DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA28

Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Financial Institutions

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Interim final rule.

SUMMARY: FinCEN is issuing a series of interim final rules to provide guidance to financial institutions concerning the provision in the Bank Secrecy Act (BSA), added by section 352 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, that requires financial institutions to establish anti-money laundering programs. This interim final rule provides that banks, savings associations, credit unions, registered brokers and dealers in securities, futures commission merchants, and casinos, will be deemed to be in compliance with section 352 if they establish and maintain anti-money laundering programs as required by existing FinCEN regulations, or their respective Federal regulator or self-regulatory organization. The establishment of anti-money laundering programs by money services businesses, operators of credit card systems, and mutual funds are the subject of separate rules published in this separate part of this issue of the **Federal Register**. This rule temporarily exempts, pending further analysis and review by Treasury and FinCEN, all other financial institutions (as defined in the BSA) from the requirement in section 352 that they establish anti-money laundering programs.

DATES: This interim final rule is effective April 24, 2002. Written comments may be submitted to FinCEN on or before May 29, 2002.

ADDRESSES: Submit comments (preferably an original and four copies) to FinCEN, P.O. Box 39, Vienna, VA 22183, Attn: Section 352 AMLP 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 352 AMLP 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 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 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2001, the President signed into law the USA PATRIOT Act (Public Law 107–56) (the Act). Title III of the Act makes a number of amendments to the anti-money laundering provisions of the BSA, which is codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to make it easier to prevent, detect, and prosecute international money laundering and the financing of terrorism. Section 352(a) of the Act, which becomes effective on April 24, 2002, amended section 5318(h) of the BSA. As amended, section 5318(h)(1) requires every financial institution to establish an anti-money laundering program that includes, at a minimum (i) the development of internal policies, procedures, and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test programs.

The definition of ''financial institution'' in sections 5312(a)(2) and (c)(1) is extremely broad. It includes institutions that are already subject to Federal regulation such as banks, savings associations, credit unions, money services businesses (such as money transmitters and currency exchanges), and registered securities broker-dealers and futures commission merchants. The definition also includes dealers in precious metals, stones, or jewels; pawnbrokers; loan or finance companies; private bankers; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; investment bankers; investment companies; and commodity pool operators and commodity trading advisors that are registered or required to register under the Commodity Exchange Act (7 U.S.C. 1 et seq). Section 5318(h)(1) requires all of these businesses to establish anti-money laundering programs.

Section 5318(h)(2) authorizes Treasury, after consulting with the appropriate Federal functional regulator,[1] to prescribe minimum standards for anti-money laundering programs. This section also authorizes Treasury to exempt from the application of those minimum standards any financial institution that is not subject to the rules implementing the BSA for so long as it is not subject to such rules. Section 352(c) of the Act directs the Secretary of the Treasury to prescribe regulations by April 24, 2002 that ''consider the extent to which [the requirements of section 5318(h)(1)] are commensurate with the size, location, and activities'' of financial institutions. BSA section 5318(a)(6) provides that the Secretary may exempt any financial institution from any BSA statutory requirement. Taken together, these provisions authorize the issuance of regulations that may prescribe different requirements for anti-money laundering programs under, and that may exempt certain financial institutions from the requirements of, section 5318(h)(1).

Accordingly, and as described below, this interim final rule prescribes anti-money laundering program requirements for banks, savings associations, registered brokers and dealers in securities, futures commission merchants, and casinos. The establishment of anti-money laundering programs by money services businesses, operators of credit card systems, and mutual funds are the subject of interim final rules published in this separate part of this issue of the **Federal Register**. Thus, by virtue of the interim final rules published today, all financial institutions presently subject to FinCEN's existing BSA regulations are now subject to anti-money laundering program requirements, as are three new types of financial institutions not previously regulated under the BSA: futures commission merchants, mutual funds, and operators of credit card systems.

In order to ensure the issuance of well-considered regulations tailored to the unique money laundering risks associated with the remaining financial institutions, this rule temporarily exempts, until not later than October 24, 2002, all other financial institutions from the requirement that they establish anti-money laundering programs. During the next six months Treasury

[1] These are defined by reference to section 509 of the Gramm-Leach-Bliley Act (Public Law 106–102) to include the Board of Governors of the Federal Reserve System (FRB), the Office of the Comptroller of the Currency (OCC), the Board of Directors of the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), the National Credit Union Administration (NCUA), and the Securities and Exchange Commission (SEC), and, pursuant to section 321(c) of the Act, the Commodity Futures Trading Commission (CFTC).

and FinCEN will continue studying the money laundering risks posed by these institutions in order to develop appropriate anti-money laundering program requirements. During this period, Treasury and FinCEN expect to issue a series of regulations, focusing first on those exempted financial institutions that appear to pose the greatest potential for money laundering, that will further define the exempted financial institutions and delineate minimum standards for their anti-money laundering programs.

II. Analysis of the Interim Final Rule

A. Banks, Savings Associations, and Credit Unions

Following the enactment of the Act, Treasury established a working group that includes representatives of the Federal functional regulators and the Department of Justice to assist in implementing section 352 of the Act and in determining the appropriate minimum standards for anti-money laundering programs for financial institutions regulated by a Federal functional regulator. Certain financial institutions are already required to have anti-money laundering programs. Since 1987, all federally insured depository institutions and credit unions have been required by their federal regulators to have anti-money laundering programs. These programs contain the same elements that are required by section 5318(h)(1). [2] Accordingly, section 103.120(b) provides that a financial institution that is subject to regulation by a Federal functional regulator will be deemed to be in compliance with the requirements of section 5318(h)(1) if it complies with the regulations of its regulator governing the establishment and maintenance of anti-money laundering programs. Examination of these financial institutions by their Federal functional regulators will continue to ensure compliance with those regulations.

B. Registered Securities Broker-Dealers and Futures Commission Merchants

Similarly, Treasury and FinCEN also believe it is appropriate to implement section 5318(h)(1) with respect to registered securities brokers and dealers and to futures commission merchants through their respective self-regulatory organizations (SROs). Indeed, the initiative demonstrated by the SEC, CFTC and their SROs in advancing anti-money laundering programs has significantly accelerated the implementation of section 352. Accordingly, section 103.120(c) provides that a registered securities broker-dealer or a futures commission merchant will be deemed in compliance with the requirements of section 5318(h)(1) if it complies with the rules, regulations, or requirements of its SRO concerning the establishment and maintenance of anti-money laundering programs.

Following consultation between Treasury and the SEC, the two principal securities industry SROs [3] have each adopted a rule requiring their members to implement anti-money laundering programs.[4] These rules, which incorporate the requirements of section 5318(h)(1), apply to essentially all securities broker-dealers that do business with the public and were approved by the SEC on April 22, 2002 (see Securities Exchange Act Release No. 45798).

The SROs will examine their members for compliance with these requirements and take appropriate enforcement action in cases of noncompliance. In addition, the SEC has authority to examine registered broker-dealers for compliance with these, as well as all other SRO rules. Utilizing the examination, enforcement, and outreach capabilities of the SROs and the SEC is an effective means to ensure meaningful compliance with the anti-money laundering program requirement, and is consistent with the objectives of section 352 of the Act. However, in the unlikely event that Treasury were to determine it necessary, Treasury specifically reserves its right to issue regulations prescribing minimum standards under section 352 for securities brokers and dealers.

Treasury and FinCEN, in consultation with the CFTC, are implementing section 5318(h)(1) with respect to the futures industry in a similar manner. The National Futures Association (NFA), which is the futures industry SRO whose members include all registered futures commission merchants, empowered its Executive Committee on February 21, 2002 to develop and adopt a rule requiring all futures commission merchants and introducing broker members [5] to establish anti-money laundering programs that satisfy the requirements of section 5318(h)(1). The CFTC approved this rule on April 23, 2002. The NFA will examine its members for compliance with this requirement and take enforcement actions in cases of noncompliance. The CFTC, in turn, will examine the NFA for its enforcement of the anti-money laundering program rule and take enforcement action against the NFA in cases of non-enforcement. As with securities brokers and dealers, Treasury reserves its right to issue regulations prescribing minimum standards for futures commission merchants should it be deemed necessary.

C. Casinos

In 1993, FinCEN issued regulations requiring casinos to establish written anti-money laundering compliance programs.[6] Each compliance program must include internal controls to assure ongoing compliance, internal or external independent testing for compliance, training for casino personnel, and one or more compliance officers. In addition, casinos that have automated data processing systems are required to use automated programs to aid in assuring compliance. Accordingly, section 103.120(d) provides that a casino that is in compliance with these regulations will be deemed to be in compliance with the requirements of section 5318(h)(1).

D. Money Services Businesses, Mutual Funds, Operators of Credit Card Systems

Anti-money laundering program requirements for money services businesses, mutual funds, and operators of credit card systems are described in separate interim final rules published in this separate part of this issue of the **Federal Register**.

E. All Other BSA Financial Institutions

Treasury and FinCEN are exercising the authority under BSA section 5318(a)(6) to temporarily exempt all other financial institutions from the requirement in section 5318(h)(1) that they establish anti-money laundering programs. The temporary exemption in section 103.170 applies to dealers in precious metals, stones, or jewels; pawnbrokers; loan or finance

[2] 12 CFR 21.21 (OCC); 12 CFR 208.63 (FRB); 12 CFR 326.8 (FDIC); 12 CFR 563.177 (OTS); 12 CFR 748.2 (NCUA).

[3] The National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE).

[4] See 67 FR 8565 and 8567 (Feb. 25, 2002).

[5] ''Introducing brokers'' (defined in section 1a(23) of the Commodity Exchange Act (7 U.S.C. 1a(23))) play a crucial role in preventing money laundering in the futures industry. BSA section 5312(a)(2)(H) defines ''financial institution'' to include ''a broker or dealer in securities or commodities,'' and Treasury believes that introducing brokers are included within this definition. Accordingly, NFA has included introducing brokers in its anti-money laundering program requirement. Sections 5312(a)(2)(Y) and (Z) authorize Treasury to include additional businesses within the BSA's definition of financial institution. Treasury is considering whether it is necessary to clarify formally that section 5312(a)(2)(H) includes ''introducing brokers'' within the definition of ''financial institution.''

[6] 31 CFR 103.64.

companies; private bankers; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; certain investment companies [7]; commodity pool operators; and commodity trading advisors. The exemption does not extend to ''investment bankers'' because all such entities are either depository institutions or securities broker-dealers that are subject to anti-money laundering program requirements by section 103.120(b) or (c), respectively. [8]

The need for the temporary exemption is a practical one. First, although included within the list of financial institutions in the BSA, these businesses have never been defined for purposes of the BSA. For example, does a ''dealer in precious metals, stones, or jewels'' include a jewelry counter at a department store and a kiosk in a shopping mall that sells gold and silver earrings, bracelets, and necklaces, as well as a diamond merchant? Similarly, does ''a business engaged in ''vehicle sales, including automobile, airplane, and boat sales '' include businesses selling motorcycles, motorbikes, or snowmobiles? Treasury and FinCEN do not believe it is sound regulatory policy to subject the broad categories of BSA ''financial institutions'' to the requirements of BSA section 5318(h)(1) without specifically defining the businesses that will be subject to those requirements. Second, in the six months since the enactment of the Act, Treasury and FinCEN have not had sufficient time and opportunity to analyze the nature of the businesses of the remaining financial institutions. More importantly, Treasury and FinCEN have not had the opportunity to identify the nature and scope of the money laundering or terrorist financing risks associated with these businesses. The extension of the anti-money laundering program requirement to all the remaining financial institutions, most of which have never been subject to federal financial regulation, raises many significant practical and policy issues. An inadequate understanding of the affected industries could result in poorly conceived regulations that impose unreasonable regulatory burdens with little or no corresponding anti-money laundering benefits. Finally, Treasury and FinCEN are aware that many of these financial institutions are sole proprietors or small businesses, and that any regulations affecting them must recognize this fact.

For these reasons, Treasury and FinCEN believe that a temporary exemption from the requirements of section 5318(h)(1) is appropriate at this time. During the next six months, Treasury and FinCEN will review and analyze the extent to which these businesses may be used by money launderers or terrorist financiers, and will issue a series of additional rules requiring that they establish anti-money laundering programs where appropriate, and delineating minimum standards for those programs. Treasury and FinCEN have been examining the money laundering risks associated with insurance products and will issue in the near future a proposed rule governing the establishment of anti-money laundering programs by insurance companies. Although Treasury and FinCEN intend to issue regulations addressing anti-money laundering programs for all exempted financial institutions by October 24, 2002, any category of financial institution for which regulations have not been proposed or promulgated by that date will be required to establish anti-money laundering programs that comply with the requirements of 31 U.S.C. 5318(h)(1).

Treasury and FinCEN emphasize that the exemption from the requirement to establish anti-money laundering programs does not in any way relieve any business from the existing requirements in 31 U.S.C. 5331 and 26 U.S.C. 6050I that they report transactions in cash or currency, or certain monetary instruments, that exceed $10,000. The regulations under these sections are codified at 31 CFR 103.30 and 26 CFR 1.6050I, respectively. Every temporarily exempted business must ensure that it has appropriate procedures to report such transactions to FinCEN and the IRS using the single Form 8300 jointly prescribed by those agencies. In addition, all financial institutions are reminded of the importance of reporting suspected terrorist activities or otherwise suspicious transactions to the appropriate law enforcement authorities. Form 8300 contains a check box to indicate that a particular transaction, whether or not required to be reported, otherwise appears suspicious.

III. Administrative Procedure Act

The provisions of 31 U.S.C. 5318(h)(1), requiring all financial institutions to establish anti-money laundering programs with at least four identified elements, become effective April 24, 2002. This interim rule exempts certain financial institutions from these requirements and deems other financial institutions to be in compliance with these requirements. Accordingly, good cause is found to dispense with notice and public procedure as unnecessary pursuant to 5 U.S.C. 553(b)(B), and to make the provisions of the interim rule effective in less than 30 days pursuant to 5 U.S.C. 553(d)(1) and (3).

IV. Regulatory Flexibility Act

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

V. Executive Order 12866

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

List of Subjects in 31 CFR Part 103

Banks, banking, Brokers, Counter money laundering, Counter-terrorism,

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[7] The principal statute governing investment companies is the Investment Company Act of 1940 (codified at 15 U.S.C. 80a1–80a64) (the 1940 Act), which defines investment company broadly. However, entities commonly known as hedge funds, private equity funds and venture capital funds are specifically excluded from the definition of investment company for purposes of the 1940 Act. Section 356 of the USA PATRIOT Act requires that the Treasury, the Federal Reserve, and the SEC submit a joint report to Congress, not later than October 26, 2002, on recommendations for effective regulations to apply the requirements of the BSA to investment companies, including persons that, but for the noted exceptions, would be investment companies. Treasury anticipates that the CFTC will participate in ;the development of this report because a significant percentage of hedge funds are registered and regulated as commodity pool operators. Section 356 also requires that the report include recommendations whether personal holding companies should be treated as investment companies under the BSA. Pending further review and analysis, Treasury is temporarily exempting investment companies, other than ''open-end companies'' (as defined in section 5(a)(1) of the 1940 Act), from the requirements of BSA section 5318(h)(1). The applicability of these requirements to ''open-end companies'' is addressed in the interim final rule concerning mutual funds published in this separate part of this issue of the **Federal Register.** Pending further review and analysis, Treasury is also deferring determination of the scope of the BSA definition of ''investment company,'' but anticipates that it is likely that the referenced entities excluded from application ;of the 1940 Act will be subject to anti-money laundering program requirements.

[8] *See* Davenport Management, Inc. 1993 SEC No-Act. Lexis 624 (April 13, 1993) (stating that a corporation would be required to register as a broker-dealer if it acted as an intermediary in securities transactions, negotiated the terms of securities transactions, received transaction-based compensation, had direct contact with outside investors, and provided ''investment banking services''); See also Securities Exchange Act Release No. 11742 (October 5, 1975) (noting that a bank might be subject to registration as a municipal securities dealer if it engages in underwriting or otherwise holds itself out as a dealer).