

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

RIN 1506-AA29

Financial Crimes Enforcement Network; Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.**ACTION:** Notice of proposed rulemaking.

SUMMARY: Treasury and FinCEN are issuing a proposed regulation to implement section 312 of the USA PATRIOT Act of 2001, which requires U.S. financial institutions to establish due diligence policies, procedures, and controls reasonably designed to detect and report money laundering through correspondent accounts and private banking accounts that U.S. financial institutions establish or maintain for non-U.S. persons.

DATES: Written comments may be submitted to FinCEN on or before July 1, 2002.

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

FOR FURTHER INFORMATION CONTACT: Office of the Assistant General Counsel for Enforcement (Treasury), (202) 622-1927; the Office of the Assistant General Counsel for Banking and Finance (Treasury), (202) 622-0480; or Office of the Chief Counsel (FinCEN), (703) 905-3590 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:**I. Background**

On October 26, 2001, President Bush signed into law the USA PATRIOT Act of 2001, Public Law 107-56 (the Act). Title III of the Act, captioned "International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001," includes certain amendments to the Bank Secrecy Act (BSA), 31 U.S.C. 5311 *et seq.*, intended to aid in the prevention, detection, and prosecution of international money laundering and terrorist financing.

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

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

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

Section 312(b)(2) provides that subsection 5318(i) takes effect on July 23, 2002, and applies with respect to accounts covered by the requirement, regardless of when they were opened.

II. The Proposed Rule

The proposed rule, which was developed by Treasury in consultation with the staffs of the Federal functional

regulators, requires covered financial institutions (which for purposes of this provision includes all U.S. financial institutions required under Treasury regulations to establish an anti-money laundering program) to implement programs to ensure that the due diligence requirements of the Act are met. The proposed regulation sets forth certain minimum requirements and otherwise adopts a risk-based approach, permitting covered financial institutions to tailor their programs to their own lines of business, financial products and services offered, size, customer base, and location. The proposed rule contemplates that covered financial institutions will pay close attention to the risks presented by different foreign financial institution and private banking customers, the jurisdictions in which they operate, and the types of transactions for which the accounts are used. A covered financial institution's program under the proposed rule should include evaluation and consideration of any risks associated with these and other relevant factors. Covered financial institutions are expected to exercise sound business judgment in complying with the proposed rule and in addressing risks presented by foreign financial institution and private banking customers.

Treasury intends covered financial institutions to incorporate the due diligence programs required under the proposed rule into their existing programs under the BSA; it is not necessary for these financial institutions to establish separate programs for correspondent and private banking account due diligence. All federally insured depository institutions and credit unions are currently subject to regulations requiring them to maintain BSA compliance programs,¹ as are casinos.² In addition, effective April 24, 2002, securities broker-dealers, futures commission merchants and introducing brokers were required by section 352 of the Act and by rules of their respective self-regulatory organization to develop and implement anti-money laundering programs.³ Also, on April 23, 2002,

FinCEN issued interim final regulations under section 352 requiring mutual funds, money services businesses, and operators of credit card systems to establish anti-money laundering programs.⁴ These program requirements include, at a minimum, (1) internal policies, procedures and controls to ensure ongoing BSA compliance; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs.

III. Section-by-Section Analysis

1. Overview.

On December 28, 2001, Treasury published in the **Federal Register** a notice of proposed rulemaking to implement sections 313 and 319(b) of the Act (the Section 313/319 NPRM).⁵ This proposed rule concerned provisions that: prohibit certain financial institutions from providing correspondent accounts to foreign shell banks; require such financial institutions to take reasonable steps to ensure that correspondent accounts provided to foreign banks are not being used to indirectly provide banking services to foreign shell banks; require certain financial institutions that provide correspondent accounts to foreign banks to maintain records of the ownership of such foreign banks and their agents in the United States designated for service of legal process for records regarding the correspondent account; and require the termination of correspondent accounts of foreign banks that fail to turn over their account records in response to a lawful request of the Secretary of the Treasury (Secretary) or the Attorney General. The Section 313/319 NPRM proposed to codify these requirements in a new Part 104 of title 31 of the Code of Federal Regulations.

The interim final rules published by Treasury on April 29, 2002, concerning anti-money laundering programs under section 352 of the Act, were codified in a new Subpart I of Part 103 of title 31 of the Code of Federal Regulations.

For clarity and convenience concerning the obligations of financial institutions with respect to the related requirements of sections 312, 313, 319(b), and 352 of the Act, Treasury intends to codify all of the regulations implementing these sections in Subpart I of Part 103. Accordingly, the "reserved" definitions in proposed section 103.175 are for terms used in the Section 313/319 NPRM that are not relevant for purposes of this proposed

rule under Act section 312. In addition, "reserved" §§ 103.177, 103.185, and 103.190 correspond to the three sections proposed in the Section 313/319 NPRM.

2. Section 103.175 B Definitions.

The proposed rule defines *beneficial ownership interest* to mean any noncontingent legal authority to fund, direct, or manage an account, or noncontingent legal entitlement to all or any part of the corpus or income of the account (other than an interest of less than the lesser of \$1,000,000 or five percent of either the corpus or income of the account). Thus, the holder of any current right to any assets in a private banking account whose interest exceeds the minimum threshold would need to be identified; however, a financial institution would not be obliged to identify holders of contingent rights in an account, such as inheritance or similar interests.

The proposed rule's definition of *correspondent account* is the definition in 31 U.S.C. 5318A(e) (as added by section 311 of the Act) and is statutorily applicable for purposes of 31 U.S.C. 5318(i) with respect to banks. The proposal defines the term to mean an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution. In the case of a U.S. bank, this broad definition would include most types of banking relationships between a U.S. bank and a foreign financial institution. In the case of securities broker-dealers, futures commission merchants, and introducing brokers, a correspondent account would include any account that permits the foreign financial institution to engage in securities or futures transactions, funds transfers, or other types of financial transactions. With respect to the other types of covered financial institutions, a correspondent account would include any account such financial institution maintains for a foreign financial institution that falls within the definition: an account for receiving deposits from, making payments on behalf of, or handling other transactions related to such foreign financial institution. Treasury received many comments in connection with the Section 313/319 NPRM regarding the breadth of the definition of the term correspondent account for depository institutions and securities broker-dealers, and is continuing to consider those comments. Treasury is using the same definition as in the Section 313/319 NPRM for purposes of the proposed rule, except that the term applies to such accounts maintained by any covered financial institution, and

¹ See 12 CFR 21.21 (Office of the Comptroller of the Currency (OCC)); 12 CFR 208.63 (Board of Governors of the Federal Reserve System (Federal Reserve)); 12 CFR 326.8 (Federal Deposit Insurance Corporation (FDIC)); 12 CFR 563.177 (Office of Thrift Supervision (OTS)); 12 CFR 748.2 (National Credit Union Administration).

² 31 CFR 103.64

³ See NASD Regulation Rule 3011 and NYSE Rule 445, approved by the Securities and Exchange Commission (SEC) on April 22, 2002, Release No. 34-45798, 67 FR 20854 (April 26, 2002); National Futures Association Compliance Rule 2-9(c), approved by the Commodity Futures Trading Commission on April 23, 2002.

⁴ 67 FR 21110 (April 29, 2002).

⁵ 66 FR 67460 (Dec. 28, 2001).

applies to such accounts maintained for any foreign financial institution.

The proposed definition of *covered financial institution* is broader than the definition of “covered financial institution” in the Section 313/319 NPRM.⁶ Unlike sections 313 and 319(b) of the Act, which impose certain restrictions and requirements on correspondent accounts for foreign banks, section 312 does not limit its application to “covered financial institutions” as defined in section 313 (primarily depository institutions and securities broker-dealers). Based upon the meaning of the term correspondent account and the requirements of section 312, Treasury is proposing to define covered financial institution to include, in addition to most of the financial institutions subject to the Section 313/319 NPRM, the other financial institutions that are subject to an anti-money laundering program requirement. This includes futures commission merchants and introducing brokers, casinos, mutual funds, money services businesses, and operators of credit card systems.

Treasury and FinCEN are engaged currently in the process of reviewing all categories of U.S. financial institutions to craft regulations requiring the development of anti-money laundering programs tailored to the risks presented by the products and services offered by these industries. Implicit in Congress’ direction to Treasury to engage in this process is the recognition that all financial institutions may well pose risks that their products and services can be used unwittingly to launder money or finance terrorism. If the same functions are performed by foreign based financial institutions, similar risks are posed. When those foreign based financial institutions interface with a U.S. financial institution—any financial institution—through a correspondent account, section 312 requires appropriate due diligence to minimize the risk of money laundering or terrorist financing.

It may well be that many types of U.S. financial institutions simply do not offer and do not establish “correspondent accounts,” but section 312 will capture any such account if it is subsequently established. Moreover, the statutory definition of a correspondent account is not limited to a traditional banking account. Treasury and FinCEN are specifically requesting comment

concerning how the definition may or may not apply to the covered financial institutions. Treasury anticipates that, as additional U.S. financial institutions are required to establish anti-money laundering programs, they will also become subject to the requirements of this provision as well, to the extent they may maintain correspondent accounts for foreign financial institutions.

As in the case of the Section 313/319 NPRM, the definition includes foreign branches of insured depository institutions within the term covered financial institution. This means that any correspondent or private banking account established, maintained, administered, or managed at a foreign branch of an insured depository institution would be subject to the regulation. This issue was also the subject of substantial comment in the previous rulemaking, and Treasury is continuing to consider this issue in connection with both rulemakings.

The proposed definition of *foreign bank* is identical to the definition proposed in Treasury’s Section 313/319 NPRM. For these purposes, a foreign bank is any organization that (1) is organized under the laws of a foreign country, (2) engages in the business of banking, (3) is recognized as a bank by the bank supervisory or monetary authority of the country of its organization or principal banking operations, and (4) receives deposits in the course of its business. A foreign bank also includes a branch of a foreign bank located in a territory of the United States, Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands. A foreign bank does not include an agency or branch of a foreign bank located in the United States or an insured bank organized in a territory of the United States, Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands. In addition, a foreign central bank or foreign monetary authority that functions as a central bank is not a foreign bank, nor are certain international financial institutions of which the U.S. is a member, or which Treasury otherwise designates.

The proposed definition of *foreign financial institution* is based upon the definition of “covered financial institution” in this proposed rule. It includes any foreign bank (as defined in the proposed rule). It also includes other entities organized under foreign (non-U.S.) law (other than branches or offices of such entities in the United States) that, if they were organized in the U.S., would fall within the proposed definition of covered financial institution; *i.e.*, financial institutions that are required pursuant to Treasury’s

regulations implementing section 352 of the Act to have an anti-money laundering program. At the date of this proposal, this would include federally insured depository institutions and credit unions, securities broker-dealers, futures commission merchants and introducing brokers, casinos, mutual funds, money services businesses and operators of credit card systems. Over the coming months Treasury will be requiring additional financial institutions to adopt anti-money laundering programs, at which time the corresponding foreign entities would be included within the definition of foreign financial institution.

The proposal defines *non-U.S. person* as an individual that is neither a U.S. citizen nor a lawful permanent resident as defined in 26 U.S.C. 7701(b)(6).

The proposed rule adopts, with one change, the language of section 312 of the Act that defines *offshore banking license* as a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license. The proposed regulation uses the term “jurisdiction” rather than “country,” as there may be political subdivisions of certain countries that issue offshore banking licenses.

The proposed rule defines *person* by reference to 31 CFR 103.11(z).

The proposed rule adopts the definition of *private banking account* in section 312 of the Act, which defines the term to mean an account that requires a minimum deposit of at least \$1,000,000, that is established for one or more individuals, and that is assigned to or administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.

The proposal defines the term *senior foreign political figure* to include a current or former senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not), a senior official of a major foreign political party, or a senior executive of a foreign government-owned commercial enterprise; a corporation, business, or other entity formed by or for the benefit of any such individual; an immediate family member of such an individual; or any individual publicly known (or actually known by the relevant financial institution) to be a close personal or professional associate of such an individual. Unless the financial institution has actual

⁶ 31 U.S.C. 5318(j). For the Section 313/319 NPRM, “covered financial institutions” are those described in BSA section 5312(a)(2)(A) through (G) (insured depository institutions, trust companies, private bankers, U.S. branches of foreign banks, credit unions, and securities broker-dealers).

knowledge of the association, it must be public in some degree; an individual will not be brought within the definition if there is no readily available information about his or her ties to foreign officials. For this purpose, (1) an *immediate family member* means an individual's spouse, parents, siblings, children, and spouse's parents or siblings, and (2) *senior official or senior executive* means an individual with substantial authority over policy, operations, or the use of government-owned resources. The proposed definition is similar to the definition of "Covered Person" in the Guidance on Enhanced Scrutiny issued in 2001 by Treasury, the bank regulators, and the Department of State,⁷ and includes both current and former senior foreign political figures.

3. Section 103.176—Due Diligence Programs for Correspondent Accounts for Foreign Financial Institutions.

The proposed rule adds to the BSA regulations new § 103.176, which sets forth the due diligence requirements for correspondent accounts maintained by covered financial institutions for foreign financial institutions. It should be noted that the statute takes effect on July 23, 2002 and applies to all correspondent accounts for foreign financial institutions subject to the requirement, regardless of when they were opened.

Section 103.176(a) requires every covered financial institution to maintain a due diligence program that includes policies, procedures, and controls that are reasonably designed to enable the financial institution to detect and report any known or suspected money laundering conducted through or involving any correspondent account maintained by such financial institution for a foreign financial institution. This provision contains five specific elements that must be included in all due diligence programs.

The first element is a determination whether the correspondent account is subject to the enhanced due diligence requirements of § 103.176(b). This requires the financial institution to determine, when the correspondent account is maintained for a foreign bank, whether the foreign bank operates under any of certain offshore banking licenses or under a banking license issued by any of certain jurisdictions (as provided in § 103.176(c)).

The second required element is a risk assessment to determine whether the

correspondent account poses a significant risk of money laundering activity. The covered financial institution may consider any relevant factors in making this assessment, including the foreign financial institution's line or lines of business, size, customer base, location, products and services offered, the nature of the correspondent account, and the type of transaction activity for which it will be used.

The third required element is consideration of any publicly available information from U.S. governmental agencies and multinational organizations with respect to regulation and supervision, if any, applicable to the foreign financial institution. Covered financial institutions should take steps to avail themselves of public information about jurisdictions in which their foreign financial institution customers are organized or licensed, to assist in determining whether particular correspondent accounts pose significant risks.

The fourth required element of the due diligence program requires a covered financial institution to consider any guidance issued by Treasury or the covered financial institution's functional regulator regarding money laundering risks associated with particular foreign financial institutions and types of correspondent accounts. Again, covered financial institutions should be familiar with any information disseminated by Treasury and other federal regulators that may assist financial institutions in making informed risk assessments with respect to correspondent accounts.

Finally, the due diligence program requires a covered financial institution to review public information to ascertain whether the foreign financial institution has been the subject of any criminal action of any nature, or of any regulatory action relating to money laundering, to determine whether the circumstances of such action may reflect an increased risk of money laundering through the correspondent account.

This list of required elements is intended as a minimum standard for an effective due diligence program. Programs should be risk-focused to ensure that all correspondent accounts receive appropriate due diligence and that correspondent accounts presenting more significant risks of money laundering activity receive scrutiny reasonably designed to detect and report such activity. Programs may include policies and procedures that are more detailed than the basic required elements. Policies and procedures should be tailored to the covered

financial institution's business and operations and the types of financial services it offers through correspondent accounts.

Section 103.176(b) imposes three additional due diligence requirements for correspondent accounts for foreign banks operating under certain types of licenses (as provided in § 103.176(c)). For each such correspondent account, a covered financial institution's program must include the three additional elements of (1) enhanced scrutiny, (2) a determination whether the foreign bank maintains its own correspondent accounts for other foreign banks, and (3) identification of certain owners of the foreign bank.

First, § 103.176(b)(1) requires a covered financial institution to take reasonable steps to conduct enhanced scrutiny of such correspondent accounts, to guard against money laundering and to detect and report known or suspected illegal activity occurring through the correspondent account. Enhanced scrutiny shall include obtaining and reviewing documentation from the foreign bank about its own anti-money laundering program and considering the extent to which such program is reasonably designed to detect and prevent money laundering. This is a required element of the program, and the program must include it for all correspondent accounts subject to enhanced scrutiny.

In addition, enhanced scrutiny shall, when appropriate, also include (1) monitoring transactions through the correspondent account reasonably designed to detect money laundering; and (2) obtaining information about the sources and beneficial ownership of funds in the correspondent account, as well as information about the identity of any persons who will have authority to direct transaction activity of the correspondent account. While these two components of enhanced scrutiny are not required in every instance, they may be a necessary element of enhanced scrutiny in some cases based on the financial institution's risk assessment of the correspondent account. These elements are also not a comprehensive list of the components of enhanced scrutiny, and the program may provide for additional steps when appropriate in light of the risk assessment of an account. A financial institution's due diligence program should provide for when these and other measures are necessary to ensure that the financial institution has taken reasonable steps, on a risk-based analysis, to guard against money laundering through foreign correspondent accounts.

⁷ Guidance on Enhanced Scrutiny for Transactions that May Involve the Proceeds of Foreign Official Corruption, issued by Treasury, the Federal Reserve, OCC, FDIC, OTS, and the Department of State, January 2001 ("2001 Guidance").

The second additional requirement, set forth in § 103.176(b)(2), is that for any correspondent account for a foreign bank described in § 103.176(c), a covered financial institution must take reasonable steps to determine whether the foreign bank itself maintains correspondent accounts for other foreign banks. Each covered financial institution's program should include policies and procedures for assessing and minimizing risks associated with doing business with foreign banks that have further correspondent relationships. The due diligence program required by the proposed rule must include procedures for the financial institution to follow in these circumstances, including determining the identity of the other foreign banks and, where appropriate in light of the risks involved, identifying the measures in place at the foreign correspondent bank to prevent money laundering through the financial institution's correspondent account.

Finally, § 103.176(b)(3) requires a covered financial institution to take reasonable steps to determine the ownership of any foreign bank described in § 103.176(c) whose shares are not publicly traded. For purposes of this requirement, an *owner* is defined as any person who directly or indirectly owns, controls, or has power to vote 5 percent or more of any class of securities of a foreign bank. A reasonable step would be to obtain from the foreign bank a statement as to whether its shares are publicly traded, and if not, a list of its owners (as defined), including the percentage of shares held by each and nature of interest (*e.g.*, direct or indirect). Also for purposes of this requirement, *publicly traded* means shares that are traded on an exchange or an organized over-the-counter market that is regulated by a foreign securities authority as defined in section 3(a)(50) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(50)).

Section 103.176(c) lists the categories of foreign banks for which the additional requirements of § 103.176(b) apply. Under section 312 of the Act, these additional requirements apply to a correspondent account for any foreign bank operating under (1) an offshore banking license; (2) a banking license issued by a foreign country that is designated as noncooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a

member,⁸ with which designation the United States representative to the group or organization concurs; or (3) a banking license issued by a foreign country that has been designated by Treasury as warranting special measures due to money laundering concerns.

Section 103.176(c) incorporates the requirements of section 312, with some clarification. Correspondent accounts for a branch of a foreign bank operating under an offshore branch license would not be subject to the additional requirements of § 103.176(b) if the foreign bank has been found, or is chartered in a jurisdiction where one or more foreign banks have been found, by the Federal Reserve to be subject to comprehensive supervision or regulation on a consolidated basis by the relevant supervisors in that jurisdiction,⁹ and such foreign bank does not fall within either of the other two categories of foreign banks for which the additional requirements apply. A covered financial institution's due diligence program should nevertheless include consideration of the location of the foreign bank's branch in the due diligence program required by § 103.176(a). In identifying the jurisdictions referred to in § 103.176(c)(2) and (3), covered financial institutions should refer to Treasury guidance available on the FinCEN Web site, or guidance available on the FATF Web site (www.oecd.org/fatf).

Section 103.176(d) states that a covered financial institution's due diligence program for foreign correspondent accounts must also include procedures to be followed when due diligence cannot be adequately performed. That is, if the financial institution is unable to take reasonable steps to detect and report possible instances of money laundering, or to obtain adequate information regarding correspondent accounts for banks described in § 103.176(c), the due diligence program should provide for steps to be taken, including, as

appropriate, refusing to open the account, suspending transaction activity, filing suspicious activity reports, or closing the account.

4. Section 103.178—Due Diligence Programs for Private Banking Accounts for Non-U.S. Persons.

The proposed rule adds to the BSA regulations new § 103.178, which sets forth the due diligence requirements applicable to private banking accounts for non-U.S. persons. It should be noted that, as with correspondent accounts, the statute takes effect on July 23, 2002 and applies to all private banking accounts for non-U.S. persons subject to the requirement, regardless of when they were opened.

Section 103.178(a) requires each financial institution to maintain a due diligence program that includes policies, procedures, and controls that are reasonably designed to detect and report any known or suspected money laundering conducted through or involving any private banking account that the financial institution maintains for or on behalf of a non-U.S. person.

Section 103.178(b) sets forth minimum due diligence requirements for such accounts. Under paragraphs (b)(1)–(3), a covered financial institution's due diligence program must include reasonable steps to ascertain the identity of all nominal holders and holders of any beneficial ownership interest in the private banking account, including the lines of business and source of wealth of such persons, source of funds deposited into the account, and whether any such holder may be a senior foreign political figure. Reasonable steps may include various means of ascertaining identity and source of funds, including confirming information provided by accountholders or their agents, and contacting beneficial owners, as appropriate, to confirm their ownership interests and source of funds. The level of confirmation necessary to ascertain all nominal and beneficial owners may vary depending upon the particular customer, and an effective due diligence program will provide for consideration of the various risk factors that may be involved. Reasonable steps to ascertain whether any holder may be a senior foreign political figure should generally include some review of public information, including information available on databases on the Internet. Financial institutions should carefully consider the best methods of discharging their due diligence obligations in this regard, giving consideration to the characteristics of the various foreign jurisdictions and types of senior political figures that are

⁸ The only intergovernmental organization that currently designates countries as noncooperative with international anti-money laundering standards is the Financial Action Task Force on Money Laundering (FATF), an intergovernmental body whose purpose is the development of policies, at both the national and international levels, to combat money laundering. The U.S. has concurred in all designations made to date.

⁹ As of May 10, 2002, the Federal Reserve has made such a finding with respect to one or more foreign banks chartered in the following jurisdictions: Austria, Belgium, France, Germany, Greece, Italy, Ireland, the Netherlands, Portugal, Spain, Switzerland, the United Kingdom, Canada, Mexico, Argentina, Brazil, Chile, Australia, Hong Kong Special Administrative Region, Israel, Japan, Korea, Taiwan, and Turkey.

relevant, and the availability of databases that are useful in making this determination. Should a financial institution learn at any time that an account holder is a senior foreign political figure, it would be required to apply enhanced scrutiny as required by § 103.178(c)(2).

Section 103.178(b)(4) requires the due diligence program to include procedures ensuring that the covered financial institution will take reasonable steps to detect and report any known or suspected violation of law conducted through or involving a private banking account for a non-U.S. person.

Section 103.178(c)(1) specifies that if a financial institution's due diligence program reveals information indicating that a particular individual may be a senior foreign political figure, it should exercise reasonable diligence in seeking to determine whether the individual is, in fact, a senior foreign political figure.¹⁰ The paragraph provides further that if the institution does not learn of any information indicating that an individual may be a former senior foreign political figure (which by definition includes an immediate family member or close associate of such a person), and the individual states that he or she is not a former senior foreign political figure, the institution may rely on such statement, in addition to the results of their due diligence, in determining whether the account is subject to the enhanced due diligence requirements of § 103.178(c)(2).

Section 103.178(c)(2) specifies that the covered financial institution's due diligence program must include enhanced scrutiny of private banking accounts held by or on behalf of senior foreign political figures that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption. At the outset, the decision to open such an account should generally be approved by senior management. The appropriate level of enhanced scrutiny will vary according to the circumstances and risk factors presented. For example, if a private banking customer is from a jurisdiction where it is well known through publicly available sources that current or former political figures have been implicated in large-scale corruption, it may be appropriate to probe regarding employment history and sources of funds to a greater extent than for a customer from a jurisdiction with no such history. The length of time since a former senior political figure has been in office could influence the degree of scrutiny applied to the source

of their funds. The enhanced scrutiny required by § 103.178(c)(2) should take all risk factors into consideration, including but not limited to the purpose and use of the private banking account, location of the account holder(s), source of funds in the account, the type of transactions engaged in through the account, and the jurisdictions involved in such transactions. Although the rule does not specify the extent, if any, that transaction monitoring must take place, an effective due diligence program should dictate when risk factors will require transaction monitoring, and to what extent, as necessary to detect and report proceeds of foreign corruption.¹¹

For purposes of § 103.178(c), *proceeds of foreign corruption* means assets or property that are acquired by, through, or on behalf of a senior foreign political figure through misappropriation, theft, or embezzlement of public funds, or the unlawful conversion of property of a foreign government, or through acts of bribery or extortion, and shall include other property into which such assets have been transferred.

Section 103.178(d) states that a financial institution's due diligence program for private banking accounts must also include procedures to be followed when due diligence cannot be adequately performed. That is, if the financial institution is unable to take reasonable steps to detect and report possible instances of money laundering, the due diligence program should provide for steps to be taken, including, as appropriate, not opening the account, suspending transaction activity, filing suspicious activity reports, or closing the account.

IV. Request for Comments

Treasury invites comment on all aspects of the proposed regulation, and specifically seeks comment on the following issues:

1. Is the definition of *correspondent account* appropriate for the purposes of this proposal? Should Treasury modify the definition of the term "correspondent account" for certain covered financial institutions?

2. Is the application of the proposed rule to *covered financial institutions* (as defined) appropriate? Do all of these U.S. financial institutions maintain correspondent accounts for foreign financial institutions?

3. Is the inclusion of foreign branches of U.S. depository institutions within the *covered financial institution* definition appropriate? Do other

covered financial institutions have foreign branches that maintain correspondent accounts for foreign financial institutions?

4. Is the definition of *foreign financial institution* appropriate? Are there foreign financial institutions that should not be included within the definition? Alternatively, should the regulation apply to correspondent accounts maintained for other types of foreign financial institutions as well?

5. Is the definition of *beneficial ownership interest* sufficiently clear? Should it be further narrowed or clarified?

6. Does the definition of *private banking account* require clarification, for banks, securities or futures firms? Are there other covered financial institutions that maintain private banking accounts? Is the limitation in the statutory definition to accounts that require a minimum deposit of \$1,000,000 consistent with the purposes of this provision?

7. Does the definition of *senior foreign political figure* require further clarification? If so, how might this be achieved?

8. Is the exclusion contained in § 103.176(c)(1) from the enhanced due diligence requirements for certain foreign banks operating under offshore banking licenses appropriate? For example, should correspondent accounts for offshore-licensed branches of foreign banks affiliated with covered financial institutions also be excluded from the enhanced due diligence requirement?

9. Should the rule generally adopt a more risk-based approach to the due diligence program and include fewer prescriptive and detailed provisions? Alternatively, should it include more prescriptive provisions in order to ensure that financial institutions will take additional steps to detect and report suspicious activity?

V. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 610 *et seq.*), it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule provides guidance to financial institutions concerning the mandated due diligence requirements in section 312. Moreover, the financial institutions covered by the rule tend to be larger institutions. Accordingly, a regulatory flexibility analysis is not required.

VI. Executive Order 12866

This interim final rule is not a "significant regulatory action" as

¹¹ For an enumeration of some risk factors that may warrant further scrutiny, see 2001 Guidance, Part II.D.

¹⁰ See 2001 Guidance, Part II.C.

defined in Executive Order 12866. Accordingly, a regulatory assessment is not required.

List of Subjects in 31 CFR Part 103

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

Authority and Issuance

For the reasons set forth above, FinCEN is proposing to amend subpart I of 31 CFR Part 103 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. 5311–5331; title III, secs. 312, 313, 314, 319(b), 352, Pub. L. 107–56, 115 Stat. 307.

2. Add the undesignated centerheading “ANTI-MONEY LAUNDERING PROGRAMS” immediately before § 103.120.

§ 103.120 [Amended]

3. Section 103.120 is amended as follows:

a. Paragraph (b) is amended by adding “the requirements of §§ 103.176 and 103.178 and” immediately after the words “complies with”.

b. Paragraph (c)(1) is amended by adding “the requirements of §§ 103.176 and 103.178 and” immediately after the words “complies with”.

4. Add new undesignated centerheadings and §§ 103.175 through 103.178, 103.185, and 103.190 to subpart I to read as follows:

SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS

103.175 Definitions.

103.176 Due diligence programs for correspondent accounts for foreign financial institutions.

103.177 Records concerning owners of foreign banks and agents designated to receive service of legal process; prohibition on correspondent accounts for foreign shell banks. [Reserved]

103.178 Due diligence programs for private banking accounts for non-U.S. persons.

LAW ENFORCEMENT ACCESS TO FOREIGN BANK RECORDS

103.185 Summons or subpoena of foreign bank records. [Reserved]

103.190 Termination of correspondent relationship. [Reserved]

SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS

§ 103.175 Definitions.

Except as otherwise provided, the following definitions apply for purposes of §§ 103.176 through 103.190:

(a) [Reserved]

(b) *Beneficial ownership interest* in an account means:

(1) A noncontingent legal authority to fund, direct, or manage the account (including, without limitation, the power to direct payments into or out of the account); provided, that a legal authority to fund or to direct payments into an account shall mean a specific contractual or judicial authority to do so; or

(2) A noncontingent legal entitlement to all or any part of the corpus or income of the account, but shall not include any interest of less than the lesser of \$1,000,000 or five percent of either the corpus or income of the account.

(c) *Correspondent account* means:

(1) For purposes of § 103.176, an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution; and

(2) [Reserved]

(d) *Covered financial institution* means:

(1) For purposes of §§ 103.176 and 103.178:

(i) An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h))) and any foreign branch of an insured bank;

(ii) A commercial bank;

(iii) An agency or branch of a foreign bank in the United States;

(iv) A federally insured credit union;

(v) A thrift institution;

(vi) A corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*);

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

(viii) A futures commission merchant registered, or required to register, under, and an introducing broker as defined in § 1a23 of, the Commodity Exchange Act (7 U.S.C. 1 *et seq.*);

(ix) A casino (as defined in § 103.11(n)(5));

(x) A mutual fund (as defined in § 103.130);

(xi) A money services business (as defined in § 103.11(uu)); and

(xii) An operator of a credit card system (as defined in § 103.135).

(2) [Reserved].

(e) *Foreign bank*. (1) The term *foreign bank* means any organization that:

(i) Is organized under the laws of a foreign country;

(ii) Engages in the business of banking;

(iii) Is recognized as a bank by the bank supervisory or monetary authority of the country of its organization or principal banking operations; and

(iv) Receives deposits in the regular course of its business.

(2) For purposes of this definition:

(i) The term *foreign bank* includes a branch of a foreign bank in a territory of the United States, Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands.

(ii) The term *foreign bank* does not include:

(A) An agency or branch of a foreign bank in the United States, other than in a territory of the United States, Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands;

(B) An insured bank organized under the laws of a territory of the United States, Puerto Rico, Guam, American Samoa, or the U.S. Virgin Islands;

(C) A foreign central bank or foreign monetary authority that functions as a central bank; and

(D) The African Development Bank, African Development Fund, Asian Development Bank; Bank for International Settlements, European Bank for Reconstruction and Development, Inter-American Development Bank, International Bank for Reconstruction and Development (the World Bank), International Finance Corporation, International Monetary Fund, North American Development Bank, International Development Association, Multilateral Investment Guarantee Agency, and similar international financial institutions of which the United States is a member or as otherwise designated by the Secretary.

(f) *Foreign financial institution* means a foreign bank and any other person organized under foreign law (other than a branch or office of such person in the United States) which, if organized in the United States, would be required to establish an anti-money laundering program pursuant to §§ 103.120 through 103.169. For purposes of this definition:

(1) The dollar limitations in §§ 103.11(uu)(1) through (4) shall not be taken into account when determining whether a person organized under foreign law would, if organized in the United States, be a money services business required to establish an anti-money laundering program pursuant to § 103.125; and

(2) No person organized under foreign law shall be deemed to be a foreign financial institution by virtue of § 103.11(uu)(6).

(g) [Reserved]

(h) [Reserved]

(i) *Non-United States person* or *non-U.S. person* means an individual who is neither a United States citizen nor a lawful permanent resident as defined in 26 U.S.C. 7701(b)(6).

(j) *Offshore banking license* means a license to conduct banking activities that prohibits the licensed entity from conducting banking activities with the citizens of, or in the local currency of, the jurisdiction that issued the license.

(k) [Reserved]

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

(m) [Reserved]

(n) *Private banking account* means an account (or any combination of accounts) that:

(1) Requires a minimum aggregate amount of funds or other assets of not less than \$1,000,000;

(2) Is established on behalf of or for the benefit of 1 or more individuals who have a direct or beneficial ownership interest in the account; and

(3) Is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a covered financial institution acting as a liaison between the covered financial institution and the direct or beneficial owner of the account.

(o) *Senior foreign political figure*. (1) The term *senior foreign political figure* means:

(i) A current or former senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not), a senior official of a major foreign political party, or a senior executive of a foreign government-owned commercial enterprise;

(ii) A corporation, business or other entity that has been formed by, or for the benefit of, any such individual;

(iii) An immediate family member of any such individual; and

(iv) A person who is widely and publicly known (or is actually known by the relevant covered financial institution) to maintain a close personal or professional relationship with any such individual.

(2) For purposes of this definition:

(i) *Senior official or executive* means an individual with substantial authority over policy, operations, or the use of government-owned resources; and

(ii) *Immediate family member* means a spouse, parents, siblings, children, and a spouse's parents or siblings.

(p) [Reserved]

§ 103.176 Due diligence programs for correspondent accounts for foreign financial institutions.

(a) *In general*. A covered financial institution shall maintain a due diligence program that includes policies, procedures, and controls that are reasonably designed to enable the financial institution to detect and report any known or suspected money laundering activity conducted through or involving any correspondent account maintained by such financial institution for a foreign financial institution. Such procedures shall include:

(1) Determining whether the correspondent account is subject to paragraph (b) of this section;

(2) Assessing whether the foreign financial institution presents a significant risk of money laundering, based on any relevant factors;

(3) Considering information available from U.S. governmental agencies and multinational organizations with respect to supervision and regulation, if any, applicable to the foreign financial institution;

(4) Reviewing guidance issued by Treasury or its Federal functional regulator regarding money laundering risks associated with particular foreign financial institutions and correspondent accounts for foreign financial institutions generally; and

(5) Reviewing public information to ascertain whether the foreign financial institution has been the subject of criminal action of any nature, or regulatory action relating to money laundering.

(b) *Enhanced due diligence for certain foreign banks*. In the case of a correspondent account maintained for a foreign bank described in paragraph (c) of this section, the due diligence program required by paragraph (a) of this section shall also include, at a minimum, the following elements:

(1) Enhanced scrutiny of such correspondent account to guard against money laundering and to ensure detection and reporting of known or suspected illegal activity. Enhanced scrutiny shall also include obtaining and reviewing documentation relating to the foreign bank's anti-money laundering program and considering the extent to which such program is reasonably designed to detect and prevent money laundering, and when appropriate shall also include:

(i) Monitoring of transactions through the correspondent account reasonably designed to detect money laundering; and

(ii) Obtaining information from the foreign bank about the identity of any persons that will have authority to direct transactions through the correspondent account, and the sources and beneficial ownership of funds or other assets of such persons in the correspondent account.

(2) A determination whether the foreign bank holding the account maintains correspondent accounts for other foreign banks. If the foreign bank does maintain correspondent accounts for other foreign banks, the due diligence program required by paragraph (a) of this section shall provide for:

(i) Documentation of the identity of the other foreign banks for which the foreign bank maintains correspondent accounts; and

(ii) Policies and procedures for assessing and minimizing risks associated with the foreign bank's correspondent accounts for other foreign banks.

(3)(i) For any foreign bank whose shares are not publicly traded, the identification of each owner of the foreign bank and the nature and extent of each owner's ownership interest.

(ii) For purposes of paragraph (b)(3)(i) of this section:

(A) *Owner* means any person who directly or indirectly owns, controls, or has voting power over 5 percent or more of any class of securities of a foreign bank; and

(B) *Publicly traded* means shares that are traded on an exchange or an organized over-the-counter market that is regulated by a foreign securities authority as defined in section 3(a)(50) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(50)).

(c) *Foreign banks to be accorded enhanced due diligence*. The due diligence program elements of paragraph (b) of this section are required for any correspondent account maintained for a foreign bank that operates under:

(1) An offshore banking license, other than a branch of a foreign bank if such foreign bank:

(i) Does not fall within paragraph (c)(2) or (3) of this section; and

(ii) Has been found, or is chartered in a jurisdiction where one or more foreign banks have been found, by the Board of Governors of the Federal Reserve System under the Bank Holding Company Act or the International Banking Act, to be subject to comprehensive supervision or regulation on a consolidated basis by the relevant supervisors in that jurisdiction;

(2) A license issued by a foreign country that has been designated by an intergovernmental group or organization to which the United States belongs as noncooperative with international anti-money laundering principles or procedures and with which designation the U.S. representative concurs; or

(3) A license issued by a foreign country that Treasury has identified (by regulation or other public issuance) as warranting special measures due to money laundering concerns.

(d) *Special procedures when due diligence cannot be performed.* The due diligence program required by paragraph (a) of this section shall include procedures to be followed in circumstances in which a covered financial institution cannot perform appropriate due diligence with respect to a correspondent account, including when the institution should refuse to open the account, suspend transaction activity, file a suspicious activity report, or close the account.

§ 103.177 Records concerning owners of foreign banks and agents designated to receive service of legal process; prohibition on correspondent accounts for foreign shell banks. [Reserved]

§ 103.178 Due diligence programs for private banking accounts for non-U.S. persons.

(a) *In general.* A covered financial institution shall maintain a due diligence program that includes policies, procedures, and controls that are reasonably designed to detect and report any known or suspected money laundering conducted through or involving any private banking account maintained by such financial institution in the United States by or on behalf of a non-U.S. person.

(b) *Minimum requirements.* The due diligence program required by paragraph (a) of this section shall, at a minimum, ensure that the financial institution takes reasonable steps to:

(1) Ascertain the identity of all nominal holders and holders of any beneficial ownership interest in the private banking account, including information on those holders' lines of business and source of wealth;

(2) Ascertain the source of funds deposited into the private banking account;

(3) Ascertain whether any such holder may be a senior foreign political figure; and

(4) Report, in accordance with applicable law and regulation, any known or suspected violation of law conducted through or involving the private banking account.

(c) *Special requirements for senior foreign political figures.* (1) In performing the due diligence program required by paragraph (a) of this section:

(i) If a covered financial institution learns of information indicating that a particular individual may be a senior foreign political figure, it should exercise reasonable diligence in seeking to determine whether the individual is, in fact, a senior foreign political figure.

(ii) If a covered financial institution does not learn of any information indicating that an individual may be a former senior foreign political figure, and the individual states that he or she is not a former senior foreign political figure, the financial institution may rely on such statement in determining whether the account is subject to the due diligence requirements of paragraph (c)(2) of this section.

(2) In the case of any private banking account for which a senior foreign political figure is a nominal holder or holds a beneficial ownership interest, the due diligence program required by paragraph (a) of this section shall include policies and procedures reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

(3) For purposes of this paragraph (c), the term *proceeds of foreign corruption* means assets or property that are acquired by, through, or on behalf of a senior foreign political figure through misappropriation, theft or embezzlement of public funds, or the unlawful conversion of property of a foreign government, or through acts of bribery or extortion, and shall include other property into which such assets have been transformed or converted.

(d) *Special procedures when due diligence cannot be performed.* The due diligence program required by paragraph (a) of this section shall include procedures to be followed in circumstances in which a covered financial institution cannot perform appropriate due diligence with respect to a private banking account, including when the institution should refuse to open the account, suspend transaction activity, file a suspicious activity report, or close the account.

LAW ENFORCEMENT ACCESS TO FOREIGN BANK RECORDS

§ 103.185 Summons or subpoena of foreign bank records.

[Reserved]

§ 103.190 Termination of correspondent relationship.

[Reserved]

Dated: May 22, 2002.

James F. Sloan,

Director, Financial Crimes Enforcement Network.

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