



# Department of the Treasury Financial Crimes Enforcement Network

## Guidance

### FIN-2009-G001

**Issued:** April 27, 2009

**Subject:** **Guidance on Supporting Information Suitable for Determining the Portion of a Business Customer's Annual Gross Revenues that is Derived from Activities Ineligible for Exemption from Currency Transaction Reporting Requirements**

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### Background

The Financial Crimes Enforcement Network (FinCEN) is issuing this guidance to assist banks<sup>1</sup> in determining the appropriateness of exempting from currency transaction reporting requirements non-listed business customers that derive some portion of their annual gross revenues from ineligible business activities.<sup>2</sup>

Pursuant to the Bank Secrecy Act, a bank is required to file a Currency Transaction Report for each transaction in currency of more than \$10,000 by, through, or to that bank.<sup>3</sup> Additionally, multiple currency transactions totaling more than \$10,000 during any one business day must be treated as a single transaction if the bank has knowledge that they are by or on behalf of the same person.<sup>4</sup>

Nonetheless, a bank may exempt certain customers from currency transaction reporting requirements providing that those customers meet criteria specified in the governing regulation.<sup>5</sup> For example, a bank may exempt a customer (to the extent of its domestic operations and only with respect to transactions conducted through its exemptible accounts) that qualifies as a "non-listed business"<sup>6</sup> – that is, a customer that: (1) has

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<sup>1</sup> Pursuant to the Bank Secrecy Act, the term "bank" includes *inter alia* each agent, agency, branch, or office within the United States of any person doing business as a commercial bank, a savings and loan association, a thrift institution, a credit union, or a foreign bank. 31 C.F.R. § 103.11(c).

<sup>2</sup> FinCEN consulted with the staffs of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision prior to issuing this guidance.

<sup>3</sup> 31 C.F.R. § 103.22(b).

<sup>4</sup> 31 C.F.R. § 103.22(c).

<sup>5</sup> See 31 C.F.R. § 103.22(d)(2)(i)-(v) ["Phase I" exemption from currency transaction reporting requirements]; 31 C.F.R. § 103.22(d)(2)(vi)-(vii) ["Phase II" exemption].

<sup>6</sup> 31 C.F.R. § 103(d)(2)(vi).

maintained a transaction account at the bank for at least two months<sup>7</sup> or upon which the bank has conducted an appropriate risk-based analysis of the legitimacy of the customer's transactions prior to the customer having maintained such a transaction account for two months;<sup>8</sup> (2) frequently engages in transactions in currency in excess of \$10,000 with the bank;<sup>9</sup> and (3) is incorporated or organized under the laws of the United States or a State, or is registered as and eligible to do business within the United States or a State.<sup>10</sup>

Various businesses (*e.g.*, a business engaged primarily in: serving as a financial institution or as an agent for a financial institution of any type; chartering or operation of ships, aircraft, or buses; operating a real estate brokerage; etc.)<sup>11</sup> are ineligible for treatment as exempt non-listed businesses. However, a customer that engages in multiple business activities may qualify for an exemption as a non-listed business provided that no more than 50 percent of its annual gross revenues are derived from one or more ineligible business activities.<sup>12</sup>

### **Reasonable Determination**

Although there is no expectation that a bank will be able to establish the *exact* percentage of a non-listed business customer's annual gross revenues that is derived from ineligible business activities, a bank must consider and maintain materials and other supporting information that allow it to substantiate that the decision to exempt the customer from currency transaction reporting was based upon a *reasonable determination* that the customer derives no more than 50 percent of its annual gross revenues from ineligible business activities.<sup>13</sup> Such a reasonable determination should be based upon its understanding of the nature of the customer's business, the purpose of the customer's accounts, and the actual or anticipated activity in those accounts.

In instances where it is apparent – through a bank's implementation and application of due diligence policies, procedures, and processes to all customers – that a non-listed

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<sup>7</sup> 31 C.F.R. § 103.22(d)(2)(vi)(A).

<sup>8</sup> Pursuant to 31 C.F.R. § 103.22(d)(3)(ii)(B), an exempting bank may exempt an otherwise eligible non-listed business customer prior to the passing of two months' time if it conducts and documents a risk-based assessment of the customer that allows it to form a reasonable belief that the customer has a legitimate business purpose for conducting frequent large currency transactions.

<sup>9</sup> 31 C.F.R. § 103.22(d)(2)(vi)(B). As indicated in the December 5, 2008 final rule amending currency transaction reporting exemption requirements, when interpreting the term "frequently": "[D]epository institutions may designate an otherwise eligible customer for Phase II exemption after the customer has within a year conducted five or more reportable cash transactions." 73 FR 74010, 74014 (Dec. 5, 2008).

<sup>10</sup> 31 C.F.R. § 103.22(d)(2)(vi)(C).

<sup>11</sup> 31 C.F.R. § 103.22(d)(5)(viii).

<sup>12</sup> 31 C.F.R. § 103.22(d)(5)(viii); *see also* FinCEN Advisory, Issue 10 – Reformed CTR Exemption Process: Questions & Answers (Oct. 1998), Question & Answer No. 9: "A business that engages in multiple business activities may be treated as a non-listed business so long as no more than 50% of its gross revenues per year is derived from one or more . . . ineligible business activities . . ."

<sup>13</sup> 31 C.F.R. § 103.22(d)(5)(i): "[A] bank must take such steps to assure itself that a person is an exempt person . . . to document the basis for its conclusions, and document its compliance, with the terms of [currency transaction reporting exemption requirements], that a reasonable and prudent bank would take and document to protect itself from loan or other fraud or loss based on misidentification of a person's status . . ." *See also* 31 C.F.R. § 103.22(d)(5)(x).

business customer derives a clear minority of its annual gross revenues from ineligible business activities, the bank could reasonably and appropriately exempt that customer from currency transaction reporting based solely upon materials and information collected and considered in the ordinary course of conducting customer due diligence.

However, in those instances where it is less clear whether a non-listed business customer derives no more than 50 percent of its annual gross revenues from ineligible activities, a bank should obtain such additional supporting materials and information that would allow it to make a reasonable determination that it may appropriately exempt that customer from currency transaction reporting.

In particular, in such cases a bank could reasonably make such a determination based upon customer completion of a bank checklist/form or receipt of a self-certification statement/letter signed by the customer containing credible information regarding its annual gross revenues, which checklist/form or statement/letter would be substantiated by corroborating information.

If available, a bank is encouraged to request and review a business customer's audited financial statements; however, other information may be similarly relied upon providing that it allows the bank to make a reasonable determination regarding the portion of the customer's annual gross revenues that is derived from ineligible business activities.

For example, in many cases a bank could – again, based upon its understanding of the nature of the customer's business, the purpose of the customer's accounts, and the actual or anticipated activity in those accounts – also come to such a reasonable determination based upon reviewing other reliable information, such as: the customer's most recent tax returns that have been filed with the applicable federal and state authorities; the customer's unaudited financial statements; or documents relating to a bank's lending relationship with the customer.

In certain exceptional instances – although there is no requirement to do so – a bank might consider, when deciding to exempt certain business customers, visiting a customer's place of business to develop a greater understanding of the nature of the customer's business activities and then recording relevant information in the customer's file.

The information supporting each designation of an exempt non-listed business customer must be reviewed and verified by a bank at least once per year.<sup>14</sup>

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<sup>14</sup> 31 C.F.R. § 103.22(d)(4). Additionally, a bank must review and verify at least once each year that management monitors exempt non-listed business customer accounts for suspicious transactions. 31 C.F.R. §§ 103.22(d)(4), (d)(8).

### **No Effect on Other Regulatory Requirements**

Banks are reminded that exempting a customer from currency transaction reporting requirements has no effect on compliance with other Bank Secrecy Act/anti-money laundering programmatic, recordkeeping, and reporting requirements. In particular, banks are reminded of the requirement to implement appropriate risk-based policies, procedures, and processes, including conducting customer due diligence on a risk-assessed basis to aid in the identification of potentially suspicious transactions – and that, if a bank knows, suspects, or has reason to suspect that a transaction involves funds derived from illegal activity or that a customer has otherwise engaged in activities indicative of money laundering, terrorist financing, or other violation of law or regulation, it should file a Suspicious Activity Report.