

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.

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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

delay, commenters are encouraged to e-mail comments. Comments should be sent by one method only. Comments may be mailed to FinCEN, Section 326 Certain Credit Union and Trust Company Rule Comments, P.O. Box 39, Vienna, VA 22183 or sent by e-mail to regcomments@fincen.treas.gov with the caption "Attention: Section 326 Certain Credit Union and Trust Company 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, D.C. 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 Chief Counsel (FinCEN), (703) 905-3590.

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. Final regulations implementing section 326 must be effective by October 25, 2002.

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 Federal bank regulators (the Agencies),

the SEC, and the CFTC (the Federal functional regulators). FinCEN and the Federal bank regulators are today jointly issuing a proposed rule that applies to banks within the meaning of 31 CFR 103.11(c) that are subject to a Federal banking regulator. Under its own authority, FinCEN is issuing this proposed rule to extend rules identical¹ to those in the joint proposal to all banks lacking a Federal functional regulator, namely private banks and State chartered credit unions that are not federally insured, and trust companies. The text of the joint rule is published elsewhere in this separate part of this issue of the **Federal Register**.

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 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.

B. Codification of the Proposed Rule

The substantive requirements of the proposed rule will be codified with other Bank Secrecy Act regulations as part of Treasury's regulations in 31 CFR part 103. FinCEN anticipates that, at that time, it will publish a final rule that implements section 326 in a single section that will apply to all banks.

¹ The references in the joint rule to a bank's anti-money laundering program requirement (proposed § 103.121 (b)(1)) and to the procedures for exemptions granted by the Federal functional regulator (with Treasury concurrence) (proposed § 103.121(c)) will be modified appropriately at the final rule stage.

II. Detailed Analysis

A. Regulations Implementing Section 326

Definitions. 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 proposes 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.

Bank. For purposes of this proposed rule, the "bank" includes only those banks within the meaning of 31 CFR 103.11(c) that lack a Federal functional regulator. These are private banks and certain State chartered credit unions that are not federally insured, and trust companies.

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 outside of the scope of section 326, and are not covered by the proposed regulation.

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.

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 as a person who does not satisfy these criteria.

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.

General Rule. Section 326 of the Act requires Treasury to 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 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 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 joint regulation for federally regulated banks, the CIP must be incorporated into the bank's anti-money laundering (BSA) program. FinCEN has not yet issued an anti-money laundering program regulation for the banks subject to this proposed rule, but anticipates doing so in the near future, at which time they would be required to incorporate the CIP into that program. 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.

Identity Verification Procedures. Under section 326 of the Act, the regulations issued by Treasury 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 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 anticipates 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.²

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 expects 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

² 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.

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 recognizes 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.

Verification. The proposed regulation provides that the CIP must contain risk-based procedures for verifying the information that the bank obtains in accordance with the proposed rule, within a reasonable period of time after the account is opened. Treasury 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, Treasury recognizes 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.³

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.

Non-Documentary Verification. The proposed regulation provides that a 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 believes 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 recognizes 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 expects 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 also recognizes 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

³ 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.

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).⁴

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.⁵ 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.

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.⁶ 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 emphasizes 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, Pub. L. 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 accessible in accordance with 31 CFR 103.38(d).

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 requires 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.

Customer Notice. Section 326 of the Act contemplates that financial institutions will provide their customers

with "adequate notice" of the customer identification procedures. 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.

Exemptions. Section 326 states that the Secretary (and, in the case of section 4(k) institutions, the appropriate Federal functional regulator) 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, Treasury, may by order or regulation exempt any bank lacking a federal functional regulator or type of account at such a bank from the requirements of this section. In issuing such exemptions, 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. Treasury also may consider other necessary and appropriate factors.

Other Information Requirements Unaffected. Nothing in the proposal 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 the proposal, 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

⁴ Treasury understands that most banks currently make use of technology that permits instantaneous negative, positive, and logical verification of identity.

⁵ 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.

⁶ 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.

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 believes 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 the proposal.

Section 103.34(a)(3) currently provides that a bank need not obtain a taxpayer identification number with respect to specified categories of persons⁷ opening certain deposit accounts. This proposed rule does not contain any exemptions from the CIP requirements.

Treasury is 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 the proposal. 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 believes 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 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 believes that the quoted language in section 103.34(b)(1) is inconsistent with the requirements of the proposal. For this reason, Treasury is proposing to delete the quoted language.

III. Request for Comments

Treasury invites 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. 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.

4. Whether non-U.S. persons that are not individuals will be able to provide a bank with the identifying information required in the proposal, or whether other categories of identifying information should be added to this proposal 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.

5. Whether the proposed regulation will subject banks to conflicting State laws. Treasury requests that commenters cite and describe any potentially conflicting State laws.

6. 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 notes 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).

7. Whether any of the exemptions from the customer identification requirements contained in current section 103.34(a)(3) should be continued in the proposal. In this regard, Treasury requests that commenters address the standards set forth in the proposal (as well as any other appropriate factors).

IV. 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).⁸

Treasury certifies 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 believes 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.

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 Treasury's Office of Foreign Assets Control (OFAC). See 31 CFR part 500. Banks should already have compliance programs in place to ensure that they do

⁷ 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 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 as 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.

⁸ 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).

not violate OFAC rules. Treasury understands 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 believes 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 believes 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 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 believes 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 believes 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 believes 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*.

V. 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) lacking a Federal functional regulator. The proposed rule requires each bank to

establish a written CIP that must include recordkeeping procedures and procedures for providing customers with notice that the bank is requesting information to verify their identity.

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. Treasury believes that little burden is associated with the recordkeeping requirements of the proposal, 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. 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 believes that nominal burden is associated with the disclosure requirement of the proposal. 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 private banks, credit unions, and trust companies that do not have a Federal functional regulator.

Estimated number of financial institutions: 2,460.

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: 27,060 hours.

Treasury requests 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 requests comment on whether the banks are currently maintaining the records requested by the proposal. Treasury also invites comment on:

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

(2) The accuracy of the estimated 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), with a copy to FinCEN by mail or the Internet at the addresses previously specified.

VI. Executive Order 12866

Treasury has 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 believes banks 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, banks should already have compliance programs in place to ensure

they comply with OFAC rules prohibiting transactions with certain foreign countries or their nationals.

Dated: July 15, 2002.

James F. Sloan,

Director, Financial Crimes Enforcement Network.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-46192, File No. S7-25-02]

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA32

Customer Identification Programs For Broker-Dealers

AGENCIES: Financial Crimes Enforcement Network, Treasury; Securities and Exchange Commission.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Department of the Treasury, through the Financial Crimes Enforcement Network (FinCEN), and the Securities and Exchange Commission 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 to jointly prescribe with the Securities and Exchange Commission a regulation that, at a minimum, requires broker-dealers 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 broker-dealer by any government agency.

DATES: Written comments on the proposed rule may be submitted to the Treasury Department and the Securities and Exchange Commission 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 comments. Comments should be sent by one method only.

Treasury: Comments may be mailed to FinCEN, Section 326 Broker-Dealer Rule

Comments, P.O. Box 39, Vienna, VA 22183, or sent to Internet address regcomments@fincen.treas.gov with the caption "Attention: Section 326 Broker-Dealer 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).

Securities and Exchange Commission: Comments also should be submitted in triplicate to Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Comments also may be submitted electronically at the following e-mail address: rulecomments@sec.gov. Comment letters should refer to File No. S7-25-02; this file number should be included on the subject line if e-mail is used. All comments received will be available for public inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549-0102. Electronically submitted comment letters will be posted on the Commission's Internet web site (<http://www.sec.gov>). Personal identifying information, such as names or e-mail addresses, will not be edited from electronic submissions. Submit only information you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT:

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.

Securities and Exchange Commission: Division of Market Regulation, 202/942-0177 or marketreg@sec.gov.

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.¹ 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). See 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 of the Treasury (Secretary) to prescribe regulations setting forth minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at the financial institution.

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, investment companies, 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 Federal functional regulator appropriate for such financial institution. The Federal functional regulators include the Securities and Exchange Commission (Commission), the Commodity Futures Trading Commission (CFTC), and the banking agencies (banking agencies), namely, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration. Final regulations implementing section 326 must be effective before October 25, 2002.

Section 326 provides that the regulations, at a minimum, 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.

¹ Pub. L. 107-56.