(d) Any other documentation requested by the Secretary that is necessary to determine whether to approve or disapprove the compact or amendment.

§ 293.9 Where should a compact or amendment be submitted for review and approval?

Submit compacts and amendments to the Director, Office of Indian Gaming, U.S. Department of the Interior, 1849 C Street, NW., Mail Stop 3657, Main Interior Building, Washington, DC 20240. If this address changes, a notice with the new address will be published in the **Federal Register** within 5 business days.

§ 293.10 How long will the Secretary take to review a compact or amendment?

(a) The Secretary must approve or disapprove a compact or amendment within 45 calendar days after receiving the compact or amendment.

(b) The Secretary will notify the Indian tribe and the State in writing of the decision to approve or disapprove a compact or amendment.

§ 293.11 When will the 45-day timeline begin?

The 45-day timeline will begin when a compact or amendment is received and date stamped in the Office of Indian Gaming at the address listed in § 293.9.

§ 293.12 What happens if the Secretary does not act on the compact or amendment within the 45-day review period?

If the Secretary neither affirmatively approves nor disapproves a compact or amendment within the 45-day review period, the compact or amendment is considered to have been approved, but only to the extent it complies with the provisions of the Indian Gaming Regulatory Act.

§ 293.13 Who can withdraw a compact or amendment after it has been received by the Secretary?

To withdraw a compact or amendment after it has been received by the Secretary, the Indian tribe and State must submit a written request to the Director, Office of Indian Gaming at the address listed in § 293.9.

§ 293.14 When may the Secretary disapprove a compact or amendment?

The Secretary may disapprove a compact or amendment only if it violates:

(a) Any provision of the Indian Gaming Regulatory Act;

(b) Any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or

(c) The trust obligations of the United States to Indians.

§ 293.15 When does an approved or considered-to-have-been-approved compact or amendment take effect?

(a) An approved or considered-to-have-been-approved compact or amendment takes effect on the date that notice of its approval is published in the **Federal Register**.

(b) The notice of approval must be published in the **Federal Register** within 90 days from the date the compact or amendment is received by the Office of Indian Gaming.

§ 293.16 How does the Paperwork Reduction Act affect this part?

The information collection requirements contained in this part have been approved by the OMB under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned control number 1076–0172. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

[FR Doc. E8–28882 Filed 12–4–08; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA90

Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Exemptions from the Requirement to Report Transactions in Currency

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

ACTION: Final rule.

SUMMARY: FinCEN is issuing this final rule to amend the Bank Secrecy Act (BSA) regulation that allows depository institutions to exempt transactions of certain persons from the requirement to report transactions in currency in excess of $10,000. Modification of the exemption procedures is a part of the Department of the Treasury's continuing effort to increase the efficiency and effectiveness of its anti-money laundering and counter-terrorist financing policies.

DATES: *Effective Date:* January 5, 2009.

FOR FURTHER INFORMATION CONTACT: The FinCEN regulatory helpline at (800) 949–2732 and select Option 3.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Background

The Bank Secrecy Act, Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, authorizes the Secretary of the Treasury (''Secretary''), among other things, to issue regulations requiring financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, regulatory and counter-terrorism matters, and to implement anti-money laundering programs and compliance procedures. The reporting by financial institutions of transactions in currency in excess of $10,000 has long been a major component of the Department of the Treasury's implementation of the BSA. The reporting requirement is promulgated pursuant to 31 U.S.C. 5313(a) requiring reports of domestic coin and currency transactions. The regulations implementing the BSA appear at 31 CFR part 103. The Secretary's authority to administer the BSA has been delegated to the Director of FinCEN.

The Money Laundering Suppression Act of 1994 (MLSA) amended the BSA by establishing a system for exempting transactions by certain customers of depository institutions from currency transaction reporting.[1] In general, the statutory exemption system, 31 U.S.C. 5313(d) through (g), creates two types of exemptions.[2] Under 31 U.S.C. 5313(d) (sometimes called the ''mandatory exemption'' provision), the Secretary is required to provide depository institutions with the ability to exempt from the currency transaction reporting requirement transactions in currency between the depository institution and four specified categories of customers. The four specified categories of customers in the mandatory exemption provision are: (1) Another depository institution; (2) a department or agency of the United States, any State, or any political subdivision of any State; (3) any entity established under the laws of the United States, any State, or any political subdivision of any State, or under an interstate compact between

[1] *See* section 402 of the Money Laundering Suppression Act of 1994 (the ''Money Laundering Suppression Act''), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325 (Sept. 23, 1994).

[2] The enactment of 31 U.S.C. 5313(d) through (g) reflected congressional intent to ''reform * * * the procedures for exempting transactions between depository institutions and their customers.'' *See* H.R. Rep. 103–652, 103d Cong., 2d Sess. 186 (Aug. 2, 1994).

two or more States, which exercises governmental authority on behalf of the United States or any such State or political subdivision; and (4) any business or category of business the reports on which have little or no value for law enforcement purposes.

Under 31 U.S.C. 5313(e) (sometimes called the ''discretionary exemption'' provision) the Secretary is authorized, but not required, to allow depository institutions to exempt from the currency transaction reporting requirement transactions in currency between it and a qualified business customer.[3] A ''qualified business customer,'' for purposes of the discretionary exemption provision, is a business that:

(A) Maintains a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act) at the depository institution;

(B) frequently engages in transactions with the depository institution which are subject to the reporting requirements of subsection (a); and

(C) meets criteria which the Secretary determines are sufficient to ensure that the purposes of [the BSA] are carried out without requiring a report with respect to such transactions.[4]

The Secretary was required to establish by regulation the criteria for granting and maintaining an exemption for qualified business customers,[5] as well as guidelines for depository institutions to follow in selecting customers for exemption.[6] The BSA allowed for the guidelines including a description of the type of businesses for which no exemption would be granted under the discretionary exemption provision. The Secretary also was required to prescribe regulations that require an annual review of qualified business customers and require depository institutions to resubmit information about those customers with modifications if appropriate.[7]

B. Overview of the Current Regulatory Provisions To Exempt Certain Persons From Currency Transaction Reporting

The current exemption procedures, which are codified at 31 CFR 103.22(d), were the result of a five-part rulemaking.[8] The current exemption procedures apply to depository institution customers that fall within one of the classes of exempt persons described in 31 CFR 103.22(d)(2)(i)–(vii), commonly referred to as ''Phase I'' and ''Phase II'' exemptions. Phase I eligible customers include: (i) Other banks [9] operating in the United States; (ii) government departments and agencies; (iii) certain entities that exercise governmental authority; (iv) entities whose equity interests are listed on one of the major national stock exchanges; and (v) certain subsidiaries of entities whose equity interests are listed on one of the major national stock exchanges.[10] Phase II eligible customers include: (i) ''non-listed businesses'' and (ii) ''payroll customers.'' A ''non-listed business'' is any other commercial enterprise that is not ineligible for exemption [11] and that:

(A) Has maintained a transaction account at the bank for at least 12 months;

(B) Frequently engages in transactions in currency with the bank in excess of $10,000; and

(C) 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.[12]

A ''payroll customer,'' under 31 CFR 103.22(d)(2)(vii), is any other person (*i.e.*, a person not otherwise covered under the exempt person definitions) that:

(A) Has maintained a transaction account at the bank for at least 12 months;

(B) Operates a firm that regularly withdraws more than $10,000 in order to pay its United States employees in currency; and

(C) 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.[13]

A payroll customer is an exempt person ''[w]ith respect solely to withdrawals for payroll purposes.'' [14]

Designating an Eligible Customer as Exempt and Other Requirements

Currently, a depository institution exempting a customer must file a FinCEN Form 110, Designation of Exempt Person (''DOEP'') (''FinCEN Form 110'') within 30 days after the first transaction which the bank wishes to exempt with respect to the customer.[15] For a Phase I customer, a depository institution must file the form only once and must conduct an annual review of the customer. For a Phase II customer, a depository institution must also conduct an annual review of the customer, and must biennially renew the customer's exemption by re-filing the form, certifying that it has applied its system of monitoring the customer's transactions in currency for suspicious activity, and reporting any change in control of the customer.

C. The Government Accountability Office (GAO) Report

The United States Government Accountability Office (GAO) issued a report (''the GAO Report'') this year that was helpful to FinCEN in identifying ways the current CTR exemption requirements could be improved.[16] The GAO found that CTRs provide federal, state, and local law enforcement officials with ''unique and reliable information essential to a variety of efforts'' and that advances in technology have made information reported through CTRs that much more useful.[17] In discussing the usefulness of CTRs, the GAO Report noted that the CTR, which captures information based on objective facts that determine its filing, and the SAR, which requires a financial institution to make a subjective determination of what is suspicious prior to its filing, are complementary sources of information for law enforcement.[18] Finally, the GAO Report found that CTR requirements also are useful to law enforcement because they force criminals to act in ways that increase chances of detection as they attempt to avoid conducting reportable transactions.[19]

Recognizing both the value of CTR data and the need to improve the current CTR exemption regulatory requirements, the GAO Report made three main recommendations for changes to the current CTR exemption regulations: (1) Remove the regulatory requirement that depository institutions

[3] For additional information about the terms of 31 U.S.C. 5313(e)–(g), see 63 FR 50147, 50148 (Sept. 21, 1998).

[4] 31 U.S.C. 5313(e)(2).

[5] *See* 31 U.S.C. 5313(e)(3).

[6] *See* 31 U.S.C. 5313(e)(4)(A).

[7] *See* 31 U.S.C. 5313(e)(5).

[8] *See* 61 FR 18204 (Apr. 24, 1996), 62 FR 47141, 47156 (Sept. 8, 1997), 62 FR 63298 (Nov. 28, 1997), 63 FR 50147 (September 21, 1998), and 65 FR 46356 (July 28, 2000) (the rulemakings that comprise the current CTR exemption system).

[9] *See* 31 CFR 103.22 (definition of a bank, which includes other depository institutions).

[10] *See* 31 CFR 103.22(d)(2)(v) (definition of a subsidiary).

[11] *See* 31 CFR 103.22(d)(6)(vii) (lists those non-listed businesses that are ineligible for exemption).

[12] 31 CFR 103.22(d)(2)(vi). (A non-listed business is an exempt person only ''[t]o the extent of its domestic operations.'')

[13] 31 CFR 103.22(d)(2)(vii).

[14] Id.

[15] *See* 31 CFR 103.22(d)(3)(i). FinCEN Form 110 replaced the previous designation form, Treasury Form TD F 90–22.53.

[16] *See* ''Bank Secrecy Act: Increased Use of Exemption Provisions Could Reduce Currency Transaction Reporting While Maintaining Usefulness to Law Enforcement Efforts'' GAO–08–355 (GAO: Washington, D.C.: Feb. 21, 2008).

[17] *See* id. at 2.

[18] *See* id. at 17 and 19.

[19] *See* id at 23–24.

file exemption forms, and annually review the supporting information, for banks, federal, state, and local government agencies, and entities exercising federal, state or local governmental authority; (2) remove the regulatory requirement that depository institutions biennially renew Phase II exemptions; and (3) permit depository institutions to exempt otherwise eligible non-listed customers who frequently engage in large cash transactions within a period of time shorter than 12 months.

II. Notice of Proposed Rulemaking

The final rule contained in this document is based on the Notice of Proposed Rulemaking published in the **Federal Register** on April 24, 2008 (''Notice'').[20] With the intent of simplifying the CTR exemption process and taking into account the recommendations made in the GAO Report, the Notice proposed a number of changes to the current regulatory requirements that govern the CTR exemption process. In particular the Notice proposed: removing the initial designation and annual review requirements for Phase I customers that are depository institutions, governments, or those acting with governmental authority; removing the biennial filing requirement for Phase II exempt customers but retaining the requirement to report a customer's change in control once every two years; eliminating the waiting period for exempting otherwise eligible Phase II customers by adopting a risk-based approach to exempting those customers; and requiring depository institutions to report a revocation of an exemption for Phase I and Phase II customers. The Notice also proposed a number of technical edits.

III. Comments on the Notice—Overview and General Issues

The comment period for the Notice ended on June 23, 2008. We received a total of 37 comment letters.[21] Of these, 19 were submitted by banks, five by credit unions, seven by industry associations, and two by individuals.[22] Generally, commenters were supportive of the proposals to eliminate the filing of a DOEP form and the annual review requirement for Phase I customers that are banks, government agencies, and entities exercising government authority. Some commenters suggested extending those proposals to the entire category of Phase I customers, which also includes public companies listed on a major stock exchange and their subsidiaries. Most commenters were supportive of removing the biennial filing requirement for Phase II exempt customers, but were not supportive of having to monitor for and report to FinCEN a change in control for those customers. Most banks that commented on the Phase II proposals also were not supportive of adopting only a risk-based analysis in lieu of the current twelve-month waiting period, though some credit unions were slightly more supportive of the proposal because of its potential to give depository institutions more flexibility in using the exemption process. Almost all commenters supported the current definition of ''frequently'' as meaning engaging in eight or more large currency transactions per year,[23] but many requested that FinCEN permit depository institutions to prorate that number if the waiting period for Phase II was made shorter. Finally, some commenters supported making filing a revocation mandatory, some did not think filing a revocation was overly burdensome but thought filing a revocation should remain voluntary, and others objected to the revocation requirement, which they viewed as being unnecessary and duplicative because they would begin filing CTRs again on customers they no longer exempt.

IV. Section-by-Section Analysis

A. Removing the Initial Designation and Annual Review Requirements for Certain Phase I Customers

FinCEN proposed to amend § 103.22 by (1) removing the requirement that depository institutions file an initial DOEP form (FinCEN Form 110) for Phase I eligible customers that are depository institutions, federal, state, or local governments, or entities exercising governmental authority;[24] and (2) removing the requirement that depository institutions conduct an annual review of the continued eligibility of those customers.[25] FinCEN proposed these amendments to further simplify the process of exempting these Phase I customers, because CTRs filed on them are not likely to be highly useful to law enforcement, and because those entities are unlikely to change the characteristics that made them eligible for exemption at the time of their initial designation.[26] All of the comments received regarding these two proposals were supportive. As a result, the final rule adopts these proposals without change.

Some commenters noted that most of the cost of using these Phase I exemptions results from the practice of creating additional files, separate from the files kept to demonstrate compliance with other BSA requirements, such as the customer identification program (''CIP'')[27] and the anti-money laundering (''AML'') program[28] requirements. While depository institutions will no longer be required to make an initial designation of exemption for these Phase I customers, depository institutions should take the same steps to assure themselves of the customer's initial eligibility for exemption, and to document the basis of its conclusions, that a reasonable and prudent bank would take to protect itself from loan or other fraud or loss based on misidentification of a person's status.[29] If a bank is able to determine a customer's eligibility for an exemption in the course of complying with its other BSA obligations, such as the requirement to maintain a Customer Identification Program (''CIP''), then the bank may make notations within its other BSA documentation, and need not maintain additional, separate documentation for the sole purpose of complying with the Phase I or Phase II exemption requirements. Also, while depository institutions must still comply with their SAR reporting obligations should any of their Phase I customers engage in suspicious activity, they are not required to review and confirm the continued exemption eligibility of Phase I customers that are banks, government agencies, or entities exercising governmental authorities.

[20] *See* 73 FR 22101 (Apr. 24, 2008).

[21] All comments to the Notice are available for public viewing at *www.regulations.gov*.

[22] One comment was blank and three were identical comments submitted by the same bank.

[23] See FinCEN's ''Guidance on Interpreting 'Frequently' Found in the Criteria for Exempting a 'Non-Listed Business' Under 31 CFR 103.22(d)(2)(vi)(B)'' (Nov. 2002).

[24] *See* 31 CFR 103.22(d)(3)(ii). *See* also 31 CFR 103.22(d)(6)(ii) (Operating rules that illustrate what types of entities normally exercise governmental authority).

[25] *See* 31 CFR 103.22(d)(4).

[26] FinCEN estimates that this rule will result in an additional 5,000 exemptions. Based on an analysis of CTR filings in 2007, FinCEN identified approximately 90,000 CTRs filed on 5,000 separate depository institutions. As a result of the revisions contained in the final rule, specifically the elimination of the requirements to file a designation of exempt person form and conduct an annual review on depository institutions, FinCEN expects that an exemption will be exercised for these 5,000 institutions. The actual number of exemptions is likely to exceed this level given the current estimate does not include additional exemptions for non-depository institutions, such as non-listed businesses.

[27] *See* 31 CFR 103.121.

[28] *See* 31 CFR 103.120.

[29] *See* re-designated 31 CFR 103.22(d)(5)(i).

Extending Proposals to Phase I Eligible Listed Public Companies and Their Subsidiaries

Some commenters requested that the proposals to remove the initial designation and annual review requirements for certain Phase I customers be extended to include Phase I eligible customers that are listed public companies and their subsidiaries. In the Notice, FinCEN did not extend these proposals to those Phase I customers that are listed public companies or their subsidiaries, because, unlike other Phase I entities, it is more likely that these customers may lose their exempt status because they no longer are publicly-traded companies. For example, one commenter noted a recent trend of some U.S. public companies being reorganized as private companies, which results in those entities no longer being subject to Securities and Exchange Commission (SEC) reporting requirements. Not having to comply with SEC reporting requirements results in private companies providing far less public information, and therefore being subject to much less scrutiny. FinCEN does not believe that confirming once a year that an exempt business continues to be a listed public company is unduly burdensome. Although it is true, as one commenter suggested, that a previously listed public company that has reorganized as a private company may be eligible for exemption as a Phase II non-listed business, it is also true that such a private company could be engaging in an ineligible line of business and thus potentially may be ineligible for exemption as a non-listed business.[30] Accordingly, FinCEN will not at this time be extending the removal of the initial designation of exemption or annual review requirements to listed public companies and their subsidiaries.

B. Waiting Period Required to Consider Phase II Entities for Exemption

FinCEN proposed amending paragraphs 31 CFR 103.22(d)(2)(vi)(A) and (vii)(A), and paragraph 31 CFR 103.22(d)(3)(iii), to remove any prescribed amount of time before a depository institution may consider a non-listed business or payroll customer for exemption, and instead enabling a depository institution to make a risk-based determination. FinCEN also solicited comment on an alternative proposal in which, instead of adopting a risk-based approach, FinCEN would maintain a reference to the length of time required to consider Phase II entities for exemption, but reduce it from twelve months to two months. Most commenters, especially banks and larger depository institutions, warned FinCEN that if only a risk-based approach were adopted, many depository institutions would no longer use Phase II exemptions because the costs associated with conducting and documenting a subjective risk-based analysis would far outweigh the cost of filing CTRs for those customers. A few of these commenters, though, suggested that in limited circumstances the flexibility of being able to exempt such a customer after conducting a risk-based analysis might be helpful.[31] Some credit union commenters were slightly more receptive to the proposal to adopt a risk-based requirement for Phase II exemptions, but also were apprehensive about the subjective nature of such a requirement. Most comments supported and preferred the proposal to shorten the waiting period for Phase II exemptions to two months, a few commenters suggested adopting both proposals in a hybrid approach, and some argued that they would not consider exempting a customer after so short a time frame as two months.

FinCEN noted in the Notice that much has changed in the regulatory landscape since 1998 when the twelve month waiting period was finalized for Phase II exemptions, and made special note of the additional requirements that depository institutions became subject to under the BSA and its implementing regulations with the enactment of the USA PATRIOT Act.[32] For example, FinCEN recognizes that depository institutions have had to gather more information about their customers at account opening as a result of requirements like the CIP requirements,[33] which must include risk-based procedures for verifying the identity of a customer, and that in general, depository institutions have become increasingly adept and sophisticated at complying with BSA requirements. In the Notice, FinCEN also articulated its intent to simplify the current exemption system, not to make complying with the regulatory requirements for exemptions more difficult and costly.[34] As a result, FinCEN believes adopting a hybrid approach that permits depository institutions to exempt an otherwise eligible Phase II customer after two months, or prior to the passing of two months' time if the institution conducts a risk-based analysis of the customer that allows the institution to form and document a reasonable belief that the customer has a legitimate business purpose for conducting frequent large cash transactions, is now appropriate. Depository institutions should note that the risk-based analysis option should be read as a separate, specific rule of paragraph (d), and is not meant to supersede the operating rules of existing 31 CFR 103.22(d)(6)(i) subject to paragraph (d). In addition, nothing in this final rule is intended to in any way relieve or reduce the obligations of the SAR requirement.[35]

The reasonableness standard for initial designation for Phase II exemption prior to two months and the reasonable standard in the operating rules in paragraph (d) are similar standards, but as they apply to different circumstances, they necessarily result in banks having to conduct different levels of review of their customers to meet those similar standards. If the waiting period has not yet been met and as a result, the bank has less time to observe the normal pattern of transaction activity that a customer engages in and to gain a knowledge of that customer, the depository institution must conduct a risk-based analysis to form a reasonable belief that the customer has a legitimate business purpose for conducting large currency transactions. That analysis may involve a greater level of review of that customer than under the reasonable and prudent standard, depending upon the depository institution's assessment of the risks associated with that customer.

Conducting a Risk-Based Analysis

When conducting a risk-based analysis to determine the Phase II exemption eligibility of a customer, the depository institution should form a reasonable belief that the customer has a legitimate business purpose for conducting frequent transactions in currency. Factors the depository

[30] *See* 31 CFR 103.22(d)(6)(viii) (list of ineligible businesses).

[31] Examples given by commenters included instances when a customer previously exempt under Phase I becomes ineligible under Phase I and the customer has not yet maintained an account with the institution for the prescribed waiting period to be eligible for Phase II exemption, or when a former customer that was previously exempted under the Phase II requirements by the institution reopens their transaction account.

[32] *See* 73 FR 22103 (April 24, 2008). The CIP requirement for depository institutions was implemented as a result of amendments made to the BSA with the enactment of the USA PATRIOT Act.

[33] 31 CFR 103.121(b)(2).

[34] *See supra* note 31 at 22102.

[35] *See* 63 FR 50155 (Sept. 21, 1998) ("FinCEN further notes that maintaining a monitoring system reasonably designed to detect suspicious activity * * * should not pose additional burdens on banks, because they remain subject in any event to the requirement to file reports of suspicious activity * * *"). *See* also 31 CFR 103.18 (bank SAR rule).

institution might consider in order to form a reasonable belief include, but are not limited to: whether the depository institution had a past relationship with the customer, certain specific characteristics of the customer's business model that may be pertinent, the types of business in which the customer engages, and where the business is operating. Exempting an otherwise eligible Phase II customer prior to two months' time may be particularly appropriate when, for example: a returning customer reopens a previously maintained exempt transaction account with the institution; a customer that would now be eligible for Phase II exemption but under the current regulations was previously not eligible because the customer had conducted fewer than eight, but at least five, large cash transactions; or, when a customer that was a publicly listed company or a subsidiary becomes ineligible for exemption under Phase I, but may be designated for exemption under Phase II.

Defining ''Frequently''

The BSA definition of those customers commonly referred to as Phase II customers requires that they ''frequently'' engage in transactions subject to the CTR requirement.[36] In the Notice, FinCEN requested comments on whether its guidance interpreting ''frequently'' as eight or more large cash transactions per year is still reasonable.[37] Almost all commenters were supportive of interpreting ''frequently'' as eight or more transactions per year, and many commenters requested that if FinCEN made the waiting period for Phase II exemption eligibility shorter, that depository institutions be permitted to pro-rate the number of transactions that an otherwise eligible Phase II customer must engage in before the depository institution could designate the customer for exemption.

FinCEN does not believe that prorating the number of transactions in the current guidance is appropriate. Only one or two large, reportable cash transactions are not likely to give a depository institution enough of a transactional history of a customer to determine that the customer will be frequently engaging in large cash transactions. FinCEN does believe, however, that changing its current guidance interpreting ''frequently'' to recommending five or more transactions per year[38] is now appropriate because the waiting period for exempting an otherwise eligible Phase II customer is being greatly shortened and it is FinCEN's intent to simplify the exemption process and encourage an increased use of exemptions. As a result, depository 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. In addition to having conducted at least five or more reportable cash transactions within a year, the customer must have maintained a transaction account for two months, or the depository institution may conduct a risk based analysis of the customer's eligibility for Phase II exemption. For example, if the customer does not conduct five reportable cash transactions until it has maintained an account for three months, the depository institution would not be able to exempt that customer until that time. Further, a seasonal customer that conducts large cash transactions only during one part of the year would satisfy the ''frequently'' requirement after it had conducted five or more reportable cash transactions within one year, regardless of whether those transactions were conducted during the time period when the customer conducts transactions with the most frequency.

Finally, some commenters asked for clarification regarding whether the customer must continue to satisfy the ''frequently'' requirement every year after initial designation to retain its exempt status. FinCEN wishes to clarify that to retain eligibility for a Phase II exemption, a customer must have actually conducted at least five reportable cash transactions in each full year following the customer's initial designation. For example, if a depository institution discovers during the annual review of a Phase II exempt customer that the customer had conducted only four reportable cash transactions during the year under review, the depository institution going forward may no longer treat the customer as exempt until the customer conducts at least five reportable cash transactions in an ensuing year and is otherwise eligible for exemption. The depository institution, however, is not required to back file CTRs with respect to a designated Phase II customer that had met the eligibility requirements in a preceding year, but was subsequently found not to have conducted five or more transactions in the year under review.

C. Removing the Biennial Filing Requirement for Phase II Exempt Customers

FinCEN proposed removing paragraph § 103.22(d)(5) to eliminate the requirement that depository institutions biennially file a designation of exempt person for non-listed and payroll customers. In concert with this proposal, FinCEN also proposed amending paragraph 31 CFR 103.22(d)(4) to continue requiring depository institutions to notify FinCEN of any change in control of a Phase II customer, and redesignated paragraph 31 CFR 103.22(d)(9) to require depository institutions to report to FinCEN a decision to revoke the designation of an otherwise eligible customer for exemption. Commenters were supportive of the proposal to remove the biennial filing requirement, and as a result, FinCEN is adopting it in this final rule without change.[39] Commenters also requested that FinCEN remove the annual review requirement for Phase II exempt entities. The annual review of Phase II entities is required by the statutory language of the BSA.[40]

Finally, one commenter also requested guidance on the applicability of the requirements in this final rule to those customers that had been designated for Phase II exemption under the exemption rules currently in place. As of the effective date of this final rule, the requirements in the final rule are applicable to all exempt customers and depository institutions will no longer be required to comply with those requirements that have been removed from § 103.22(d). For example, a depository institution that had designated a customer for Phase II exemption under § 103.22(d) prior to its amendment by this final rule, would remain subject to the requirement to conduct an annual review of the customer on a yearly basis, but, upon the effective date of the final rule, would no longer be required to submit a biennial renewal for that customer.[41]

[36] *See* 31 U.S.C. 5313(e)(2)(B). *See* also 31 CFR 103.22(d)(2)(vi) (definition of a non-listed business) and 31 CFR 103.22(d)(2)(vii) (definition of a payroll customer).

[37] *See* FinCEN's ''Guidance on Interpreting 'Frequently' Found in the Criteria for Exempting a 'Non-Listed Business' Under 31 CFR 103.22(d)(2)(vi)(B)'' (Nov. 2002).

[38] For the purposes of this guidance, a year is defined as any consecutive twelve month period.

[39] While depository institutions will no longer need to certify with biennial renewal that the bank's SAR monitoring system had been properly applied to the currency transactions in currency of an exempt person, this in no way is meant to modify the SAR requirement.

[40] *See* 31 U.S.C. 5313(e)(5).

[41] Similarly, for Phase I exemptions of depository institutions, federal, state, or local governments, or entities exercising governmental authority made under the prior rule, no annual review will be required upon the effective date of this final rule.

Change in Control

The NPRM retained the requirement to file change of control information that originally appeared in the 1998 rulemaking on the CTR exemption system.[42] Most commenters, however, were not supportive of having to continue to report change in control information to FinCEN. Almost all commenters who addressed this issue expressed great confusion about what constitutes a change in control. While reporting a change in control is currently accomplished by checking a box on FinCEN Form 110 to report that some change has occurred without providing any additional information about the change, many commenters suggested that continuing to require this information, either once every two years or on an ongoing basis, would necessitate a level of account monitoring that would make using Phase II exemptions too costly.

In light of these comments and FinCEN's own research on the utility of this information, the final rule will no longer require the reporting of change in control information as part of the CTR exemption system. The former requirement to report change in control was derived from 31 U.S.C. 5313(e)(5)(B), which directs Treasury to issue regulations requiring banks to resubmit information on customers pertaining to modification of those customers. Pursuant to the broad authority contained in 31 U.S.C. 5318(a)(6), FinCEN may grant an exemption from the requirement in section 5313(e)(5)(B). FinCEN believes an exemption is appropriate here because of the limited utility in reporting change in control by checking a box on FinCEN Form 110.

D. Requiring Reporting of Revocation

Most commenters stated that reporting a revocation of an otherwise exempt eligible customer would not be an undue burden, but some questioned the usefulness of the information and requested that reporting a revocation remain voluntary. In light of these comments and FinCEN's own research on the utility of this information, at this time FinCEN is not making the reporting of a revocation mandatory in the final rule. Depository institutions are reminded, though, that if an exemption is revoked because during the annual review of the eligibility of a customer the institution detects suspicious activity, the suspicious activity reporting (SAR) requirement must be met.[43]

E. Limitation on Liability

Except for certain technical edits highlighted in the next paragraph, FinCEN is making no changes to the provisions of the CTR exemption rule that limit liability for banks that do not file CTRs in reliance upon the exemption rule. Thus banks will continue to have a safe harbor from liability unless the bank knowingly files false or incomplete information or has reason to believe that the customer does not meet exemption criteria or that the transaction is not a transaction of an exempt person. Moreover, the limitation on liability provisions will continue to provide a safe harbor to banks when exempting exempt customers for which an annual review must be conducted, applicable between the time of initial designation and the completion of each subsequent annual review, in the absence of specific knowledge that the customer no longer meets the requirements for exemption.

F. Technical Edits

In the Notice, FinCEN proposed making a number of technical edits. All of the comments made regarding the technical edits made in the Notice were supportive of those proposed changes. As a result, FinCEN is adopting the following proposals:

- Amending paragraphs 31 CFR 103.22(d)(1), 31 CFR 103.22(d)(2)(vi), 31 CFR 103.22(d)(5)(i) and (viii), 31 CFR 103.22(d)(7)(ii), 31 CFR 103.22(d)(8)(i) and (ii), and 31 CFR 103.22(d)(9) to change cross references;
- Amending paragraphs 31 CFR 103.22(d)(2)(iv) and redesignated 31 CFR 103.22(d)(5)(iii) to correctly reflect the name of the NASDAQ Capital Markets Companies listing, the NASDAQ and the EDGAR system;
- Amending 31 CFR 103.22(d)(3)(i) by making a specific reference to FinCEN Form 110, removing text that references the exemption requirements that existed prior to 1998, and re-stating that a designation must be made within 30 calendar days of the reportable transaction in currency the institution wishes to exempt;
- Amending 31 CFR 103.22(d)(3)(ii) to reflect that transactions in currency with any of the twelve Federal Reserve Banks continue to be exempt from the requirement to file an exemption form; and
- Amending redesignated 31 CFR 103.22(d)(7)(ii) to correspond to changes made regarding the annual review requirement for certain Phase I customers.

V. Revision of FinCEN Form 110

To assist depository institutions in completing the DOEP, FinCEN Form 110,[44] FinCEN is providing the following guidance for items affected by this final rule.

- Depository institutions should disregard any references to biennial renewals that appear on the face of FinCEN Form 110 (specifically, Part I, Item 1b, ''Biennial renewal''; Part II, Item 11; Part III, Item 19, second sentence; and Part V), as well as in the instructions to the form (specifically in the second paragraph under the heading ''When and where to file''; the second sentence under the heading ''Specific Instructions'' that begins, ''Additionally, with regard to non-listed businesses. * * *''); and the instruction to Item 11 under the heading ''Exempt Person Information.''
- Depository institutions should disregard Part II, Item 10a, ''Bank'' and ''Government agency/Government authority.''

VI. Regulatory Matters

A. Executive Order 12866

This rule is a significant regulatory action for purposes of Executive Order 12866, ''Regulatory Planning and Review,'' as amended, and has been reviewed by the Office of Management and Budget.

B. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (March 22, 1995) (''Unfunded Mandates Act''), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on balance the rule provides the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

---

[42] *See* 31 CFR 103.22(d)(5)(ii). *See also* 63 FR 50153 (Sept. 21, 1998).

[43] *See* 31 CFR 103.22(d)(9).

[44] FinCEN Form 110 is available for review on FinCEN's Web site at *http://www.fincen.gov/forms/fin110_dep.pdf*.

C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FinCEN certifies that this final regulation likely will not have a significant economic impact on a substantial number of small entities. The regulatory changes in this final rule likely will reduce the requirements for exempting certain persons from the currency transaction reporting requirements of the BSA and should reduce the obligations associated with complying with those regulatory requirements for financial institutions of all sizes. Accordingly, a regulatory flexibility analysis is not required.

D. Paperwork Reduction Act

The collection of information burden contained in this rule has been approved by the Office of Management and Budget (''OMB'') in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (''Paperwork Reduction Act'') under control number 1506–0012. Based on comments received, this final rule reduces the burden hours associated with this information collection (the Form) that had been previously pre-approved. Treasury submitted the final rule to the OMB for review in accordance with 44 U.S.C. 3507(d), and OMB has approved again the collection of information requirements in today's rule, again under control number 1506–0012. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The regulatory requirement related to the collection of designation of exempt person information that is revised in this final rule is in 31 CFR 103.22(d). If a depository institution voluntarily designates a customer for exemption, the depository institution is required to provide this information,[45] which will be used by law enforcement agencies in the enforcement of criminal and regulatory laws. The likely recordkeepers are businesses.

The reporting burden of designating an eligible customer as an exempt person was reflected in the burden estimates contained in the **Federal Register** notice to renew without change the DOEP form, FinCEN Form 110 (See 73 FR 12250), which is used to report a designation to FinCEN.[46] This figure was one hour and thirty minutes. Based on comments received and on FinCEN's own evaluation of the anticipated result of decreasing burden by removing additional regulatory requirements in this final rule than were proposed in the Notice, this number will be reduced to forty minutes recordkeeping and thirty minutes form completion for each filing, for a total of one hour and ten minutes per filing (a decrease of 20 minutes).

A comment to the Notice provided estimates of the amount of time involved in exempting customers. The commenter estimated that it took 7 hours for a Phase I exemption and 7.8 hours for a Phase II exemption, but the commenter's estimates took into account requirements that are being eliminated by this final rule. Based on the new requirements in the final rule, FinCEN believes a more accurate estimate for complying with the rule, completing the form and maintaining the associated rule and form recordkeeping is a total of 3 hours 10 minutes per response (30 minutes form completion and two hours forty minutes recordkeeping).

Based on the number of DOEPs currently being filed by depository institutions, FinCEN estimates that the final rule will result in an annual filing of a total of 65,000 DOEP forms by affected depository institutions. Some comments to the Notice suggested that the number of DOEPs filed would not increase as a result of the regulatory changes proposed, while others suggested that more DOEPs would be filed as a result of the regulatory changes in the Notice. Based on all of the above information, the total burden for this rule is 205,833 hours. FinCEN will monitor the filing of DOEPs under the final rule in order to determine whether this number should be further revised.

[45] *See* 31 U.S.C. 5313. *See also* 31 CFR 103.22(d).

[46] *See* 73 FR 12250 (Mar. 6, 2008).

List of Subjects in 31 CFR Part 103

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

Authority and Issuance

■ For the reasons set forth above, FinCEN is amending 31 CFR Part 103 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, sec. 314, Pub. L. 107–56, 115 Stat. 307.

■ 2. Amend § 103.22 by:
■ a. Revising paragraph (d)(1);
■ b. Revising paragraph (d)(2)(iv);
■ c. Revising the introductory text of paragraph (d)(2)(vi);
■ d. Revising paragraph (d)(2)(vi)(A);
■ e. Revising paragraph (d)(2)(vii)(A);
■ f. Revising paragraph (d)(3);
■ g. Revising paragraph (d)(4);
■ h. Removing paragraphs (d)(5) and (d)(11);
■ i. Redesignating paragraph (d)(6) as (d)(5); (d)(7) as (d)(6); (d)(8) as (d)(7); (d)(9) as (d)(8); and (d)(10) as (d)(9).
■ j. Revising redesignated paragraph (d)(5)(i);
■ k. Revising redesignated paragraph (d)(5)(iii);
■ l. Revising the last sentence of redesignated paragraph (d)(5)(viii);
■ m. Revising redesignated paragraph (d)(7)(ii);
■ n. Revising redesignated paragraph (d)(8)(i);
■ o. Revising the last sentence of redesignated paragraph (d)(8)(ii); and
■ p. Revising the introductory text of redesignated paragraph (d)(9).

The amended regulation reads as follows:

§ 103.22 Reports of transactions in currency.

* * * * *

(d) * * *

(1) *General.* No bank is required to file a report otherwise required by paragraph (b) of this section with respect to any transaction in currency between an exempt person and such bank, or, to the extent provided in paragraph (d)(5)(vi) of this section, between such exempt person and other banks affiliated with such bank. In addition, a non-bank financial institution is not required to file a report otherwise required by paragraph (b) of this section with respect to a transaction in currency between the institution and a commercial bank. (A limitation on the exemption described in this paragraph (d)(1) is set forth in paragraph (d)(6) of this section.)

(2) * * *

(iv) Any entity, other than a bank, whose common stock or analogous equity interests are listed on the New York Stock Exchange or the American Stock Exchange or whose common stock or analogous equity interests have been designated as a NASDAQ National Market Security listed on the NASDAQ Stock Market (except stock or interests listed under the separate ''NASDAQ Capital Markets Companies'' heading), provided that, for purposes of this paragraph (d)(2)(iv), a person that is a financial institution, other than a bank, is an exempt person only to the extent of its domestic operations;

* * * * *

(vi) To the extent of its domestic operations and only with respect to transactions conducted through its exemptible accounts, any other commercial enterprise (for purposes of this paragraph (d), a ''non-listed business''), other than an enterprise specified in paragraph (d)(5)(viii) of this section, that:

(A) Maintains a transaction account, as defined in paragraph (d)(5)(ix) of this section, at the bank for at least two months, except as provided in paragraph (d)(3)(ii)(B) of this section;

* * * * *

(vii) * * *

(vii) * * *

(A) Maintains a transaction account, as defined in paragraph (d)(5)(ix) of this section, at the bank for at least two months, except as provided in paragraph (d)(3)(ii)(B) of this section;

* * * * *

(3) *Designation of certain exempt persons*—(i) *General.* Except as provided in paragraph (d)(3)(ii) of this section, a bank must designate an exempt person by filing FinCEN Form 110. Such designation must occur by the close of the 30-calendar day period beginning after the day of the first reportable transaction in currency with that person sought to be exempted from reporting under the terms of this paragraph (d). The designation must be made separately by each bank that treats the customer as an exempt person, except as provided in paragraph (d)(5)(vi) of this section.

(ii) *Special rules.*—(A) A bank is not required to file a FinCEN Form 110 with respect to the transfer of currency to or from:

(1) Any of the twelve Federal Reserve Banks; or

(2) Any exempt person as described in paragraphs (d)(2)(i) to (iii) of this section.

(B) Notwithstanding subparagraphs (d)(2)(vi)(A) and (d)(2)(vii)(A) of this section, and if the requirements under this paragraph (d) of this section are otherwise satisfied, a bank may designate a non-listed business or a payroll customer, as described in paragraphs (d)(2)(vi) and (vii) of this section, as an exempt person before the customer has maintained a transaction account at the bank for at least two months if the bank conducts and documents a risk-based assessment of the customer and forms a reasonable belief that the customer has a legitimate business purpose for conducting frequent transactions in currency.

(4) *Annual review.* At least once each year, a bank must review the eligibility of an exempt person described in paragraphs (d)(2)(iv) to (vii) of this section to determine whether such person remains eligible for an exemption. As part of its annual review, a bank must review the application of the monitoring system required to be maintained by paragraph (d)(8)(ii) of this section to each existing account of an exempt person described in paragraphs (d)(2)(vi) or (d)(2)(vii) of this section.

(5) *Operating rules*—(i) *General rule.* Subject to the specific rules of this paragraph (d), a bank must take such steps to assure itself that a person is an exempt person (within the meaning of the applicable provision of paragraph (d)(2) of this section), to document the basis for its conclusions, and document its compliance, with the terms of this paragraph (d), 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, and in the case of the monitoring system requirement set forth in paragraph (d)(8)(ii) of this section, such steps that a reasonable and prudent bank would take and document to identify suspicious transactions as required by paragraph (d)(8)(ii) of this section.

* * * * *

(iii) *Stock exchange listings.* In determining whether a person is described in paragraph (d)(2)(iv) of this section, a bank may rely on any New York, American, or NASDAQ Stock Market listing published in a newspaper of general circulation, on any commonly accepted or published stock symbol guide, on any information contained in the Securities and Exchange Commission ''EDGAR'' System, or on any information contained on an Internet site or sites maintained by the New York Stock Exchange, the American Stock Exchange, or the NASDAQ.

* * * * *

(viii) * * * 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 are derived from one or more of the ineligible business activities listed in this paragraph (d)(5)(viii).

* * * * *

(7) * * *

(ii) Subject to the specific terms of this paragraph (d), and absent any specific knowledge of information indicating that a customer no longer meets the requirements of an exempt person, a bank satisfies the requirements of this paragraph (d) to the extent it continues to treat that customer as an exempt person until the completion of that customer's next required periodic review, which as required by paragraph (d)(4) of this section for an exempt person described in paragraph (d)(2)(iv) to (vii) of this section, shall occur no less than once each year.

* * * * *

(8) *Obligations to file suspicious activity reports and maintain system for monitoring transactions in currency.* (i) Nothing in this paragraph (d) relieves a bank of the obligation, or reduces in any way such bank's obligation, to file a report required by § 103.18 with respect to any transaction, including any transaction in currency that a bank knows, suspects, or has reason to suspect is a transaction or attempted transaction that is described in § 103.18(a)(2)(i), (ii), or (iii), or relieves a bank of any reporting or recordkeeping obligation imposed by this part (except the obligation to report transactions in currency pursuant to this section to the extent provided in this paragraph (d)). Thus, for example, a sharp increase from one year to the next in the gross total of currency transactions made by an exempt customer, or similarly anomalous transactions trends or patterns, may trigger the obligation of a bank under § 103.18.

(ii) * * * The statement in the preceding sentence with respect to accounts of non-listed business and payroll customers does not limit the obligation of banks generally to take the steps necessary to satisfy the terms of paragraph (d)(8)(i) of this section and § 103.18 with respect to all exempt persons.

(9) *Revocation.* Without any action on the part of the Department of the Treasury and subject to the limitation on liability contained in paragraph (d)(7)(ii) of this section:

* * * * *

Dated: December 2, 2008.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E8–28858 Filed 12–4–08; 8:45 am]

BILLING CODE 4810–02–P