



OCC BULLETIN

Comptroller of the Currency
Administrator of National Banks

Subject: Bank Secrecy Act/ Anti-Money
Laundering

Description: FinCEN; Final Rule for Section 312
of the USA PATRIOT Act;
Enhanced Due Diligence for
Correspondent Accounts Maintained
by Certain Foreign Banks

TO: Chief Executive Officers, BSA Officers, and Compliance Officers of All National Banks, Federal Branches and Agencies, Technology Service Providers, Department and Division Heads, and All Examining Personnel.


The attached documents, issued on August 8, 2007, by the Financial Crimes Enforcement Network (FinCEN), announce the final rule implementing a significant provision of Section 312 of the USA PATRIOT Act.

Section 312 of the USA PATRIOT Act requires U.S. financial institutions to perform due diligence and, in some cases, enhanced due diligence, with regard to correspondent accounts established or maintained for foreign financial institutions and private banking accounts established or maintained for non-U.S. persons. This final rule applies to the accounts of three specific categories of foreign banks, including those with an offshore banking license and certain high-risk banks subject to well-recognized international or U.S. Treasury Department determinations.

The final rule states that U.S. financial institutions must identify, for due diligence purposes, the owners of these foreign banks if their shares are not publicly traded and also ascertain whether such foreign banks provide correspondent accounts to other foreign banks and, therefore, provide them with access to the U.S. financial system. In making their risk assessments, financial institutions should consider, among other factors, the nature of the foreign banks' business, reasonably available information on the foreign banks' anti-money laundering record, and information on the nature of the foreign supervisory regulations under which the bank is operating.

The final rule is effective September 10, 2007. The enhanced due diligence requirements will apply as of February 5, 2008, to each correspondent account for certain foreign banks for accounts established on or after that date. For such correspondent accounts established before February 5, 2008, the enhanced due diligence requirements apply as of May 5, 2008.

For further information, please contact your examiner-in-charge, OCC supervisory office, or the OCC Compliance Policy Department at (202) 874-4428.



Ann F. Jaedcke
Deputy Comptroller for Compliance Policy

- Attachments: a) FinCEN news release
[<http://www.occ.treas.gov/ftp/bulletin/2007-33a.pdf>]
b) Final Rule
[<http://www.occ.treas.gov/fr/fedregister/72fr44768.pdf>]



Financial Crimes Enforcement Network

A bureau of the U.S. Department of the Treasury

FinCEN news releases are available on the Internet and by e-mail subscription at www.fincen.gov.
For more information, please contact FinCEN's Office of Public Affairs at (703) 905-3770.

FOR IMMEDIATE RELEASE

August 8, 2007

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FinCEN Issues Final Rule for Section 312 of the USA PATRIOT ACT

Enhanced Due Diligence for Correspondent Accounts Maintained by Certain Foreign Banks

VIENNA, Va. – The Financial Crimes Enforcement Network (FinCEN) announced today the issuance of a final rule implementing a key provision of Section 312 of the USA PATRIOT Act, clarifying the risk-based procedures that U.S. financial institutions should use in tailoring their enhanced due diligence to assess the risks of some foreign banking relationships.

“As international anti-money laundering standards improve globally, risk assessments for foreign banks should become easier to conduct. Common standards are increasingly protecting both sides of the international relationship,” said FinCEN Director James H. Freis, Jr. “U.S. banks can take comfort in the fidelity of their foreign customers and foreign banks will find it easier to process their U.S. transactions.”

The rule applies to the accounts of three specific and relatively small categories of foreign banks, including those with an offshore banking license and certain high-risk banks subject to well-recognized international or U.S. Treasury Department determinations.

The rule states that U.S. financial institutions must identify, for due diligence purposes, the owners of these foreign banks if their shares are not publicly traded and also ascertain whether such foreign banks provide correspondent accounts to other foreign banks and therefore provide them with access to the U.S. financial system. In making their risk assessments financial institutions should consider, among other factors, the nature of the foreign banks’ business, reasonably-available information on the foreign banks’ anti-money laundering record, and information on the nature of the foreign supervisory regulations under which the bank is operating.

“The institution that provides financial services is best situated to assess the risks of providing those services,” noted Director Freis. “FinCEN will continue its focus on risk and seek to provide more certainty for the industry by finalizing rules and both providing, and responding to, feedback.”

On January 4, 2006, FinCEN issued a final rule implementing the due diligence requirements for correspondent accounts for foreign financial institutions and the due diligence and enhanced scrutiny requirements for private banking accounts for non-U.S. persons. In an effort to be responsive to industry comments on significant issues, it concurrently issued a second notice of proposed rulemaking concerning the enhanced due diligence provisions, which is now finalized with this release. Today's announcement completes the implementation of Section 312 of the USA PATRIOT Act.

The final rule takes effect within 180 days for new accounts opened by U.S. financial institutions and 270 days for existing accounts from the date the regulation is published in the *Federal Register*

Attachments:

- **Final Regulation**

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The mission of the Financial Crimes Enforcement Network is to safeguard the financial system from the abuses of financial crime, including terrorist financing, money laundering, and other illicit activity. We achieve this mission by: administering the Bank Secrecy Act; supporting law enforcement, intelligence, and regulatory agencies through sharing and analysis of financial intelligence; building global cooperation with our counterpart financial intelligence units; and networking people, ideas, and information.

DEPARTMENT OF THE TREASURY
31 CFR Part 103

RIN 1506-AA29

**Financial Crimes Enforcement
Network; Anti-Money Laundering
Programs; Special Due Diligence
Programs for Certain Foreign
Accounts**

AGENCY: Financial Crimes Enforcement Network, Treasury.

ACTION: Final rule.

SUMMARY: The Financial Crimes Enforcement Network is issuing this final rule to implement the enhanced due diligence requirements for correspondent accounts for certain foreign banks set forth in section 312 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56. Section 312 requires U.S. financial institutions to establish due diligence and, where necessary, enhanced due diligence, policies, procedures, and controls reasonably designed to detect and report money laundering through correspondent accounts and private banking accounts established or maintained by U.S. financial institutions for non-U.S. persons. We issued final rules implementing the due diligence requirements for correspondent accounts and the due diligence and enhanced due diligence requirements for private banking accounts for non-U.S. persons on January 4, 2006. This final rule completes the section 312 rulemaking process.

DATES: This final rule is effective September 10, 2007.

Applicability Dates: On February 5, 2008, the enhanced due diligence provisions of this final rule will apply to correspondent accounts for certain foreign banks established on or after such date. On May 5, 2008, the enhanced due diligence provisions of this final rule will apply to correspondent accounts for certain foreign banks established before February 5, 2008. See 31 CFR 103.176(f) of this final rule.

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs

Division, Financial Crimes Enforcement Network, (800) 949-2732.

SUPPLEMENTARY INFORMATION**I. Background**

Section 312 of the USA PATRIOT Act amended the Bank Secrecy Act¹ to add new subsection (i) to 31 U.S.C. 5318. This provision requires each U.S. financial institution that establishes, maintains, administers, or manages a correspondent account or a private banking account in the United States for a non-U.S. person to subject such accounts to certain anti-money laundering measures. In particular, a covered financial institution² must establish appropriate, specific and, where necessary, enhanced due diligence policies, procedures, and controls that are reasonably designed to enable the financial institution to detect and report instances of money laundering through these accounts.

On May 30, 2002, we published a notice of proposed rulemaking in the **Federal Register**, proposing to implement the requirements of section 312 in their entirety.³ In that proposal, we set forth a series of specific measures that covered financial institutions could, and in some instances would be required to, apply to correspondent accounts and private banking accounts established or maintained for non-U.S. persons. We received comments on that proposal raising concerns about the definitions in the proposal, the scope of the requirements contained in the proposed rule text, and the types of financial institutions that would be subject to the proposal's requirements.

To have adequate time to review the comments we received in response to the proposal, to determine the appropriate resolution of the issues raised, and to give direction to financial institutions that would be subject to section 312,⁴ we issued an interim final rule on July 23, 2002.⁵ In the interim final rule, we exercised our authority under 31 U.S.C. 5318(a)(6) to defer temporarily the application of section

312 to certain financial institutions.⁶ For those financial institutions that were not subject to the deferral,⁷ we provided interim guidance for compliance with the statute by generally describing the scope of coverage, duties, and obligations under that provision, pending issuance of a final rule.

Thereafter, on January 4, 2006, we issued final rules implementing section 312, excepting the enhanced due diligence provisions for correspondent accounts established or maintained for certain foreign banks.⁸ Also on January 4, we published a second notice of proposed rulemaking (Second Proposed Rule or proposed rule),⁹ seeking comment on a new approach to implementing the enhanced due diligence provisions of section 312 with respect to correspondent accounts established or maintained for certain statutorily designated foreign banks ("respondent banks").¹⁰

As required by section 312, the enhanced due diligence measures proposed would apply to correspondent accounts maintained for a foreign bank operating under an offshore banking license,¹¹ under a license issued by a country that has been designated as being non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member and with which designation the United States representative to the group or organization concurs,¹² or under a license issued by a country designated by the Secretary of the Treasury

⁶ Pursuant to the interim final rule, banks, savings associations, and credit unions had to comply with the correspondent account and private banking account provisions of section 312. Securities broker-dealers, futures commission merchants, and introducing brokers had to comply with the private banking account provisions of section 312. We deferred the application of section 312 to all other financial institutions.

⁷ See *id.*

⁸ *Anti-Money Laundering Programs; Special Due Diligence for Certain Foreign Accounts*, 71 FR 496 (January 4, 2006).

⁹ *Anti-Money Laundering Programs; Special Due Diligence for Certain Foreign Accounts*, 71 FR 516 (January 4, 2006).

¹⁰ Section 312 contains enhanced due diligence provisions for both correspondent accounts and private banking accounts for non-U.S. persons. Unless otherwise provided in this release, the term "enhanced due diligence provisions" relates exclusively to the correspondent account provisions of section 312.

¹¹ See 31 U.S.C. 5318(i)(4)(A) and 31 CFR 103.175(k) (defining "offshore banking license").

¹² The Financial Action Task Force (FATF) is the only intergovernmental organization of which the United States is a member that has designated countries as non-cooperative with international anti-money laundering principles (no such countries currently are designated). The United States has concurred with all FATF designations to date.

¹ Bank Secrecy Act, Pub. L. No. 91-508 (codified as amended at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332).

² 31 CFR 103.175(f) (defining a "covered financial institution" as any one of a number of specific U.S. financial institutions, including banks, broker-dealers, futures commission merchants, and mutual funds).

³ *Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts*, 67 FR 37736 (May 30, 2002) (First Proposed Rule).

⁴ Section 312(b)(2) of the Act provides that section 5318(i) of the Bank Secrecy Act would take effect on July 23, 2002, whether or not final rules had been issued by that date.

⁵ *Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts*, 67 FR 48348 (July 23, 2002).

(Secretary) as warranting special measures due to money laundering concerns.¹³ With respect to these accounts, we proposed that a covered financial institution would be required to conduct risk-based enhanced due diligence with regard to a correspondent account maintained for or on behalf of such a foreign bank to guard against money laundering and to report suspicious activity; to ascertain whether such a foreign bank maintains correspondent accounts for other foreign banks¹⁴ and, if so, to conduct appropriate due diligence; and to identify the owners of such a foreign bank if its shares are not publicly traded. This final rule adopts the risk-based enhanced due diligence rule that we proposed on January 4, 2006.

Finally, section 312(b)(1) of the USA PATRIOT Act provides that the Secretary shall issue implementing regulations under this section “in consultation with the appropriate federal functional regulators (as defined in section 509 of the Gramm-Leach-Bliley Act) of the affected financial institutions.” This final rule was developed in consultation with the staffs of the federal functional regulators.¹⁵

II. Summary of Comments and Revisions

A. Comments

We received seven comment letters on the Second Proposed Rule. Commenters included U.S. banks, an association of state banking supervisors, and trade associations representing U.S. banks,

¹³ The Secretary is authorized under section 311 of the USA Patriot Act, after finding that reasonable grounds exist for concluding that a foreign jurisdiction, foreign financial institution, international class of transaction, or type of account is of “primary money laundering concern,” to require domestic financial institutions and domestic financial agencies to take certain statutorily defined “special measures” against the primary money laundering concern. Section 311 requires the Secretary to consult with various Federal agencies before making such a finding or imposing special measures. For a listing of findings and rulemakings issued pursuant to section 311, see http://www.fincen.gov/reg_section311.html.

¹⁴ In the preamble to the Second Proposed Rule, we referred to these relationships as nested accounts or nested banks. It has been suggested that the term “nested” is not synonymous with indirect use of a correspondent account. We have not employed the terminology in this final rule.

¹⁵ Section 509 of the Gramm-Leach-Bliley Act defines federal functional regulators to include the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration Board, and the U.S. Securities and Exchange Commission. See 15 U.S.C. 6809. The Commodity Futures Trading Commission was defined in section 321 of the USA PATRIOT Act as a federal functional regulator for the purposes of implementing that Act.

foreign banks, the futures industry, investment companies, the securities industry, and the bond markets.¹⁶ Eleven trade associations representing covered financial institutions jointly signed one of the comment letters. In general, commenters expressed support for the risk-based approach elaborated in the Second Proposed Rule. We respond to the submitted comments in the *Section-by-Section Analysis*, below.

B. Revisions

This final rule is substantially similar to the Second Proposed Rule. The following revisions to the rule, which we will explain more fully in the Section-by-Section Analysis below, have been made in response to comments received on the Second Proposed Rule.

First, the provisions requiring covered financial institutions, in appropriate circumstances, to obtain and review “documentation” relating to a respondent bank’s anti-money laundering program and to “consider[] whether such program appears to be reasonably designed to detect and prevent money laundering” have been revised to require covered financial institutions, in appropriate circumstances, to obtain and consider “information” relating to a respondent bank’s anti-money laundering program in order to assess the risk of money laundering presented by the respondent bank’s account.

Second, the provision requiring a covered financial institution, in certain circumstances, to take reasonable steps to assess and “minimize” money laundering risks related to the customers of their respondent banks has been revised to require a covered financial institution, in certain circumstances, to take reasonable steps to assess and “mitigate” such money laundering risks.

III. Section-by-Section Analysis

A. Section 103.176(b)—Enhanced Due Diligence for Certain Foreign Banks

Section 103.176(b) of this final rule requires a covered financial institution to establish enhanced due diligence procedures that, at a minimum, include taking reasonable steps to (1) Conduct risk-based enhanced scrutiny of correspondent accounts established or maintained for respondent banks to

¹⁶ The comment letters may be inspected at the Financial Crimes Enforcement Network reading room in Vienna, Virginia between 10 a.m. and 4 p.m. Persons wishing to inspect comments must request an appointment by telephone at (202) 354-6400 (not a toll-free number). The comment letters are also available on our Web site at <http://www.fincen.gov/71fr516.htm>.

guard against money laundering and to identify and report suspicious transactions, (2) determine whether the subject respondent bank in turn maintains correspondent accounts for other foreign banks that enable those other foreign banks to gain access to the respondent bank’s correspondent account with the covered financial institution and, if so, to take reasonable steps to obtain information to assess and mitigate the money laundering risks associated with such accounts, and (3) determine the identity of each owner of a respondent bank whose shares are not publicly traded, and the nature and extent of each owner’s ownership interest.

The commenters generally expressed support for the risk-based approach of the Second Proposed Rule. One commenter suggested that the five risk factors enumerated in our rules implementing the due diligence requirements for correspondent accounts contained in section 312 should also be applied to determine the appropriate extent of enhanced due diligence.¹⁷

As these five risk factors are meant to apply to all respondent banks, including those subject to the enhanced due diligence provisions of section 312, it would be appropriate to consider the five factors listed in subsection (a)(2) when assessing the risk posed by a respondent bank subject to the provisions of this final rule to help determine the level of enhanced due diligence required. The fourth risk factor in particular—the anti-money laundering regime of the jurisdiction that issued a charter or license to the foreign bank and, to the extent reasonably available, of the home jurisdiction of the foreign bank or its parent¹⁸—may be especially relevant in a covered financial institution’s determination of the nature and extent of the risks posed by the correspondent

¹⁷ As part of its general due diligence program for foreign correspondent accounts, a covered financial institution is expected to establish policies, procedures, and controls that include assessing the money laundering risk of a correspondent account based upon consideration of all the risk factors, including (1) The nature of the foreign financial institution’s business and the markets it serves; (2) the type, purpose, and anticipated activity of the correspondent account; (3) the nature and duration of the covered financial institution’s relationship with the foreign financial institution; (4) the anti-money laundering and supervisory regime of the jurisdiction that issued a charter or license to the foreign financial institution, and its owners if applicable, to the extent that such information is reasonably available; and (5) information known or reasonably available to the covered financial institution about the foreign financial institution’s anti-money laundering record. 31 C.F.R. 103.176(a)(2).

¹⁸ 31 CFR 103.176(a)(2)(iv).

accounts for the foreign banks covered by this rule and the extent of the enhanced due diligence that is necessary and appropriate to mitigate these risks.¹⁹

1. 103.176(b)(1)—*Enhanced scrutiny to guard against money laundering.* Section 103.176(b)(1) of the Second Proposed Rule would have required a covered financial institution to conduct risk-based enhanced scrutiny of correspondent accounts established or maintained for respondent banks to guard against money laundering and to identify and report suspicious transactions. This provision is adopted in the final rule without substantial change.

Section 103.176(b)(1)(i) and (ii) of the Second Proposed Rule would have required covered financial institutions, as part of their enhanced due diligence programs when appropriate, to obtain and review documentation related to a respondent bank's anti-money laundering program and consider whether the program appears to be reasonably designed to detect and prevent money laundering. Several commenters questioned the utility of the requirement and expressed concern about the cost of complying with it.

One commenter read the Second Proposed Rule as effectively requiring a covered financial institution to perform an audit of a respondent bank's anti-money laundering program, despite guidance in the preamble stating that an audit was not required. Another commenter similarly expressed concern that this and other provisions of the Second Proposed Rule would cause covered financial institutions to become policemen and regulators. A third commenter was concerned that this provision ultimately would be enforced as a default or mandatory requirement.

Other commenters additionally suggested that obtaining and reviewing documentation frequently would be a difficult and expensive proposition, as such documents may be written only in the native language of a respondent bank. One commenter questioned the utility of reviewing the documentation of a respondent bank's anti-money laundering program and suggested that other due diligence measures, such as reviewing and monitoring transactions conducted by the foreign bank, would be more productive. Other commenters offered that administering a questionnaire to a respondent bank about its anti-money laundering

practices, when appropriate, would be more effective than a review of its anti-money laundering program documents.

In response to these comments, section 103.176(b)(1)(i) of the final rule now requires a covered financial institution, in appropriate circumstances, to obtain and consider information related to the anti-money laundering program of the respondent bank to assess the risk of money laundering presented by the respondent bank's correspondent account. This provision of the final rule is not meant to be a mandatory requirement. Rather, it is intended to be risk-based. We emphasize that whether enhanced due diligence should include a reasonable inquiry into the anti-money laundering program of a respondent bank will depend on the extent to which reviewing the anti-money laundering program of the respondent bank would be appropriate based upon the nature of the correspondent account.²⁰ While covered financial institutions have discretion with respect to implementing this provision, as with other risk-based provisions of the BSA and its implementing regulations, a covered financial institution is responsible for reasonably demonstrating that it is effectively exercising that discretion on a risk-assessed basis.

We revised this due diligence provision of the Second Proposed Rule to clarify that covered financial institutions are expected neither to conduct an audit of the anti-money laundering programs of their respondent bank customers, nor to determine the extent to which the respondent bank's anti-money laundering program is "reasonably designed to detect and prevent money laundering," which may be difficult to determine without

conducting an audit.²¹ Rather, under the final rule, a covered financial institution is required to consider and assess more generally the extent to which it may be exposed to money laundering risk by the respondent bank's correspondent account. The revision also was made to reduce the burdens associated with reviewing documents, such as language barriers, as well as to provide covered financial institutions with flexibility to determine how to conduct due diligence with respect to a respondent bank's anti-money laundering efforts.

For example, a covered financial institution may, in appropriate circumstances, use a questionnaire, as several commenters suggested, to gather information related to the anti-money laundering program of a respondent bank, provided that the questionnaire and the responses thereto enable a covered financial institution to assess effectively the risk of money laundering presented by the respondent bank. In appropriate situations, such as where a covered financial institution has a sufficient transaction history with a respondent bank, a covered financial institution may also conduct a review of that transaction history to assess the money laundering risk presented by the respondent bank.

As one commenter suggested, a covered financial institution may also, in appropriate circumstances, incorporate its enhanced due diligence efforts into the certification process available under the rules implementing sections 313 and 319(b) of the USA PATRIOT Act.²² Incorporating a questionnaire into the certification form would not alone affect the safe harbor provided under the rules implementing sections 313 and 319(b),²³ provided that the covered financial institution also obtains and maintains all of the information required under those rules.

We caution, however, that the certifications are subject to renewal only every three years. Waiting until the next certification is required before obtaining information about the respondent bank's anti-money laundering program may not be reasonable for purposes of complying with the enhanced due diligence provisions of section 312. We also remind covered financial institutions incorporating a questionnaire into their certifications that doing so will not extend the section 313 and 319(b) safe harbor to this final rule.

¹⁹ See Second Proposed Rule, 71 FR at 517 (adopting a risk-based approach to enhanced due diligence as an alternative to creating exceptions to the enhanced due diligence provisions for foreign banks operating under an offshore banking license).

²⁰ For example, a covered financial institution may maintain a correspondent account for a respondent bank with which it has had a longstanding relationship, for a respondent bank that only conducts proprietary transactions through the correspondent account, for a respondent bank that is controlled by a U.S. institution, or for a respondent bank whose licensing or home jurisdiction is known for maintaining a comprehensive anti-money laundering regime. In such circumstances, a covered financial institution may determine through experience and due diligence that reviewing information related to the anti-money laundering program of the respondent bank will not provide information that is relevant to the covered financial institution's risk-assessment or monitoring of the respondent bank's correspondent account. In contrast, a respondent bank that permits or conducts transactions on behalf of other foreign banks, or operates payable-through accounts, through the covered financial institution may pose a greater money laundering risk. In such circumstances, conducting due diligence that includes a review of information related to the respondent bank's anti-money laundering program may be appropriate.

²¹ See, e.g., Second Proposed Rule, 71 FR at 518 ("[w]e do not contemplate that the covered financial institution would conduct an audit of the foreign correspondent bank's written anti-money laundering program").

²² See 31 CFR 103.177.

²³ 31 CFR 103.177(b).

Finally, one commenter asked whether a covered financial institution would be required to formulate additional due diligence measures for its accounts for foreign banks that are subject of this final rule if the covered financial institution applies the equivalent of enhanced due diligence required in this final rule to all of its correspondent accounts for foreign financial institutions.²⁴ If a covered financial institution applies both the due diligence program for foreign correspondent accounts²⁵ and the enhanced due diligence requirements of this final rule to all of its correspondent accounts for foreign financial institutions, then the covered financial institution would not be required to formulate additional due diligence measures for the correspondent accounts it establishes and maintains for foreign banks that are the subjects of this final rule.

Section 103.176(b)(1)(iii) of the Second Proposed Rule would have required covered financial institutions to monitor transactions to, from, or through a respondent bank in a manner that is reasonably designed to detect money laundering and suspicious activity. In the preamble to the Second Proposed Rule, we emphasized that monitoring is an important aspect of enhanced due diligence.²⁶ This monitoring may be conducted manually or electronically, may be done on an individual account basis or by product activity, and should reflect the risk assessment conducted by the covered financial institution on each respondent bank subject of the enhanced due diligence provisions. Section 103.176(b)(1)(iii) has been incorporated into the final rule without change, and has been re-designated as Section 103.176(b)(1)(ii).

Section 103.176(b)(1)(iv) of the Second Proposed Rule would have required covered financial institutions to obtain information from the foreign bank about the identity of any person with authority to direct transactions through any correspondent account that is a payable-through account, and the sources and beneficial owners of funds or other assets in the payable-through account. This provision has been incorporated into the final rule without change, and has been re-designated as Section 103.176(b)(1)(iii).

2. 103.176(b)(2)—Foreign bank customers. Section 103.176(b)(2) of the

²⁴ See 31 CFR 103.175(h) (defining “foreign financial institution” to include banks, broker-dealers in securities, futures commission merchants, and mutual funds).

²⁵ 31 CFR 103.176(a).

²⁶ Second Proposed Rule, 71 FR at 518.

Second Proposed Rule would have required a covered financial institution to determine whether a respondent bank in turn maintains correspondent accounts for other foreign banks that enable those other foreign banks to gain access to the respondent bank’s account with the covered financial institution. If such a situation exists, the Second Proposed Rule would have required the covered financial institution to take reasonable steps to assess and minimize the potential money laundering risk posed by the respondent bank’s accounts for those other foreign banks.

Commenters were concerned about the extent to which they would be expected to obtain lists of foreign bank customers from their respondent banks, for the purposes of complying with section 103.176(b)(2).²⁷ One commenter, for example, stated that it may not be possible to obtain a list of the foreign bank customers of respondent banks due to strict privacy laws in some countries.²⁸ Two commenters suggested that there are situations where it is unlikely, due to the nature of the correspondent account, that funds transfers will be conducted through the account, and therefore the covered financial institution should not be required to obtain lists of, or other information about, foreign bank customers of their respondent banks.

As a general rule, we do not expect that a covered financial institution will request and obtain lists of foreign bank customers from their respondent banks. We do expect, however, that covered financial institutions, based upon their risk assessment of a respondent bank and as part of their enhanced due diligence efforts, will make appropriate inquiries about such factors as the nature of the foreign bank customers the respondent bank serves (if any) and the extent to which transactions for any such foreign bank customer may be conducted through the respondent bank’s correspondent account. The covered financial institution also could consult bank reference guides, and monitor or otherwise assess transaction

²⁷ Other commenters requested clarification that the provisions of subsection (b)(2) are risk-based.

²⁸ One commenter expressed the view that it should not be required to obtain the anti-money laundering programs of the foreign bank customers of a respondent bank. Section 103.176(b)(2) does not contain such a requirement. Obtaining and considering information related to the anti-money laundering program of a foreign respondent bank, and not the program of its foreign bank customers, is set forth in this final rule as an enhanced due diligence procedure when appropriate. See 31 CFR 103.176(b)(1)(i).

activity to the extent it may contain foreign bank customer information.²⁹

There may be circumstances, such as in the highest risk situations, where it may be necessary and appropriate to request and obtain the identity of a respondent bank’s foreign bank customers directly from the respondent bank. If obtaining such information in appropriate circumstances is not possible—including by monitoring account activity—the covered financial institution should determine, pursuant to section 103.176(d) of this final rule, how to proceed in light of the particular circumstances.

One commenter expressed concern that covered financial institutions may be held responsible, according to the provisions of section 103.176(b)(2), for monitoring and reporting suspicious activity of the foreign bank customers of their respondent banks. The obligation to monitor for and report suspicious activity arises from the rules implementing 31 U.S.C. 5318(g). Under those rules, covered financial institutions must report suspicious activity involving any of their accounts to the extent they know, suspect, or have reason to suspect a violation of law or regulation, including suspicious activity attempted or conducted by, at, or through correspondent accounts they establish or maintain for respondent banks.³⁰ Such activity may involve the respondent bank’s foreign bank customers.

One commenter was concerned by the level of due diligence that may be required by the use of the word “minimize” in section 103.176(b)(2) of the Second Proposed Rule and suggested replacing with the word *mitigate*. Accordingly, in this final rule, we have revised the relevant clause to require a covered financial institution to “take reasonable steps to obtain

²⁹ In situations where it is unlikely that funds transfers will be conducted through a correspondent account, covered financial institutions may determine that it would not be necessary to obtain a list of the respondent bank’s foreign bank customers. We note, however, that correspondent accounts that may not be used to conduct funds transfers nonetheless may be used to launder money and conduct other illicit financial activity.

³⁰ See 31 CFR 103.15(a) (suspicious activity reporting requirements for mutual funds), 31 CFR 103.17(a) (same for futures commission merchants), 31 CFR 103.18(a) (for banks), and 31 CFR 103.19(a) (for broker-dealers in securities). See also In the Matter of the Federal Branch of Arab Bank PLC, FinCEN enforcement action 2005–2 (Aug. 17, 2005) and In the Matter of the New York Branch of ABN Amro Bank N.V., FinCEN enforcement action 2005–5 (Dec. 19, 2005) (financial institutions responsible for monitoring the transactions through correspondent accounts maintained on behalf of foreign financial institutions), available at http://www.fincen.gov/reg_enforcement.html.

information relevant to assess and mitigate money laundering risks associated with the foreign bank's correspondent accounts for other foreign banks" ³¹ as the commenter suggested.

Finally, commenters sought clarification as to whether section 103.176(b)(2) is risk-based. The first part of this sub-paragraph requires a covered financial institution to take reasonable steps to "[d]etermine whether the foreign bank for which the correspondent account is established or maintained in turn maintains correspondent accounts for other foreign banks that use the foreign correspondent account established or maintained by the covered financial institution." Making that initial determination is not dependent on the risks associated with a particular respondent bank.

However, once a covered financial institution has taken reasonable steps to make such a determination, it may "take reasonable steps to obtain information relevant to assess and mitigate money laundering risks associated with the foreign bank's correspondent accounts for other foreign banks, including, as appropriate, the identity of those foreign banks," as section 103.176(b)(2) provides and the authorizing statute contemplates. A covered financial institution may take a risk-based approach when determining what steps to gather due diligence information are appropriate.

3. 103.176(b)(3)—*Identification of the owners of foreign banks.* Section 103.176(b)(3) of the Second Proposed Rule would require a covered financial institution to take reasonable steps to identify the owners of a respondent bank if the respondent bank's shares are not publicly traded. The section defined an owner as "any person who directly or indirectly owns, controls, or has the power to vote 10 percent or more of any class of securities" of the respondent bank.

One commenter suggested that we increase the proposed 10% threshold for identifying the interest of the owners of respondent banks to 25% for banks that are considered to represent a relatively low level of money laundering risk. Other commenters requested clarification that the provisions of subsection (b)(3) are risk-based.

After consideration, we adopted the proposed threshold into the final rule without change. The final rule covers three specific and relatively small categories of foreign banks that have been designated by statute. We believe that tiered ownership thresholds would undermine the benefit of identifying the

owners of high-risk respondent banks while not appreciably reducing the burden of identifying such owners. Accordingly, we have not adopted a risk-based approach to section 103.176(b)(3).

B. Section 103.176(c)—Foreign Banks Subject to Enhanced Due Diligence

Section 103.176(c) of the Second Proposed Rule set forth the types of foreign banks for which enhanced due diligence would be required, as provided by section 312 of the USA PATRIOT Act. The enhanced due diligence provisions would apply to foreign banks operating under (1) An offshore banking license; ³² (2) a license issued by a country designated as being non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member and with which designation the United States representative to the group or organization concurs; ³³ or (3) a license issued by a country designated by the Secretary as warranting special measures due to money laundering concerns. ³⁴ The final rule adopts this provision without change.

One commenter suggested that we reinstate the proposed exception from the enhanced due diligence requirements of section 312 for an offshore bank that "has been found, or is chartered in a jurisdiction where one or more foreign banks have been found, by the Board of Governors of the Federal Reserve System under the Bank Holding Company Act or the International Banking Act, to be subject to comprehensive supervision or regulation on a consolidated basis by the relevant supervisors in that jurisdiction." ³⁵ After consideration, we did not include such an exception in this final rule.

We believe that the risk-based provisions of the final rule are better suited to addressing the various risk profiles of respondent banks subject to enhanced due diligence than the proposed exception. Thus, when dealing with an offshore banking location of a bank located in a country with a strong anti-money laundering regime, for example, a covered financial institution ordinarily will not be required to conduct enhanced due

diligence to the same degree as it would with a stand-alone offshore bank. ³⁶

One commenter was concerned that a covered financial institution may be cited for a violation of this final rule if it failed to subject an account established or maintained for a high-risk foreign bank to the enhanced due diligence requirements of the rule even when the foreign bank was not in one of the three designated categories of banks subject to enhanced due diligence. However, section 103.176(b) is expressly limited to the foreign banks enumerated at section 103.176(c). With respect to high-risk foreign banks not enumerated in section 103.176(c), a failure to apply appropriate due diligence to a correspondent account maintained for such a foreign bank would constitute a violation of the general due diligence provisions of the correspondent account rule, ³⁷ but not the enhanced due diligence provisions of this final rule.

C. Section 103.176(d)—Special Procedures

According to the provisions of proposed section 103.176(d), a covered financial institution would be required to establish special procedures for circumstances in which appropriate due diligence or enhanced due diligence cannot be performed with respect to a correspondent account. We received no comments on this provision of the Second Proposed Rule. It has been adopted in this final rule without change.

D. Section 103.176(e) and (f)—Applicability Rules

This final rule revises section 103.176(e) and adds new section (f) to reflect the applicability dates of the obligations under this section. The Second Proposed Rule did not address the issue of applicability dates. We are mindful, however, of the obligations that will result from the statutory requirement that enhanced due diligence apply to all correspondent accounts maintained for certain foreign banks, regardless of when the accounts were opened. Effective 180 days after the date of publication of this final rule, the requirements of this final rule will

³⁶ See *supra* note 19 and accompanying text (recognizing that the anti-money laundering and supervisory regime of the jurisdiction that issued a charter or license to a foreign bank may be particularly relevant in assessing the money laundering risk posed by the foreign bank and a mitigating risk factor for the purposes of complying with the enhanced due diligence provisions, as also may be the regime of the home jurisdiction of the foreign bank or its parent to the extent relevant information is readily available).

³⁷ See 31 CFR 103.176(a).

³² See *supra* note 11.

³³ See *supra* note 12.

³⁴ See *supra* note 13.

³⁵ See First Proposed Rule, 67 FR at 37743.

³¹ Emphasis added.

apply to correspondent accounts opened on or after that date. Effective 270 days after the date of publication of this final rule, the rule's requirements will apply to all correspondent accounts opened prior to the date that is 180 days after the date of publication of this final rule.

Section 103.176(f)(2) contains a special implementation rule for banks. This special implementation rule requires banks that have been subject to the provisions of our interim final rule³⁸ to continue to comply with the existing enhanced due diligence requirements for correspondent accounts of section 312 until the effective dates described in section 103.176(f)(1) are triggered.

Section 103.176(f)(3) contains a special implementation rule for all other covered financial institutions. This section provides that securities broker-dealers, futures commission merchants, introducing brokers, mutual funds, and trust banks or trust companies that have a federal regulator are not required to comply with the enhanced due diligence provisions until the effective dates described in section 103.176(f)(1) are triggered.

E. Section 103.176(g)—Exemptions

New section 103.176(g) restates and conforms the exemption for certain financial institutions from the due diligence and enhanced due diligence requirements of section 103.176.

IV. Regulatory Flexibility Act

We certified that the January 4, 2006 proposed rule would not have a significant economic impact on a substantial number of small entities. We made this certification because the proposed rule would provide guidance concerning certain mandated enhanced due diligence requirements in section 312 of the Act, and because the financial institutions that would be covered by the rule tend to be larger institutions.

One commenter expressed concern that the final rule will make it prohibitive for smaller institutions to engage in the foreign correspondent banking business. However, this final rule does not impose significant new burdens on covered financial institutions of any size. Since at least 2002, the depository institutions covered by this rule have been subject to an interim final rule containing substantially similar enhanced due diligence requirements.³⁹ Other covered financial institutions have been required

to establish and maintain anti-money laundering programs reasonably designed, among other things, to prevent money laundering through correspondent accounts generally.⁴⁰

Because the terms of the interim rule and the final rule are substantially similar, and because the single comment does not provide evidence of any significant economic impact created by the interim or final rule, we believe that the final rule will not have a significant economic impact on a substantial number of small businesses. We also note that even if, as the comment asserts, the rule made foreign correspondent banking prohibitive for small entities, this would establish neither that a substantial number of small entities engage in foreign correspondent banking, nor that any that do derive significant revenue from such business.

Moreover, we have incorporated flexibility into this final rule, particularly by shifting from the prescriptive approach to compliance proposed in the First Proposed Rule to the risk-based approach adopted in this final rule. This flexibility will permit each covered financial institution to tailor its enhanced due diligence program for statutorily designated foreign banks⁴¹ to fit its size and the risks of its customer base.

For these reasons, it is hereby certified, pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that this final rule will not have a significant economic impact on a substantial number of small businesses.

V. Executive Order 12866

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

VI. Paperwork Reduction Act

The collection of information contained in this final rule has been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and was assigned Office of Management and Budget Control Number 1506-0046. 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

³⁸ See *Anti-Money Laundering Programs for Financial Institutions*, 67 FR 21110 (April 29, 2002) (establishing anti-money laundering program requirements for federally regulated depository institutions, broker-dealers in securities, futures commission merchants, and introducing brokers in commodities). See also *Anti-Money Laundering Program for Mutual Funds*, 67 FR 21117 (April 29, 2002).

⁴¹ See *supra* text accompanying footnotes 11-13.

control number assigned by the Office of Management and Budget.

The only requirements in the final rule that are subject to the Paperwork Reduction Act are set forth in 31 CFR 103.176(b)(1)(i), 103.176(b)(1)(iii)(A), and 103.176(b)(3), requiring covered financial institutions to obtain information relating to certain foreign banks' anti-money laundering programs, when appropriate, to obtain information from such foreign banks about the identity of any person with authority to direct transactions through a correspondent account that is a payable-through account and the sources and beneficial owner of funds or other assets in the payable-through account, when appropriate, and to obtain the identity of certain owners of any such foreign bank that is privately owned and the nature and extent of the ownership interest. The estimated annual average burden associated with this collection of information was one hour per recordkeeper. We estimated that there would be 28,163 recordkeepers, for a total of 28,163 annual burden hours.⁴² We received two comments on this burden estimate.

One commenter argued that the burden would "number into the hundreds of hours, at a minimum." The number of burden hours set forth under the Paperwork Reduction Act is designed to be an average, however, and includes recordkeepers subject to the provisions of this final rule that may not maintain correspondent accounts for statutorily designated foreign banks. Moreover, the number of burden hours pertains only to the collection of information when appropriate, and not to the review of the information.

Another commenter suggested that the number of burden hours may be two hours per year instead of one hour. We accept that estimate and, accordingly, have adjusted our final estimate of burden hours to two hours per recordkeeper.

Comments concerning the accuracy of this recordkeeping burden estimate and suggestions for reducing this burden should be sent (preferably by fax (202-395-6974)) to Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 (or by the internet to ahunt@omb.eop.gov), with a copy by regular mail to Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183, "ATTN: Regulation Identifier Number 1506-AA29" or by electronic mail to

⁴² Second Proposed Rule, 71 FR at 519.

³⁸ See *supra* note 5 and accompanying text.

³⁹ *Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts*, 67 FR 48348 (July 23, 2002).

regcomments@fincen.treas.gov with the caption "ATTN: Regulatory Information Number 1506-AA29" in the body of the text.

List of Subjects in 31 CFR Part 103

Banks, Banking, Brokers, Counter-money laundering, Counter-terrorism, Currency, Foreign banking, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth above, we are amending subpart I of 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, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107–56, 115 Stat. 307.

■ 2. In subpart I, amend § 103.176 by adding paragraphs (b) and (c), revising paragraphs (d) and (e), and adding paragraphs (f) and (g) to read as follows:

§ 103.176 Due diligence programs for correspondent accounts for foreign financial institutions.

* * * * *

(b) *Enhanced due diligence for certain foreign banks.* In the case of a correspondent account established, maintained, administered, or managed in the United States for a foreign bank described in paragraph (c) of this section, the due diligence program required by paragraph (a) of this section shall include enhanced due diligence procedures designed to ensure that the covered financial institution, at a minimum, takes reasonable steps to:

(1) Conduct enhanced scrutiny of such correspondent account to guard against money laundering and to identify and report any suspicious transactions in accordance with applicable law and regulation. This enhanced scrutiny shall reflect the risk assessment of the account and shall include, as appropriate:

(i) Obtaining and considering information relating to the foreign bank's anti-money laundering program to assess the risk of money laundering presented by the foreign bank's correspondent account;

(ii) Monitoring transactions to, from, or through the correspondent account in a manner reasonably designed to detect money laundering and suspicious activity; and

(iii)(A) Obtaining information from the foreign bank about the identity of any person with authority to direct transactions through any correspondent account that is a payable-through account, and the sources and beneficial owner of funds or other assets in the payable-through account.

(B) For purposes of paragraph (b)(1)(iii)(A) of this section, a *payable-through account* means a correspondent account maintained by a covered financial institution for a foreign bank by means of which the foreign bank permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States.

(2) Determine whether the foreign bank for which the correspondent account is established or maintained in turn maintains correspondent accounts for other foreign banks that use the foreign correspondent account established or maintained by the covered financial institution and, if so, take reasonable steps to obtain information relevant to assess and mitigate money laundering risks associated with the foreign bank's correspondent accounts for other foreign banks, including, as appropriate, the identity of those foreign banks.

(3)(i) Determine, for any correspondent account established or maintained for a foreign bank whose shares are not publicly traded, the identity of each owner of the foreign bank and the nature and extent of each owner's ownership interest.

(ii) For purposes of paragraph (b)(3)(i) of this section:

(A) *Owner* means any person who directly or indirectly owns, controls, or has the power to vote 10 percent or more of any class of securities of a foreign bank. For purposes of this paragraph (b)(3)(ii)(A):

(1) Members of the same family shall be considered to be one person; and

(2) *Same family* has the meaning provided in § 103.175(l)(2)(ii).

(B) *Publicly traded* means shares that are traded on an exchange or an organized over-the-counter market that is regulated by a foreign securities authority as defined in section 3(a)(50) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(50)).

(c) *Foreign banks to be accorded enhanced due diligence.* The due diligence procedures described in paragraph (b) of this section are required for any correspondent account maintained for a foreign bank that operates under:

(1) An offshore banking license;

(2) A banking license issued by a foreign country that has been designated as non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member and with which designation the U.S. representative to the group or organization concurs; or

(3) A banking license issued by a foreign country that has been designated by the Secretary as warranting special measures due to money laundering concerns.

(d) *Special procedures when due diligence or enhanced due diligence cannot be performed.* The due diligence program required by paragraphs (a) and (b) of this section shall include procedures to be followed in circumstances in which a covered financial institution cannot perform appropriate due diligence or enhanced due diligence with respect to a correspondent account, including when the covered financial institution should refuse to open the account, suspend transaction activity, file a suspicious activity report, or close the account.

(e) *Applicability rules for general due diligence.* The provisions of paragraph (a) of this section apply to covered financial institutions as follows:

(1) *General rules—(i) Correspondent accounts established on or after July 5, 2006.* Effective July 5, 2006, the requirements of paragraph (a) of this section shall apply to each correspondent account established on or after that date.

(ii) *Correspondent accounts established before July 5, 2006.* Effective October 2, 2006, the requirements of paragraph (a) of this section shall apply to each correspondent account established before July 5, 2006.

(2) *Special rules for certain banks.* Until the requirements of paragraph (a) of this section become applicable as set forth in paragraph (e)(1) of this section, the due diligence requirements of 31 U.S.C. 5318(i)(1) shall continue to apply to any covered financial institution listed in § 103.175(f)(1)(i) through (vi).

(3) *Special rules for all other covered financial institutions.* The due diligence requirements of 31 U.S.C. 5318(i)(1) shall not apply to a covered financial institution listed in § 103.175(f)(1)(vii) through (x) until the requirements of paragraph (a) of this section become applicable as set forth in paragraph (e)(1) of this section.

(f) *Applicability rules for enhanced due diligence.* The provisions of paragraph (b) of this section apply to covered financial institutions as follows:

(1) *General rules*—(i) *Correspondent accounts established on or after* February 5, 2008. Effective February 5, 2008, the requirements of paragraph (b) of this section shall apply to each correspondent account established on or after such date.

(ii) *Correspondent accounts established before* February 5, 2008. Effective May 5, 2008, the requirements of paragraph (b) of this section shall apply to each correspondent account established before February 5, 2008.

(2) *Special rules for certain banks.* Until the requirements of paragraph (b) of this section become applicable as set forth in paragraph (f)(1) of this section, the enhanced due diligence requirements of 31 U.S.C. 5318(i)(2) shall continue to apply to any covered financial institutions listed in § 103.175(f)(1)(i) through (vi).

(3) *Special rules for all other covered financial institutions.* The enhanced due diligence requirements of 31 U.S.C. 5318(i)(2) shall not apply to a covered financial institution listed in § 103.175(f)(1)(vii) through (x) until the requirements of paragraph (b) of this section become applicable, as set forth in paragraph (f)(1) of this section.

(g) *Exemptions*—(1) *Exempt financial institutions.* Except as provided in this section, a financial institution defined in 31 U.S.C. 5312(a)(2) or (c)(1), or § 103.11(n) is exempt from the requirements of 31 U.S.C. 5318(i)(1) and (i)(2) pertaining to correspondent accounts.

(2) *Other compliance obligations of financial institutions unaffected.* Nothing in paragraph (g) of this section shall be construed to relieve a financial institution from its responsibility to comply with any other applicable requirement of law or regulation, including title 31, United States Code, and this part.

Dated: August 2, 2007.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

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