organization as well as the CTR.<sup>1</sup> Finally, recent advances in technology have enhanced law enforcement’s ability to use CTR data in the development of pattern and trend analyses.

While FinCEN values the broad utility that CTR data provides to law enforcement, FinCEN also is committed to improving the effectiveness and efficiency with which the BSA’s regulatory regime is administered. FinCEN, therefore, welcomed a study of the current CTR exemption regime by the United States Government Accountability Office (GAO). FinCEN found the GAO’s report entitled “Bank Secrecy Act: Increased Use of Exemption Provisions Could Reduce Currency Transaction Reporting While Maintaining Usefulness to Law Enforcement Efforts” (“the GAO Report”) helpful in identifying ways the CTR exemption requirements can be improved, thereby encouraging depository institutions to make full use of CTR exemptions.

**II. Background***A. Statutory Provisions*

The Bank Secrecy Act, Titles I and II of Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, authorizes the Secretary of the Treasury (Secretary), among other things, to issue regulations requiring financial institutions to keep records and file reports that are determined to

<sup>1</sup> *Bank Secrecy Act: Increased Use of Exemption Provisions Could Reduce Currency Transaction Reporting While Maintaining Usefulness to Law Enforcement Efforts*, GAO-08-355 (GAO: Washington, D.C.: February 21, 2008).

have a high degree of usefulness in criminal, tax, and regulatory matters, and to implement anti-money laundering programs and compliance procedures. The regulations implementing the BSA appear at 31 CFR Part 103. The Secretary’s authority to administer the BSA has been delegated to the Director of FinCEN.

The reporting by financial institutions of transactions in currency in excess of \$10,000 has long been a major component of the Department of the Treasury’s implementation of the BSA. The reporting requirement is promulgated pursuant to 31 U.S.C. 5313(a) requiring reports of domestic coin and currency transactions.

The Money Laundering Suppression Act of 1994 (MLSA) amended the BSA by establishing a statutory system for exempting transactions by certain customers of depository institutions from currency transaction reporting.<sup>2</sup> In general, the statutory exemption system, 31 U.S.C. 5313(d) through (g), creates two types of exemptions. Under 31 U.S.C. 5313(d) (sometimes called the “mandatory exemption” provision), the Secretary is required to provide depository institutions with the ability to exempt from the currency transaction reporting requirement transactions in currency between the depository institution and four specified categories of customers. The four specified categories of customers in the mandatory exemption provision are: (1) Another depository institution; (2) a department or agency of the United States, any State, or any political subdivision of any State; (3) any entity established under the laws of the United States, any State, or any political subdivision of any State, or under an interstate compact between two or more States, which exercises governmental authority on behalf of the United States or any such State or political subdivision; and (4) any business or category of business the reports on which have little or no value for law enforcement purposes.

Under 31 U.S.C. 5313(e) (sometimes called the “discretionary exemption”

<sup>2</sup> See section 402 of the Money Laundering Suppression Act of 1994 (the “Money Laundering Suppression Act”), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103-325 (September 23, 1994). The Money Laundering Suppression Act sought to reduce, within a reasonable period of time, the number of reports required to be filed in the aggregate by depository institutions pursuant to section 5313(a) of title 31. The enactment of 31 U.S.C. 5313(d) through (g) reflected congressional intent to “reform \* \* \* the procedures for exempting transactions between depository institutions and their customers.” See H.R. Rep. 103-652, 103d Cong., 2d Sess. 186 (August 2, 1994).

provision) the Secretary is authorized, but not required, to allow depository institutions to exempt from the currency transaction reporting requirement transactions in currency between it and a qualified business customer.<sup>3</sup> A “qualified business customer,” for purposes of the discretionary exemption provision, is a business that:

(A) Maintains a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act) at the depository institution; (B) frequently engages in transactions with the depository institution which are subject to the reporting requirements of subsection (a); and (C) meets criteria which the Secretary determines are sufficient to ensure that the purposes of [the BSA] are carried out without requiring a report with respect to such transactions.<sup>4</sup>

The Secretary was required to establish by regulation the criteria for granting and maintaining an exemption for qualified business customers,<sup>5</sup> as well as guidelines for depository institutions to follow in selecting customers for exemption.<sup>6</sup> The guidelines may include a description of the type of businesses for which no exemption will be granted under the discretionary exemption provision. The Secretary also was required to prescribe regulations that require an annual review of qualified business customers and require depository institutions to resubmit information about those customers with modifications if appropriate.<sup>7</sup>

#### *B. Overview of the Current Regulatory Provisions To Exempt Certain Persons From Currency Transaction Reporting*

The current exemption procedures, which are codified at 31 CFR 103.22(d), were the result of a five-part rulemaking.<sup>8</sup> The current exemption procedures apply to depository institution customers that fall within one of the classes of exempt persons described in 31 CFR 103.22(d)(2)(i)–(vii), commonly referred to as “Phase I” and “Phase II” exemptions.

Phase I eligible customers include: (i) Other banks<sup>9</sup> operating in the United States; (ii) Government departments and agencies; (iii) Certain entities that

exercise governmental authority; (iv) Entities whose equity interests are listed on one of the major national stock exchanges; and (v) Certain subsidiaries of entities whose equity interests are listed on one of the major national stock exchanges.<sup>10</sup> Phase II eligible customers include: (i) “Non-listed businesses” and (ii) “Payroll customers.”

#### *Phase II Eligible Customers: Non-Listed Businesses and Payroll Customers*

A “non-listed business” is any other commercial enterprise that is not ineligible for exemption<sup>11</sup> and that:

- (A) Has maintained a transaction account at the bank for at least 12 months;
- (B) Frequently engages in transactions in currency with the bank in excess of \$10,000; and
- (C) Is incorporated or organized under the laws of the United States or a State, or is registered as and eligible to do business within the United States or a State.<sup>12</sup>

Such an enterprise is an exempt person only “[t]o the extent of its domestic operations.”<sup>13</sup> The addition of non-listed businesses as a category of exempt person was intended to make transactions of all established depository institution customers (other than ineligible companies) not otherwise included within the scope of the mandatory exemption provision, including sole proprietorships, eligible for the current exemption procedures.

A “payroll customer,” under 31 CFR 103.22(d)(2)(vii), is any other person (*i.e.*, a person not otherwise covered under the exempt person definitions) that:

- (A) Has maintained a transaction account at the bank for at least 12 months;
- (B) Operates a firm that regularly withdraws more than \$10,000 in order to pay its United States employees in currency; and
- (C) Is incorporated or organized under the laws of the United States or a State,

<sup>10</sup> See 31 CFR 103.22(d)(2)(v) (definition of a subsidiary).

<sup>11</sup> Non-listed businesses that are ineligible for exemption are businesses engaged primarily in one or more of the following activities: Serving as financial institutions or agents of financial institutions of any type; purchasing or selling to customers motor vehicles of any kind, vessels, aircraft, farm equipment or mobile homes; practicing law, accountancy, or medicine; auctioning of goods; chartering or operating ships, buses, or aircraft; gaming of any kind (other than licensed pari-mutuel betting at race tracks); investment advisory services or investment banking services; real estate brokerage; pawn brokerage; title insurance and real estate closing; trade union activities; and any other activities that may be specified by FinCEN. See 31 CFR 103.22(d)(6)(vii).

<sup>12</sup> 31 CFR 103.22(d)(2)(vii).

<sup>13</sup> *Id.*

or is registered as and eligible to do business within the United States or a State.<sup>14</sup>

A payroll customer is an exempt person “[w]ith respect solely to withdrawals for payroll purposes.”<sup>15</sup>

#### *Designating an Eligible Customer as Exempt and Other Requirements*

Currently, a depository institution exempting a customer must file a FinCEN Form 110, Designation of Exempt Person (DOEP) (“FinCEN Form 110”) within 30 days after the first transaction which the bank wishes to exempt with respect to the customer.<sup>16</sup> For a Phase I customer, a depository institution must file the form only once and must conduct an annual review of the customer. For a Phase II customer, a depository institution must also conduct an annual review of the customer, and must biennially renew the customer’s exemption by refiling the form, certifying that it has applied its system of monitoring the customer’s transactions in currency for suspicious activity, and reporting any change in control of the customer.

#### *C. Objectives of Proposed Changes*

It is FinCEN’s intent to simplify the current requirements for depository institutions to exempt their eligible customers from CTR reporting by proposing changes to the current regulatory requirements to comport with the GAO Report recommendations.

#### *GAO Report Findings and Recommendations*

The GAO in its report found that CTRs provide federal, state, and local law enforcement officials with “unique and reliable information essential to a variety of efforts.”<sup>17</sup> Advances in technology have made information reported through CTRs that much more useful. Further, in discussing the usefulness of CTRs, the GAO Report contrasted the CTR, which captures information based on objective facts that determine its filing, with the SAR, which requires a financial institution to make a subjective determination of what is suspicious prior to its filing.<sup>18</sup> The information gleaned from those two types of reports is very different in nature and is useful to law enforcement in complementary ways. For example, the GAO Report noted that law enforcement agencies often consult CTR

<sup>14</sup> 31 CFR 103.22(d)(2)(vii).

<sup>15</sup> *Id.*

<sup>16</sup> See 31 CFR 103.22(d)(3)(i). FinCEN Form 110 replaced the previous designation form, Treasury Form TD F 90–22.53.

<sup>17</sup> *Supra* note 1, at 2.

<sup>18</sup> See *supra* note 1, at 17.

<sup>3</sup> For additional information about the terms of 31 U.S.C. 5313(e)–(g), see 63 Fed. Reg. 50147, 50148 (September 21, 1998).

<sup>4</sup> 31 U.S.C. 5313(e)(2).

<sup>5</sup> See 31 U.S.C. 5313(e)(3).

<sup>6</sup> See 31 U.S.C. 5313(e)(4)(A).

<sup>7</sup> See 31 U.S.C. 5313(e)(5).

<sup>8</sup> See 61 FR 18204 (April 24, 1996), 62 FR 47141, 47156 (September 8, 1997), 62 FR 63298 (November 28, 1997), 63 FR 50147 (September 21, 1998), and 65 FR 46356 (July 28, 2000) (the rulemakings that comprise the current CTR exemption system).

<sup>9</sup> See 31 CFR 103.22 (definition of a bank, which includes other depository institutions).

data to obtain more detailed information after reviewing SARs.<sup>19</sup>

CTR requirements are also useful to law enforcement because they force criminals to act in ways that increase chances of detection as they attempt to avoid conducting reportable transactions.<sup>20</sup> While the GAO Report found that it can be difficult for law enforcement to link CTRs to specific outcomes, it also is generally difficult for depository institutions to quantify the costs of meeting CTR requirements, in large part because the same processes and staff are used to fulfill other responsibilities of the financial institution.

Recognizing both the value of CTR data and the need to improve the current CTR exemption regulatory requirements, the GAO Report made three main recommendations that FinCEN proposes in this Notice: (1) Remove the regulatory requirement that depository institutions biennially renew Phase II exemptions; (2) remove the regulatory requirement that depository institutions file exemption forms, and annually review the supporting information, for banks, federal, state, and local government agencies, and entities exercising federal, state or local governmental authority; and (3) permit depository institutions to exempt otherwise eligible non-listed customers who frequently engage in large cash transactions within a period of time shorter than 12 months.

### III. Section-by-Section Analysis

The proposed rule would implement the GAO Report's recommendations by eliminating the biennial filing requirement; eliminating the requirement to file exemptions forms on, and annually review the supporting information for, exempt customers that are depository institutions, Federal, State and local government agencies, and entities exercising governmental authority; and eliminating the 12-month time period for which customers may be exempted as Phase II customers, in favor of a risk-based approach. In addition, the proposed rule would eliminate the transitional rule in the current regulations as no longer necessary, renumber the paragraphs under § 103.22(d) accordingly, and make other technical corrections as noted below.

#### A. § 103.22(d)(1)—General

FinCEN proposes to amend 31 CFR 103.22(d)(1) to change the cross references in this paragraph to reflect proposals in this notice that if adopted

would result in the paragraphs of section 103.22(d) being re-numbered.

#### B. § 103.22(d)(2)(iv) Exempt Person—Listed Entities

FinCEN proposes to amend 31 CFR 103.22(d)(2)(iv) by correcting the name of a NASDAQ Stock Market listing referenced in the regulation from its prior name, the NASDAQ Small Cap Issues, to its current name, the NASDAQ Capital Markets Companies listing.

#### C. § 103.22(d)(2)(vi) Exempt Person—Non-Listed Entities

FinCEN proposes to amend 31 CFR 103.22(d)(2)(vi) by changing a cross reference in this paragraph to reflect proposals in this notice that if adopted would result in the paragraphs of section 103.22(d) being re-numbered.

#### D. §§ 103.22(d)(2)(vi)(A) and (vii)(A) Exempt Person—Length of Time Required To Consider Phase II Entities for Exemption

FinCEN proposes to amend 31 CFR 103.22(d)(2)(vi)(A) and (vii)(A) by removing any prescribed amount of time before a depository institution may consider a non-listed business or payroll customer for exemption, and instead enabling a depository institution to make a risk-based determination as to when it has a sufficient history with such customers before treating them as an exempt person. FinCEN solicits comment on an alternative proposal in which, instead of adopting a risk-based approach, FinCEN would maintain a reference to the length of time required to consider Phase II entities for exemption, but reduce it from twelve months to two months.

The GAO Report recommended that FinCEN permit depository institutions to exempt otherwise eligible Phase II customers who frequently<sup>21</sup> engage in large cash transactions without having to wait for the current 12-month period because many depository institution respondents surveyed for the GAO Report indicated that the time-consuming nature of the biennial renewal, along with the costs associated with biennial renewals, made using the Phase II exemptions less advantageous. FinCEN supports changing the current regulatory requirements to conform to this recommendation.

In 1998, FinCEN specified a twelve month waiting period for Phase II exemptions largely in response to law enforcement concerns about

establishing an overly lax exemption system.<sup>22</sup> The exemption requirements in place prior to 1998 had allowed the designation of eligible non-listed and payroll customers after only two months, though other complex requirements also had to be met.<sup>23</sup> At that time, FinCEN concurred with law enforcement that requiring a twelve month time period was not unreasonable, given that it was greatly simplifying the exemption requirements then in place.<sup>24</sup>

Much has changed in the regulatory landscape articulated in the BSA and its implementing regulations since 1998 when almost all of what constitutes the current CTR exemption regime became effective. With the enactment of the USA PATRIOT Act and subsequent, related changes to the implementing regulations of the BSA, depository institutions became subject to additional requirements, like the customer identification program (CIP) requirements,<sup>25</sup> which must include risk-based procedures for verifying the identity of a customer. As a result, depository institutions have had to gather more information about their customers at account opening and have become increasingly adept at applying a risk-based analysis as they comply with BSA requirements.

Taking into consideration all of the changes that have been made to the BSA and its implementing regulations, FinCEN believes adopting a risk-based approach to the amount of time that is needed before an initial designation of exemption may be filed for Phase II eligible customers is now appropriate. FinCEN also proposes for comment, in the alternative, an amendment that would require depository institutions to wait two months before making the initial designation.

<sup>22</sup> See 31 CFR 103(d)(2)(vi)(A). See also 62 FR 47161 (September 8, 1997) (“The need for some ‘counterweight’ in the liberalized system was raised forcefully with FinCEN by federal law enforcement officials during formulation of the proposed rule. Enforcement officials are concerned that necessary easing of the burdens of unnecessary currency transaction reporting not have the unintended effect of opening up avenues for more efficient money laundering.”).

<sup>23</sup> See *Id.* Some requirements under the administrative exemption system included: only transactions falling within certain “permitted” ranges could be exempted, banks were required to prepare and submit signed exemption statements, or banks were required to maintain mandatory exemption lists.

<sup>24</sup> See 63 FR 50151 (September 21, 1998) (“As stated in the Notice, the ten-month difference in time periods is justified by the elimination of virtually all of the other requirements of the prior administrative exemption system.”).

<sup>25</sup> 31 CFR 103.121(b)(2).

<sup>21</sup> See FinCEN's “Guidance on Interpreting ‘Frequently’ Found in the Criteria for Exempting a ‘Non-Listed Business’ Under 31 CFR 103.22(d)(2)(vi)(B)” (November 2002).

<sup>19</sup> *Id.* at 19.

<sup>20</sup> *Id.*

*E. § 103.22(d)(3)(i)—General*

FinCEN proposes to amend 31 CFR 103.22(d)(3)(i) by making specific reference to a depository institution's need to use FinCEN Form 110<sup>26</sup> when designating an exempt person, removing text that references the exemption requirements that existed prior to 1998, and re-stating that a designation must be made within 30 calendar days of the reportable transaction in currency.

*F. § 103.22(d)(3)(ii)—Special Rules*

FinCEN proposes to amend 31 CFR 103.22(d)(3)(ii) by removing the requirement that depository institutions file an initial designation of exempt persons by using FinCEN Form 110 for Phase I eligible customers that are depository institutions, federal, state, or local governments, or entities exercising governmental authority.<sup>27</sup>

The GAO Report recommended that FinCEN eliminate the requirement for depository institutions to file an exemption form for those Phase I customers described above because CTRs filed on those entities would be of little value to law enforcement. The GAO report noted that the GAO's analysis of FinCEN data showed that in 2006 alone, almost 87,000 CTRs were filed on over 2,900 depository institutions and nearly 24,000 CTRs were filed on 2,000 government entities.<sup>28</sup>

FinCEN supports the GAO Report recommendation and agrees that CTRs filed on depository institutions, government agencies, and entities exercising governmental authority, are not likely to be highly useful to law enforcement. In addition, depository institutions would still be required to comply with their SAR reporting obligations should any of their Phase I customers engage in suspicious activity. It is FinCEN's intent to continue to simplify the CTR exemption process while ensuring that law enforcement receives information that is highly useful to its efforts. Proposing this change to the regulatory requirements to eliminate the requirement to file exemption forms on these Phase I customers is in line with both of these goals.<sup>29</sup>

<sup>26</sup> FinCEN intends to make changes to Form 110 and its instructions as necessary to reflect the changes proposed to 31 CFR 103.22(d) after the proposal is finalized.

<sup>27</sup> See 31 CFR 103.22(d)(6)(ii) (Operating rules that illustrate what types of entities normally exercise governmental authority).

<sup>28</sup> *Supra* note 1, at 50.

<sup>29</sup> Even though FinCEN Form 110 would not be required to be filed for these Phase I customers, a depository institution will continue to be required to take such steps to assure itself that the Phase I

customer is an exempt person and to document the basis of its conclusions that a reasonable and prudent bank would take and document to protect itself from loan or other fraud or loss based on misidentification of a person's status. See 31 CFR 103.22(d)(6)(i).

*G. § 103.22(d)(3)(iii)—Special Procedures*

FinCEN proposes to add 31 CFR 103.22(d)(3)(iii). That new paragraph would add a requirement that when designating an eligible non-listed or payroll customer for exemption, the depository institution conduct a risk-based assessment of the transactional activity of that customer. Under a risk-based approach, the amount of time an account has been opened would be one of many factors that a depository institution might consider when forming a reasonable belief that the customer it seeks to designate for exemption has a legitimate business purpose for conducting frequent transactions in currency. Other factors might possibly include, but are not limited to: Whether the depository institution had a past relationship with the customer; certain specific characteristics of the customer's business model that may be pertinent, the types of business in which the customer engages, and where the business is operating.

The risk-based analysis requirement proposed in this notice should be read as a separate, specific rule of paragraph (d), and is not meant to supersede the operating rules of existing 31 CFR 103.22(d)(6)(i) subject to paragraph (d).

*H. § 103.22(d)(4)—Annual Review*

FinCEN proposes to amend 31 CFR 103.22(d)(4) by removing the requirement that depository institutions conduct an annual review of the information supporting certain exempt Phase I eligible customers, namely banks, government agencies, and entities exercising governmental authority. The GAO Report recommended removing the regulatory requirement that depository institutions conduct an annual review of certain exempt Phase I eligible customers because these entities are unlikely to change the characteristics that made them eligible for exemption at their initial designation. The GAO Report also contrasted these Phase I eligible customers to other Phase I and Phase II customers, such as public companies,

which are more likely to reorganize or enter new lines of business. Accordingly, FinCEN proposes changing the current regulatory requirements for exempting the Phase I eligible customers identified by the GAO report that are unlikely to change their characteristics that made them eligible for initial designation, but notes that depository institutions must still review and verify exempt status for Phase II customers annually, as is required by the BSA and its implementing regulations.<sup>30</sup> Further, while they are separate and distinct requirements, conducting the annual review required for Phase II customers will likely provide depository institutions with important information helpful to complying with the SAR reporting obligation and the AML program requirement.

FinCEN also proposes to amend 31 CFR 103.22(d)(4) by requiring depository institutions to notify FinCEN of any change in control of a Phase II customer that it knows of, or should know of on the basis of its records. Notification would occur through the filing of an amended FinCEN Form 110 by March 15 of the calendar year following every second year in which the bank knew or should have known of the change in control. Complying with the requirement to annually review and verify the exempt status of a Phase II customer should help depository institutions determine whether they must file information regarding a change in control of an exempt person. The requirement to file change of control information is a requirement articulated in FinCEN's regulations that interpret the BSA, and is not a new requirement.<sup>31</sup> This proposal is made in concert with other proposals in this notice that conform to the GAO Report recommendation that FinCEN remove the regulatory requirement that depository institutions biennially renew Phase II exemptions. Accordingly, FinCEN is proposing that depository institutions only need file a renewal form in the event that there has been a change in control for an exempted Phase II customer during recurring two year reporting periods. FinCEN also solicits comment on whether information about change in control of a Phase II customer should be reported within 30 days of any change in control that the

<sup>30</sup> 31 U.S.C. § 5313(5)(A). See also 31 CFR § 103.22(d)(4).

<sup>31</sup> U.S.C. 5313(e)(5)(B) (requiring depository institutions to resubmit information on customers pertaining to modifications of those customers). See also 31 CFR 103.22(d)(5)(ii).

depository institution knows of, or should know of, based on its records.

#### *I. Current § 103.22(d)(5) Biennial Filing*

FinCEN proposes removing paragraph § 103.22(d)(5) to eliminate the requirement that depository institutions biennially file a designation of exempt person for non-listed and payroll customers. The GAO Report recommended removing the regulatory requirement that depository institutions biennially file a designation of exempt person for Phase II customers because it did not appear to provide any additional benefit and because eliminating the requirement might encourage institutions that had not exempted Phase II customers to do so. FinCEN, as part of its efforts to improve the efficiency and effectiveness of the BSA regime, encourages depository institutions to avail themselves of Phase II exemptions, and as a result, is proposing to adopt this recommendation. If the requirement to biennially file a designation for Phase II customers is removed, depository institutions would no longer need to certify that the bank's system of monitoring the transactions in currency of an exempt person for suspicious activity had been applied as necessary in order to continue treating a Phase II customer as exempt. FinCEN notes that this is in no way meant to modify the suspicious activity reporting requirement, but recognizes that removing this requirement may encourage more depository institutions to exempt Phase II eligible customers. Finally, as discussed above, depository institutions must still file change of control information with FinCEN on exempt persons as is required by the BSA implementing regulations.<sup>32</sup>

#### *J. Redesignated § 103.22(d)(5)(i), (iii) and (viii) Operating Rules—Cross References & Stock Exchange Listings*

FinCEN proposes to amend redesignated 31 CFR 103.22(d)(5)(i) and (viii) to change cross references in these paragraphs to reflect proposals in this notice that if adopted would result in the paragraphs of section 103.22 being re-numbered.

FinCEN also proposes amending redesignated 31 CFR 103.22(d)(5)(iii) by changing a reference to the National Association of Securities Dealers to the NASDAQ, to reflect correctly the name of the entity that contains information on its Web site that is useful to complying with Phase I exemption requirements. FinCEN also proposes making other minor technical edits, like

changing "Edgar" to "EDGAR" and "Nasdaq" to "NASDAQ", to reflect correctly that those names are acronyms.

#### *K. Redesignated § 103.22(d)(7)(i) and (ii)—Limitation on Liability*

FinCEN proposes to amend redesignated 31 CFR 103.22(d)(7)(ii) to change a cross reference in this paragraph to reflect proposals in this notice that if adopted would result in the paragraphs of section 103.22 being re-numbered, and to correspond to changes made in another section of this proposed rule that remove the requirement that depository institutions conduct an annual review of certain exempt customers.

#### *L. Redesignated § 103.22(d)(8)—Obligations To File Suspicious Activity Reports and Maintain a Monitoring System*

FinCEN proposes to amend redesignated 31 CFR 103.22(d)(8)(i) and (ii) to correct cross references made in those paragraphs to the suspicious activity reporting rule in 31 CFR Part 103 applicable to banks.

#### *M. Redesignated § 103.22(d)(9)—Revocation*

FinCEN proposes to amend redesignated 31 CFR 103.22(d)(9) to require that depository institutions report to FinCEN a decision to no longer treat a previously exempted, and an otherwise eligible customer for exemption, for continued treatment as an exempt person. Currently, it is voluntary for depository institutions to file a revocation of exemption with FinCEN. Notice of revocation would be filed with FinCEN by the close of the 30 calendar day period beginning after the day of the first transaction in currency with that person that has been reported.

FinCEN also proposes to amend redesignated 31 CFR 103.22(d)(9) to change a cross reference in this paragraph to reflect proposals in this notice that if adopted would result in the paragraphs of section 103.22 being re-numbered.

#### **IV. Request for Comment**

All comments submitted in response to this notice will become a matter of public record. FinCEN welcomes written comment on all aspects of the proposed rule, and we especially encourage comments on the following issues:

#### *A. Removing the Regulatory Requirement That Depository Institutions File Exemption Forms, and Annually Review the Supporting Information for Banks, Federal, State, and Local Government Agencies, and Entities Exercising Federal, State, or Local Governmental Authority*

- Will this proposal encourage depository institutions to avail themselves of Phase I exemptions for customers who are depository institutions, federal, state, and local government agencies, and entities exercising federal, state or local governmental authority, and if not, why?

#### *B. Removing the Regulatory Requirement That Depository Institutions Biennially Renew Phase II Exemptions*

- With the removal of the biennial requirement to renew a designation for certain eligible Phase I and Phase II customers, should depository institutions be required to file a revocation of exemption if they choose to no longer exempt an otherwise eligible customer?

- Should depository institutions be required to renew information regarding a change of control of a Phase II exempt customer once every two years, or should the requirement be that modified and updated change of control information must be filed within 30 days of the depository institution becoming aware of the change?

- Will this proposal encourage depository institutions to avail themselves of Phase II exemptions, and if not, why?

#### *C. Permitting Depository Institutions To Exempt Otherwise Eligible Phase II Customers Who Frequently Engage in Large Cash Transactions Within a Period of Time Shorter Than 12 Months*

FinCEN has proposed two alternatives to simplify the current requirement that depository institutions have a customer for at least 12 months before that customer becomes eligible for a Phase II exemption.

- Is it preferable to adopt a regulatory requirement that depository institutions only conduct a risk-based analysis of an otherwise eligible Phase II customer with no prescribed amount of time before a depository institution would be permitted to file an initial designation of exemption? Or, is it preferable to adopt a generally recommended minimum amount of time before an initial designation of exemption could be filed?

- If those commenting prefer that FinCEN state a generally recommended

<sup>32</sup> *Id.*

minimum amount of time that should pass before a depository institution exempts a Phase II customer, is two months an appropriate amount of time? Why?

- FinCEN currently defines “frequently” as eight or more reportable transactions per annum in guidance that interprets the regulatory requirements for Phase II exemption procedures. Given the proposed changes in this notice, is eight still an appropriate number of reportable transactions to deem a customer eligible for exemption?
- Will this proposal encourage depository institutions to avail themselves of Phase II exemptions, and if not, why?

## V. Regulatory Matters

### A. Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

### B. Unfunded Mandates Act of 1995 Statement

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

### C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), FinCEN certifies that this proposed regulation would not have a significant economic impact on a substantial number of small entities. The proposals in this notice of proposed rulemaking would reduce the requirements for exempting certain persons from the currency transaction reporting requirements of the BSA and should reduce the obligations associated with complying with those regulatory

requirements for financial institutions of all sizes. Accordingly, a regulatory flexibility analysis is not required.

### D. Paperwork Reduction Act

The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB control number 1506–0012. Comments on the collection of information should be sent (preferably by fax (202–395–6974)) to the 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 e-mail to *Alexander.T.Hunt@omb.eop.gov*), with a copy to FinCEN by mail or by Internet submission at the addresses previously specified. Comments on the collection of information should be received by June 23, 2008. In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR part 1320, the following information concerning the collection of information as required by 31 CFR 103.22 is presented to assist those persons wishing to comment on the information collection. The collection of information in this proposed rule is in 31 CFR 103.22.

*Description of Affected Financial Institutions:* Banks as defined in 31 CFR 103.11(c).

*Estimated Number of Affected Financial Institutions:* 19,000.

*Estimated Average Annual Burden Hours per Affected Financial Institution:* The estimated average burden associated with the collection of information in this proposed rule is one hour recordkeeping and 30 minutes per response per affected financial institution.

*Estimated Total Annual Burden:* 97,500 hours.

FinCEN specifically invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information shall have practical utility; (b) the accuracy of FinCEN’s estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and

costs of operation, maintenance, and purchase of services to maintain the information.

The information collection in 31 CFR 103.22(d)(5)(i) has previously been reviewed and approved by OMB under control number 1506–0009. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

### List of Subjects in 31 CFR Part 103

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

### Amendment

For the reasons set forth above in the preamble, 31 CFR part 103 is 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. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Pub. L. 107–56, 115 Stat. 307.

2. Section 103.22 is amended by
  - a. Revising paragraph (d)(1);
  - b. Revising paragraph (d)(2)(iv);
  - c. Revising the introductory text of paragraph (d)(2)(vi);
  - d. Revising paragraph (d)(2)(vi)(A);
  - e. Revising paragraph (d)(2)(vii)(A);
  - f. Revising paragraph (d)(3);
  - g. Revising paragraph (d)(4);
  - h. Removing paragraphs (d)(5) and (d)(11);
  - i. Redesignating paragraph (d)(6) as (d)(5); (d)(7) as (d)(6); (d)(8) as (d)(7); (d)(9) as (d)(8); and (d)(10) as (d)(9).
  - j. Revising redesignated paragraph (d)(5)(i);
  - k. Revising redesignated paragraph (d)(5)(iii);
  - l. Revising the last sentence of redesignated paragraph (d)(5)(viii);
  - m. Revising redesignated paragraph (d)(7)(ii);
  - n. Revising redesignated paragraph (d)(8)(i);
  - o. Revising the last sentence of redesignated paragraph (d)(8)(ii); and
  - p. Revising the introductory text of redesignated paragraph (d)(9).

The revisions read as follows:

### § 103.22 Reports of transactions in currency.

\* \* \* \* \*

(d) \* \* \*

(1) *General.* No bank is required to file a report otherwise required by paragraph (b) of this section with respect to any transaction in currency between an exempt person and such bank, or, to the extent provided in paragraph (d)(5)(vi) of this section, between such exempt person and other banks affiliated with such bank. In addition, a non-bank financial institution is not required to file a report otherwise required by paragraph (b) of this section with respect to a transaction in currency between the institution and a commercial bank. (A limitation on the exemption described in this paragraph (d)(1) is set forth in paragraph (d)(6) of this section.)

\* \* \* \* \*

(2) \* \* \*

(iv) Any entity, other than a bank, whose common stock or analogous equity interests are listed on the New York Stock Exchange or the American Stock Exchange or whose common stock or analogous equity interests have been designated as a NASDAQ National Market Security listed on the NASDAQ Stock Market (except stock or interests listed under the separate "NASDAQ Capital Markets Companies" heading), provided that, for purposes of this paragraph (d)(2)(iv), a person that is a financial institution, other than a bank, is an exempt person only to the extent of its domestic operations;

\* \* \* \* \*

(vi) To the extent of its domestic operations and only with respect to transactions conducted through its exemptible accounts, any other commercial enterprise (for purposes of this paragraph (d), a "non-listed business"), other than an enterprise specified in paragraph (d)(5)(viii) of this section, that:

(A) Maintains a transaction account, as defined in paragraph (d)(5)(ix) of this section, at the bank;

\* \* \* \* \*

(vii) \* \* \*

(A) Maintains a transaction account, as defined in paragraph (d)(5)(ix) of this section, at the bank;

\* \* \* \* \*

(3) *Designation of certain exempt persons*—(i) *General.* Except as provided in paragraph (d)(3)(ii) of this section, a bank must designate an exempt person by filing a FinCEN Form 110. Such designation must occur by the close of the 30-calendar day period beginning after the day of the first reportable transaction in currency with that person sought to be exempted from reporting under the terms of this paragraph (d). The designation must be

made separately by each bank that treats the customer as an exempt person, except as provided in paragraph (d)(5)(vi) of this section.

(ii) *Special rules.* A bank is not required to file a FinCEN Form 110 with respect to the transfer of currency to or from:

(A) Any of the twelve Federal Reserve Banks; or

(B) Any exempt person as described in paragraphs (d)(2)(i) to (iii) of this section.

(iii) *Special procedures.* A bank must base a decision to designate a non-listed business or a payroll customer, as described in paragraphs (d)(2)(vi) and (vii), as an exempt person on its own risk-based assessment of the customer and its pattern of currency transaction activity. The bank must form a reasonable belief that the non-listed business or payroll customer it seeks to designate for exemption has a legitimate business purpose for conducting frequent transactions in currency.

(4) *Annual review.* The information supporting each designation of an exempt person described in paragraphs (d)(2)(iv) to (vii), and the application of the monitoring system required to be maintained by paragraph (d)(8)(ii) of this section to each account of an exempt person described in paragraphs (d)(2)(vi) or (d)(2)(vii) of this section, must be reviewed and verified at least once each year. Information about any change in control of an exempt person as described in paragraphs (d)(2)(vi) or (vii) of this section that the bank knows, or should know on the basis of its records, must be reported on FinCEN Form 110 by March 15 of the second calendar year following the year in which the bank knew or should have known of the change in control.

\* \* \* \* \*

(5) *Operating rules*—(i) *General rule.* Subject to the specific rules of this paragraph (d), a bank must take such steps to assure itself that a person is an exempt person (within the meaning of the applicable provision of paragraph (d)(2) of this section), to document the basis for its conclusions, and document its compliance, with the terms of this paragraph (d), that a reasonable and prudent bank would take and document to protect itself from loan or other fraud or loss based on misidentification of a person's status, and in the case of the monitoring system requirement set forth in paragraph (d)(8)(ii) of this section, such steps that a reasonable and prudent bank would take and document to identify suspicious transactions as

required by paragraph (d)(8)(ii) of this section.

\* \* \* \* \*

(iii) *Stock exchange listings.* In determining whether a person is described in paragraph (d)(2)(iv) of this section, a bank may rely on any New York, American or NASDAQ Stock Market listing published in a newspaper of general circulation, on any commonly accepted or published stock symbol guide, on any information contained in the Securities and Exchange Commission "EDGAR" System, or on any information contained on an Internet site or sites maintained by the New York Stock Exchange, the American Stock Exchange, or the NASDAQ.

\* \* \* \* \*

(viii) \* \* \* A business that engages in multiple business activities may be treated as a non-listed business so long as no more than 50% of its gross revenues is derived from one or more of the ineligible business activities listed in this paragraph (d)(5)(viii).

\* \* \* \* \*

(7) \* \* \*

(ii) Subject to the specific terms of this paragraph (d), and absent any specific knowledge of information indicating that a customer no longer meets the requirements of an exempt person, a bank satisfies the requirements of this paragraph (d) to the extent it continues to treat that customer as an exempt person until the date of that customer's next required periodic review, which as required by paragraph (d)(4) of this section for an exempt person described in paragraph (d)(2)(iv) to (vii) of this section, shall occur no less than once each year.

\* \* \* \* \*

(8) *Obligations to file suspicious activity reports and maintain system for monitoring transactions in currency.* (i) Nothing in this paragraph (d) relieves a bank of the obligation, or reduces in any way such bank's obligation, to file a report required by § 103.18 with respect to any transaction, including any transaction in currency that a bank knows, suspects, or has reason to suspect is a transaction or attempted transaction that is described in § 103.18(a)(2)(i), (ii), or (iii), or relieves a bank or any reporting obligation or recordkeeping obligation imposed by this part (except the obligation to report transactions in currency pursuant to this section to the extent provided in this paragraph (d)). Thus, for example, a sharp increase from one year to the next in the gross total of currency transactions made by an exempt customer, or similarly anomalous

transactions trends or patterns, may trigger the obligation of a bank under § 103.18.

(ii) \* \* \* The statement in the preceding sentence with respect to accounts of non-listed business and payroll customers does not limit the obligation of banks generally to take the steps necessary to satisfy the terms of paragraph (d)(8)(i) of this section and section 103.18 with respect to all exempt persons.

(9) *Revocation.* A depository institution must notify FinCEN of its decision to no longer treat the transactions of an otherwise eligible customer as exempt from the currency transaction reporting requirement by filing FinCEN Form 110 by the close of the 30 calendar day period beginning after the day of the first transaction in currency with that person that has been reported. Without any action on the part of the Treasury Department and subject to the limitation on liability contained in paragraph (d)(7)(ii) of this section:

\* \* \* \* \*

Dated: April 21, 2008.

**James H. Freis, Jr.,**

*Director, Financial Crimes Enforcement Network.*

[FR Doc. E8-8955 Filed 4-23-08; 8:45 am]

BILLING CODE 4810-02-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket No. USCG-2008-0159]

RIN 1625-AA00

#### Safety Zone: Langley Air Force Base Air Show, Willoughby Point, Hampton, VA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a safety zone on the Back River in the vicinity of Hampton, VA in support of the Air Power over Hampton Roads Air show. This action is intended to restrict vessel traffic movement on the Back River to protect mariners from the hazards associated with the air show.

**DATES:** Comments and related material must reach the Coast Guard on or before May 27, 2008.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number USCG-2008-0159 to the Docket Management Facility at the U.S.

Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online:* <http://www.regulations.gov>.

(2) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(3) *Hand delivery:* Room W12-140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

(4) *Fax:* 202-493-2251.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call Lieutenant Candice Casavant, Waterways Management Division, Sector Hampton Roads at (757) 668-5580. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

#### SUPPLEMENTARY INFORMATION:

#### Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

#### Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2008-0159), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for

copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

#### Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time, click on "Search for Dockets," and enter the docket number for this rulemaking (USCG-2008-0159) in the Docket ID box, and click enter. You may also visit either the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or the Commander, Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

#### Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://DocketsInfo.dot.gov>.

#### Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

#### Background and Purpose

On June 20-22, 2008 Langley Air Force Base will sponsor an air show at Langley Air Force Base in the vicinity of Willoughby Point within the area bounded by 37°-05'-35" N/076°-20'-47" W, 37°-05'-46" N/076°-20'-04" W, 37°-05'-12" N/076°-19'-59" W, 37°-05'-12" N/076°-20'-18" W (NAD 1983). Due to the need to protect mariners and spectators from the hazards associated with the air show, access to the area