

DEPARTMENT OF THE TREASURY

Departmental Offices; Interim Guidance Concerning Compliance by Covered U.S. Financial Institutions With New Statutory Anti-Money Laundering Requirements Regarding Correspondent Accounts Established or Maintained for Foreign Banking Institutions

AGENCY: Department of the Treasury, Departmental Offices.

ACTION: Notice.

SUMMARY: This notice provides interim guidance to financial institutions on how to comply with the requirements of sections 313 and 319(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. 107-56). These anti-money laundering provisions concern the relationship between U.S. financial institutions and foreign banking institutions.

DATES: This notice is effective beginning November 27, 2001 and will remain in effect until superseded by regulations or a subsequent notice.

FOR FURTHER INFORMATION CONTACT: Gary W. Sutton, Senior Banking Counsel, Office of the Assistant General Counsel (Banking and Finance), 202-622-1976 or William D. Langford, Attorney-Advisor, Office of the Assistant General Counsel (Enforcement), 202-622-1932.

SUPPLEMENTARY INFORMATION: This notice provides interim guidance to U.S. financial institutions on the steps necessary for them to comply with the requirements of 31 U.S.C. 5318(j) and (k), as enacted by sections 313 and 319(b) of the USA PATRIOT Act of 2001, respectively. Although this notice may be relied upon by financial institutions until superseded by regulations or a subsequent notice, no inference may be drawn from this notice concerning the scope and substance of regulations that the Department of the Treasury will issue concerning sections 5318(j) and (k).

I. Background

A. Statutory Background

On October 26, 2001, the President signed into law the USA PATRIOT Act. Title III of the USA PATRIOT Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (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. Two of these provisions become effective on December 5, 2001.

First, section 313(a) of the USA PATRIOT Act adds a new subsection (j) of 31 U.S.C. 5318 that prohibits certain financial institutions from providing correspondent accounts to foreign "shell banks" and requires those 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". Second, section 319(b) of the USA PATRIOT Act adds a new subsection (k) to 31 U.S.C. 5318 that requires certain financial institutions that provide correspondent accounts to a foreign bank to maintain records of the foreign bank's owners and agent in the United States designated to accept service of legal process.

Under the USA PATRIOT Act, the Secretary of the Treasury (Secretary) is authorized to interpret and administer these provisions. In light of the December 25, 2001 effective date of sections 5318(j) and (k), the Secretary, in consultation with the federal financial regulators¹ and the Attorney General, is publishing this notice to provide interim guidance to financial institutions in meeting their compliance obligations under these provisions. As discussed below, this notice describes a certification that financial institutions may use as an interim means to assist them in meeting their obligations related to dealing with foreign shell banks under section 5318(j) and recordkeeping under section 5318(k). It should be noted that this certification will not satisfy a financial institution's obligations under any other provisions of the USA PATRIOT Act, including obligations to conduct due diligence under 31 U.S.C. 5318(i), as added by section 312 of the USA PATRIOT Act, or any other applicable law or regulation.

Although the prohibition in section 5318(j) becomes effective on December 25, 2001, the Department of the Treasury expects that covered financial institutions will promptly terminate any correspondent account with any foreign bank that it knows to be a shell bank that is not a regulated affiliate as described in this notice.

¹ The Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Commodities Futures Trading Commission, and the Securities and Exchange Commission.

1. What Are the Requirements of Section 5318(j)?

31 U.S.C. 5318(j), as added by section 313 of the USA PATRIOT Act, provides that a "covered financial institution" shall not establish, maintain, administer, or manage a correspondent account in the United States for, or on behalf of, a foreign bank that does not have a physical presence in any country (shell bank). In addition, the USA PATRIOT Act requires a covered financial institution to take reasonable steps to ensure that any correspondent account established, maintained, administered, or managed by the covered financial institution in the United States for a foreign bank is not being used by that foreign bank to indirectly provide banking services to a foreign shell bank that is not a regulated affiliate.

What Is a Covered Financial Institution?

For purposes of section 5318(j), a "covered financial institution" is: (1) Any insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h))); (2) a commercial bank or trust company; (3) a private banker; (4) an agency or branch of a foreign bank in the United States; (4) a credit union; (5) a thrift institution; or (6) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

What Is a Foreign Shell Bank?

For purposes of section 5318(j), a foreign shell bank is a foreign bank without a physical presence in any country. Under section 5318(j), a "physical presence" is a place of business that is maintained by a foreign bank and is located at a fixed address, other than solely an electronic address, in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank: (1) Employs one or more individuals on a full-time basis; (2) maintains operating records related to its banking activities; and (3) is subject to inspection by the banking authority that licensed the foreign bank to conduct banking activities.

What Foreign Shell Banks Are Excepted From the Limitations on Correspondent Accounts?

The limitations on the direct and indirect provision of correspondent accounts to foreign shell banks do not apply to a foreign shell bank that is a regulated affiliate. A regulated affiliate is a foreign shell bank that (1) is an affiliate of a depository institution,

credit union, or foreign bank that maintains a physical presence in the United States or a foreign country, as applicable; and (2) is subject to supervision by a banking authority in the foreign country regulating such affiliated depository institution, credit union, or foreign bank. An affiliate is a foreign bank that is controlled by or is under common control with a depository institution, credit union, or foreign bank.

What Is a Correspondent Account?

31 U.S.C. 5318A(e)(1)(B), as added by section 311 of the USA PATRIOT Act, defines “correspondent account,” with respect to banking institutions, as “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.” This definition applies for purposes of this notice and the certification.

It is the expectation of the Department of the Treasury that a covered financial institution will accord priority to requesting certifications in connection with foreign banks for which it maintains correspondent deposit accounts or their equivalents.

The Department of the Treasury intends to issue a rule under the authority of section 5318A(e)(2) and (4), as added by section 311 of the USA PATRIOT Act, to further define the term “account” (1) to prohibit non-bank covered financial institutions (including a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934) from establishing or maintaining an account for a foreign shell bank that is not a regulated affiliate and (2) to require non-bank covered financial institutions to take reasonable steps to ensure that any account established, maintained, administered, or managed by such institution in the United States for a foreign bank is not being used by that foreign bank to indirectly provide banking services to a foreign shell bank that is not a regulated affiliate.

2. What Are the Requirements of Section 5318(k)?

31 U.S.C. 5318(k), as added by section 319(b) of the USA PATRIOT Act, requires, among other things, that any covered financial institution that maintains a correspondent account in the United States for a foreign bank shall maintain records in the United States identifying (1) the owner(s) of such foreign bank and (2) the name and address of a person who resides in the United States and is authorized to accept service of legal process for

records regarding the correspondent account.

What Is a Covered Financial Institution?

Section 5318(k) does not define “covered financial institution” for purposes of this recordkeeping requirement. For purposes of this notice and the certification, the term “covered financial institution” has the same meaning as provided in section 5318(j) (see above), except that such term does not include a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934. The Department of the Treasury intends to propose similar recordkeeping requirements for such brokers and dealers.

What Is a Correspondent Account?

Section 5318(k) defines “correspondent account” by reference to the definition of that term in 31 U.S.C. 5318A(e)(1)(B), as added by section 311 of the USA PATRIOT Act, which, as discussed above, means “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.”

As noted above, it is the expectation of the Department of the Treasury that a covered financial institution will accord priority to requesting certifications in connection with foreign banks for which it maintains correspondent deposit accounts or their equivalents.

Who Is an Owner of a Foreign Bank?

Section 5318(k) does not define “owner” for purposes of the requirement that a covered financial institution maintain records of the owners of foreign banks to which it provides correspondent accounts. For purposes of this notice and the certification, an “owner” means any person who is a “large direct owner,” an “indirect owner,” and certain “small direct owners.” For purposes of these definitions: (1) “Person” means any individual, bank, corporation, partnership, limited liability company, or any other legal entity, except that members of the same family² shall be considered one person; and (2) “voting shares or other voting interests” means shares or other interests that entitle the holder to vote for or select directors (or

individuals exercising similar functions).

The definition of “owner” as used in this notice and in the certification applies only with respect to the provisions of section 5318(k), which are designed to facilitate the service of legal process. No inference may be drawn as to the applicability of this definition to other provisions of the USA PATRIOT Act, including the enhanced due diligence requirements of 31 U.S.C. 5318(i) (as added by section 312 of the USA PATRIOT Act), which sets forth different standards for reporting ownership information.

Who Is a Small Direct Owner of a Foreign Bank?

A “small direct owner” of a foreign bank is a person who owns, controls, or has power to vote less than 25 percent of any class of voting securities or other voting interests of the foreign bank. The identity of a small direct owner need not be reported for purposes of this notice and certification unless two or more small direct owners (1) in the aggregate own 25 percent or more of the voting securities or interests of the foreign bank and (2) are owned by the same indirect owner (see below).

Who Is a Large Direct Owner of a Foreign Bank?

A “large direct owner” of a foreign bank is a person who (1) owns, controls, or has power to vote 25 percent or more of any class of voting securities or other voting interests of the foreign bank; or (2) controls in any manner the election of a majority of the directors (or individuals exercising similar functions) of the foreign bank. The identity of each large direct owner is subject to reporting.

Who Is an Indirect Owner of a Foreign Bank?

If any large direct owner of a foreign bank is majority-owned by another person, or by a chain of majority-owned persons, an “indirect owner” is any person in the ownership chain of any large direct owner who is not majority-owned by another person.

If any two or more small direct owners of a foreign bank (1) in the aggregate own, control, or have power to vote 25 percent or more of any class of voting securities or other voting interests of the foreign bank and (2) are majority-owned by the same person, or by the same chain of majority-owned persons, the “indirect owner” is any person in the ownership chain of the small direct owners who is not majority-owned by another person.

² The same family means parents, spouses, children, siblings, uncles, aunts, grandparents, grandchildren, first cousins, second cousins, stepchildren, stepsiblings, parents-in-law and spouses of any of the foregoing.

Each indirect owner is subject to reporting.

Example of Reportable Owners

The following example illustrates the owners of a foreign bank who are covered by this notice and the certification:

FB is a foreign bank. Voting securities of FB are owned by Person C (15 percent), Person D (35 percent), Person E (10 percent), Person F (20 percent), and Person G (20 percent).

Persons C and G are both majority-owned by Person X, which is majority-owned by Person Y, which is majority-owned by Person Z, which is not majority-owned by another person.

Person D is majority-owned by Person V, which is majority-owned by Person W, which is not majority-owned by another person.

Persons E and F are not owned by another person.

Persons C, E, F, and G are small direct owners because each owns less than 25 percent of the voting securities of FB. The identities of Persons C and G are subject to reporting under this notice because (1) in the aggregate they own more than 25 percent of the voting securities of FB and (2) they are majority-owned by the same indirect owner Z. The identities of Persons E and F are not subject to reporting.

Person D is a large direct owner because it owns 25 percent or more of the voting securities of FB. The identity of Person D is subject to reporting under this notice.

Person W is an indirect owner because it is a majority-owner of Person V, which is a majority-owner of Person D. The identity of Person W is subject to reporting under this notice. The identity of Person V is not subject to reporting.

Person Z is an indirect owner because it is a majority-owner of Person Y, which is a majority-owner of Person X, which is a majority-owner of Persons C and G, which are small direct owners that in the aggregate own 25 percent or more of the voting securities of FB. The identity of Person Z is subject to reporting under this notice. The identity of Persons Y and X are not subject to reporting.

B. Description of Certification

What Is Being Certified?

Under paragraph 1 of the certification, a foreign bank that maintains a correspondent account with a covered financial institution certifies either that: (1) it is not a shell bank; (2) it is a shell bank that is a regulated affiliate; or (3) is a shell bank that is not a regulated

affiliate, in which case a covered financial institution is prohibited from establishing or maintaining a correspondent account with the foreign bank.

If a foreign bank certifies that it is not a shell bank, it specifies in Annex I its physical address and its regulator. If the foreign bank certifies that it is a regulated affiliate, it specifies in Annex I the name and address of the non-shell bank with which it is affiliated and the regulator of the non-shell bank and the regulated affiliate.

Under paragraph 2 of the certification, a foreign bank certifies either that: (1) It does not provide banking services to any foreign shell bank, other than a regulated affiliate; or (2) it provides banking services to a foreign shell bank but will not use any of the correspondent accounts with a U.S. financial institution to provide banking services to any foreign shell bank, other than a regulated affiliate.

Under paragraph 3 of the certification, a foreign bank certifies the identity its owner(s) in annex II. Street addresses must be provided; post office boxes are not acceptable.

Under paragraph 4 of the certification, a foreign bank certifies the identity of its agent for service of legal process in the United States, and identifies the agent in Annex III. Street addresses must be provided; post office boxes are not acceptable.

Under paragraph 5 of the certification, a foreign bank certifies that it will notify each financial institution in the United States at which it maintains a correspondent account in writing within 30 calendar days of any change in facts or circumstances previously certified or contained in the annexes to the certification.

Under paragraph 6 of the certification, a foreign bank certifies that it understands that each financial institution in the United States at which it maintains a correspondent account may provide a copy of the certification to the Secretary of the Treasury and the Attorney General of the United States, or their delegates.

Paperwork Reduction Act

The collection of information contained in the certification have been reviewed under the requirements of the Paperwork Reduction Act (44 U.S.C. 3507(j)) and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under control 1505-0184. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information

unless it displays a currently valid OMB control number.

Comments concerning the collection of information should be directed to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. Any such comments should be submitted not later than January 28, 2002.

Comments are specifically requested concerning:

Whether the collection of information is necessary for the proper performance of the functions of the Department of the Treasury, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the collection of information (see below);

How to enhance the quality, utility, and clarity of the information to be collected;

How to minimize the burden of complying with the collection of information, including the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in the certification will enable financial institutions, on an interim basis, to comply with the requirements of sections 313 and 319(b) of the USA PATRIOT Act of 2001. This information will be used to verify compliance by financial institutions with these provisions. The respondents are foreign banks that establish or maintain correspondent accounts with U.S. financial institutions. The reporting of this information by foreign banking institutions is voluntary; however failure to provide the information may preclude the establishment or the continuation of correspondent accounts with U.S. financial institutions.

Estimated total annual reporting burden: 180,00 hours.

Estimated number of respondents: 9,000.

Estimated average annual reporting burden per respondent: 20 hours.

Estimated annual frequency of responses: Once.

II. Certification

The following form of certification may be used by a covered financial institution for purposes of this notice. A covered financial institution may use other means to obtain the information necessary to satisfy its obligations under section 5318(j) or 5318(k).

Dated: November 20, 2001.

David D. Aufhauser,

General Counsel.

BILLING CODE 4810-25-M

CERTIFICATION FOR PURPOSES OF SECTIONS 5318(j) AND 5318(k)
OF TITLE 31, UNITED STATES CODE

[OMB Control Number 1505-0184]

The information contained in this Certification is sought pursuant to Sections 5318(j) and 5318(k) of Title 31 of the United States Code, as added by sections 313 and 319(b) of the USA PATRIOT Act of 2001 (Public Law 107-56).

The undersigned respondent bank, _____, _____ (“Respondent Bank”), has established one or more accounts with _____ (“Covered Financial Institution”) to receive deposits from, make payments on behalf of, or handle other financial transactions related to Respondent Bank (the “Correspondent Accounts”). The Respondent Bank hereby certifies, by an individual authorized to make such certification, as follows:

1. Respondent Bank (check appropriate box and complete Annex I):

- (a) Maintains a place of business that (i) is located at a fixed address (other than solely an electronic address) in a country in which Respondent Bank is authorized by such country to conduct banking activities, at which location Respondent Bank employs one or more individuals on a full-time basis and maintains operating records related to its banking activities; and (ii) is subject to inspection by the banking authority that licensed Respondent Bank to conduct banking activities (hereinafter referred to as a “**physical presence**”);
- (b) Does not have a **physical presence** in any country, but the Respondent Bank (i) is an affiliate of a U.S. depository institution, U.S. credit union, or non-U.S. bank that maintains a **physical presence** in a country; and (ii) is also subject to supervision by the same banking authority in the country that regulates such affiliated depository institution, credit union, or non-U.S. bank (the Respondent Bank is thus a “**regulated affiliate**”); or
- (c) Does not have a **physical presence** in a country and is not a **regulated affiliate**.

2. Respondent Bank either (check appropriate box):

- (a) does not provide banking services to any non-U.S. bank that does not have a **physical presence** in any country and that is not a **regulated affiliate**; or
- (b) provides banking services to a non-U.S. bank that does not have a **physical presence** in any country and that is not a **regulated affiliate**, but Respondent Bank will not after December 25, 2001 use any Correspondent Account with the Covered Financial Institution to provide banking services to any non-U.S. bank that does not have a **physical presence** in any country, and that is not a **regulated affiliate**.

3. Respondent Bank has no **owner(s)** (as defined below) except as set forth in Annex II. For purposes of this Certification, an **owner** means any **large direct owner**, any **indirect owner**, and certain **small direct owners**.

A **large direct owner** is a **person** who (1) owns, controls, or has power to vote 25 percent or more of any class of voting securities or other voting interests of the Respondent Bank; or (2) controls in any manner the election of a majority of the directors (or individuals exercising similar functions) of the Respondent Bank.

A **small direct owner** is a person who owns, controls, or has power to vote less than 25 percent of any class of voting securities or other voting interests of the Respondent Bank. The identity of a **small direct owner** need not be set forth in Annex II unless two or more small direct owners (1) in the aggregate own 25 percent or more of the voting securities or interests of the Respondent Bank and (2) are owned by the same **indirect owner**.

If any **direct owner** is majority-owned by another person, or a chain of majority-owned persons, an **indirect owner** is any person in the ownership chain of the **direct owner** who is not majority-owned by another person.

If any two or more **small direct owners** (1) in the aggregate own, control, or have power to vote 25 percent or more of any class of voting securities or other voting interests of the Respondent Bank and (2) and are majority-owned by the same person, or by the same chain of majority-owned persons, an **indirect owner** is any person in the ownership chain of such small direct owners who is not majority-owned by another person.

For purposes of this Certification, (i) "**person**" means any individual, bank, corporation, partnership, limited liability company or any other legal entity; (ii) **voting securities or other voting interests** means securities or other interests that entitle the holder to vote for or select directors (or individuals exercising similar functions); and (iii) members of the same family* shall be considered one **person**.

* The same family means parents, spouses, children, siblings, uncles, aunts, grandparents, grandchildren, first cousins, second cousins, stepchildren, stepsiblings, parents-in-law and spouses of any of the foregoing.

4. The individual or entity (“Agent”) identified in Annex III, resident in the United States at the address (not a post office box) set forth in Annex III, is authorized to accept service of legal process from the Secretary of the Treasury or the Attorney General of the United States pursuant to Section 5318(k) of title 31, United States Code.
5. Respondent Bank shall notify in writing within 30 calendar days each financial institution in the United States at which it maintains a Correspondent Account of any change in facts or circumstances as reported in this Certification and the Annexes hereto.
6. Respondent Bank understands that each financial institution in the United States at which it maintains a Correspondent Account may provide a copy of this Certification to the Secretary of the Treasury and the Attorney General of the United States.

I, _____ (name), certify that I have read and understand this Certification and the Annexes hereto and that the statements made in this Certification and the Annexes hereto are true and correct.

This Certification is made on behalf of _____ (name of Respondent Bank), a banking institution organized under the laws of _____ (specify country).

I understand that the statements contained in this Certification and the Annexes hereto may be transmitted to one or more departments or agencies of the United States of America for purpose of fulfilling such departments’ and agencies’ governmental functions.

[Signature]

[Title]

Executed on this _____ day of _____, 200__.

Received, reviewed and accepted by:

Name: _____
Title: _____
For: _____

[Name of Covered Financial Institution]

Date

Annex I

1. To be completed if Respondent Bank checked paragraph 1(a) of the Certification:

(A) Respondent Bank maintains a place of business at

[Street Address]

in _____.
[Country]

(B) The banking authority that has the right to inspect the place of business referred to in (A) is

_____.
[Name of Banking Authority]

2. To be completed if Respondent Bank checked paragraph 1(b) of the Certification:

(A) Respondent Bank's affiliate that is regulated is

_____, which maintains a **physical presence** at
[Name of Affiliate]

[Street Address]

in _____.
[Country]

(B) The banking authority that supervises both the Respondent Bank and its affiliate is

_____.
[Name of Banking Authority]

Annex II

Name and Address
of Owner(s)

<u>Name</u>	<i>Address</i> (No Post Office Boxes)

Attach Additional Sheets if Necessary

Annex III

**Name and Address
of Agent Designated to Accept Service of Legal Process**

<u>Name</u>	<i>Address</i> (No Post Office Boxes)	<i>Phone No.</i>	<i>Fax No.</i>	<i>E-mail Address</i>

[FR Doc. 01-29468 Filed 11-21-01; 3:04 pm]

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