

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA31

Financial Crimes Enforcement Network; Customer Identification Programs for Certain Banks Lacking a Federal Functional Regulator

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

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN is issuing a proposed regulation to implement section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (the Act) for certain banks lacking a federal functional regulator. The notice would extend to these banks the same section 326 rules as apply both to banks with a federal functional regulator and to credit unions, trust companies, and private banks lacking a federal functional regulator.

DATES: Written comments on the proposed rule may be submitted on or before June 23, 2003.

ADDRESSES: Because paper mail in the Washington area may be subject to delay, commenters are encouraged to e-mail or fax comments. Comments should be sent by one method only.

Comments may be mailed to FinCEN, Section 326 Certain Credit Union and Trust Company Rule Comments, P.O. Box 39, Vienna, VA 22183, or sent to Internet address regcomments@fincen.treas.gov with the caption "Attention: Section 326 for Certain Banks Rule Comments" in the body of the text. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m. in the FinCEN Reading Room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354-6400 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Office of the Chief Counsel (FinCEN), (703) 905-3590.

SUPPLEMENTARY INFORMATION:**I. Background***A. Section 326 of the USA PATRIOT Act*

On October 26, 2001, President Bush signed the Act (Pub. L. 107-56) into law. Title III of the Act, captioned "International Money Laundering Abatement and Anti-terrorist Financing Act of 2001," adds several new provisions to the Bank Secrecy Act (BSA), 31 U.S.C. 5311 *et seq.* These provisions are intended to facilitate the

prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 326 of the Act adds a new subsection (l) to 31 U.S.C. 5318 of the BSA that requires the Secretary to prescribe regulations "setting forth minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at a financial institution. Under section 326, the regulations must require, at a minimum, financial institutions to implement reasonable procedures for (1) verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency. In prescribing these regulations, the Secretary is directed to take into consideration the various types of accounts maintained by various types of financial institutions, the various methods of opening accounts, and the various types of identifying information available.

B. Proposed Amendment to 31 CFR 103.121

On July 23, 2002, FinCEN and the federal bank regulators jointly issued a proposed rule¹ under section 326 applicable to banks, as defined in 31 CFR 103.11(c), that have a federal functional regulator. At the same time, FinCEN issued a proposed rule under section 326 applicable to credit unions, private banks, and trust companies lacking a federal functional regulator.² Elsewhere in today's issue of the **Federal Register**, FinCEN and the federal bank regulators are adopting a final rule, 31 CFR 103.121, based on those proposals. The final rule applies to banks with a federal functional regulator and to credit unions, trust companies, and private banks without a federal functional regulator.

FinCEN believes that 31 CFR 103.121 should apply to all banks regardless of their regulator. For that reason, this

notice of proposed rulemaking would amend the final rule to extend its application to all banks without a federal functional regulator. In particular, the proposal would amend 31 CFR 103.121 by revising paragraph (a)(2)(ii) to read "A bank, as set forth in § 103.11(c), that does not have a Federal functional regulator."³

The Secretary has determined that the records required to be kept by section 326 of the Act have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, to protect against international terrorism.

II. Regulatory Flexibility Act

FinCEN certifies, pursuant to the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*), that the proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule merely extends to all banks without a federal functional regulator the customer identification program requirements in 31 CFR 103.121, which currently apply to banks with a federal functional regulator and to credit unions, private banks, and trust companies without a federal functional regulator.

The customer identification program requirements of 31 CFR 103.121 closely parallel the requirements for customer identification programs mandated by section 326 of the Act. Moreover, FinCEN believes that banks already have implemented prudential business practices and anti-money laundering programs that involve the key controls that would be required in a customer identification program under 31 CFR 103.121. First, all banks already undertake extensive measures to verify the identity of their customers as a matter of good business practice.

Second, banks are already required by other provisions to check lists of known or suspected terrorists and should already have appropriate compliance programs in place. For example, banks are prohibited from engaging in transactions involving certain foreign countries or their nationals under rules issued by the Office of Foreign Assets Control (OFAC). See 31 CFR part 500. Banks should already have compliance programs in place to ensure that they do not violate OFAC rules. FinCEN understands that many banks, including small banks, have instituted programs to

¹ See 67 FR 48290. For any financial institution engaged in financial activities described in section 4(k) of the Bank Holding Company Act of 1956 (section 4(k) institutions), the Secretary is required to prescribe the regulations issued under section 326 jointly with each of the Federal bank regulators, the SEC, and the CFTC (the Federal functional regulators).

² See 67 FR 48299.

³ The amendment will close a potential loophole so that all similarly situated entities that are banks under the BSA rules and subject only to state supervision must comply with 31 CFR 103.121 whether or not they fall within the categories of credit unions, private banks, or trust companies.

check other lists provided to them by the Federal government following the events of September 11, 2001. FinCEN believes that all banks have access to a variety of resources, such as computer software packages, that enable them to check lists provided by the Federal government.

Third, FinCEN believes the provision in 31 CFR 103.121 that requires a bank to provide adequate notice to its customers that it is requesting information to verify their identity will impose minimal costs on banks. Banks may elect to satisfy that requirement through a variety of low-cost measures, such as by posting a sign in the bank's lobby or providing any other form of written or oral notice.

The recordkeeping requirements of 31 CFR 103.121 similarly may impose some costs on banks, if, for example, some of the information that must be maintained as a consequence of implementing customer identification programs is not already retained. FinCEN believes that the compliance burden, if any, is minimized for banks, including small banks, because banks have the discretion to design and implement appropriate recordkeeping procedures, including allowing banks to maintain electronic records in lieu of (or in combination with) paper records.

Finally, FinCEN believes that the flexibility incorporated into the customer identification rules of 31 CFR 103.121 will permit each bank to tailor its customer identification program to fit its own size and needs. In this regard, FinCEN believes that expenditures associated with establishing and implementing a customer identification program will be commensurate with the size of a bank. If a bank is small, the burden to comply with the customer identification requirements should be *de minimis*.

III. Executive Order 12866

Treasury has determined that this proposal is not a "significant regulatory action" under Executive Order 12866.

Lists of Subjects in 31 CFR Part 103

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

Authority and Issuance

For the reasons set forth in the preamble, part 103 of title 31 of the

Code of Federal Regulations is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, secs. 312, 313, 314, 319, 326, 352, Pub L. 107–56, 115 Stat. 307.

2. Subpart I of part 103 is amended by revising paragraph (a)(2)(ii) of § 103.121 to read as follows:

§ 103.121 Customer Identification Programs for banks, savings associations, credit unions, and certain non-Federally regulated banks.

(a) * * *

(2) * * *

(ii) A bank, as set forth in § 103.11(c), that does not have a Federal functional regulator.

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Dated: April 28, 2003.

James F. Sloan,

Director, Financial Crimes Enforcement Network.

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