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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1020

RIN: 1506-AB18

Amendment to the Bank Secrecy Act Regulations -- Exemption 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 regulations that allow depository institutions to exempt transactions of certain payroll customers¹ from the requirement to report transactions in currency in excess of \$10,000. The rule substitutes the term “frequently” for “regularly” in the provision of the exemption rules dealing with payroll customers. This 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:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: FinCEN, Regulatory Policy and Programs Division, (800) 949-2732 and select Option 6.

¹ These customers are commonly known as “Phase II” customers and are defined at 31 CFR 1020.315(b)(7).

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Provisions

FinCEN exercises regulatory functions primarily under the Currency and Financial Transactions Reporting Act of 1970, as amended by the USA PATRIOT Act of 2001 (the “Act”) and other legislation, which legislative framework is commonly referred to as the Bank Secrecy Act (“BSA”),² which authorizes the Secretary of the Treasury (“Secretary”) to require financial institutions to keep records and file reports that “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.”³ The Secretary has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.⁴ FinCEN is authorized to impose AML program requirements on financial institutions.⁵

The Money Laundering Suppression Act of 1994 amended the BSA by establishing a system for exempting transactions by certain customers of depository institutions from currency transaction reporting.⁶ In general, the statutory exemption

² The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 18 U.S.C. 1956, 18 U.S.C. 1957, 18 U.S.C. 1960, and 31 U.S.C. 5311–5314 and 5316–5332 and notes thereto, with implementing regulations at 31 CFR Chapter X. *See* 31 CFR 1010.100(e).

³ 31 U.S.C. 5311.

⁴ Treasury Order 180-01 (Sept. 26, 2002).

⁵ 31 U.S.C. 5318(h)(2).

⁶ *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).

system creates two types of exemptions, mandatory and discretionary exemptions.⁷

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 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.⁸ 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

⁷ The enactment of 31 U.S.C. 5313(d) and (e) reflect the 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).

⁸ For additional information about the terms of 31 U.S.C. 5313(e)–(g), see 63 FR 50147, 50148 (Sept. 21, 1998).

(C) meets criteria that 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.⁹

The Secretary was required to establish by regulation the criteria for granting and maintaining an exemption for qualified business customers,¹⁰ as well as guidelines for depository institutions to follow in selecting customers for exemption.¹¹ The BSA allowed for the guidelines to include 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.¹²

B. *Overview of the Current Regulatory Provisions To Exempt Payroll Customers From Currency Transaction Reporting (CTR)*

The current exemption procedures which are codified at 31 CFR § 1020.315, were the result of a six-part rulemaking.¹³ The current exemption procedures apply to depository institution customers that fall within one of the classes of exempt persons described in 31 CFR 1020.315(b)(1)–(7), commonly referred to as Phase I and Phase II exemptions. Phase II eligible customers include: (i) “non-listed businesses”¹⁴ and (ii) “payroll customers.”¹⁵ Under the current rules a non-listed business is any other person (i.e., a person not otherwise covered under the exempt person definitions) that

⁹ 31 U.S.C. 5313(e)(2).

¹⁰ See 31 U.S.C. 5313(e)(3).

¹¹ See 31 U.S.C. 5313(e)(4)(A).

¹² See 31 U.S.C. 5313(e)(5).

¹³ See 61 FR 18204 (Apr. 24, 1996), 62 FR 47141, 47156 (Sept. 8, 1997), 62 FR 63298 (Nov. 28, 1997), 63 FR 50147 (Sept. 21, 1998), 65 FR 46356 (July 28, 2000), and 73 FR 74010 (Dec. 5, 2008) (the rulemakings that comprise the current CTR exemption system).

¹⁴ 31 CFR 1020.315(b)(6). (A non-listed business is an exempt person only “[t]o the extent of its domestic operations.”)

¹⁵ 31 CFR 1020.315(b)(7).

(A) maintains a transaction account at the bank for at least two 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 is eligible to do business with the United States or a State.¹⁶ A “payroll customer” 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 two 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.¹⁷ A payroll customer is an exempt person “[w]ith respect solely to withdrawals for payroll purposes.”¹⁸

II. Final Rule

The Terms “Frequently” and “Regularly”

Under the existing CTR exemption rules codified at 31 CFR § 1020.315, two separate categories of exempt persons use nearly synonymous terms for definitional purposes – “frequently” for non-listed businesses and “regularly” for payroll customers. To be an exempt non-listed business, a person must, among other things, “frequently engage[] in transactions in currency with the bank in excess of \$10,000.”¹⁹ To be an exempt payroll customer, a person must, among other things, “regularly withdraw[] more than \$10,000 in order to pay its United States employees in currency.”²⁰

¹⁶ 31 CFR § 1020.315(b)(6).

¹⁷ 31 CFR § 1020.315(b)(7).

¹⁸ *Id.*

¹⁹ 31 CFR § 1020.315(b)(6)(ii).

²⁰ 31 CFR § 1020.315(b)(7)(ii).

In the preamble to the December 2008 rulemaking revising the CTR exemption rules, FinCEN interpreted “frequently” to mean five or more transactions a year.²¹ This interpretation was, in part, due to the fact that the waiting period for exempting a Phase II customer was being shortened from twelve to two months, as well as an affirmative step toward further simplifying, and thereby encouraging, the greater use of the exemption process. In that rulemaking, FinCEN did not similarly define the term “regularly,” and to date has never formally defined that term in the context of the applicability of the CTR exemption rules to payroll customers.

FinCEN believes that the lack of a specific definition for the term “regularly” may have caused, and may be continuing to cause, some banks not to utilize the exemption for payroll customers. FinCEN recognizes that it has the discretion to use slightly different terms when describing the need for non-listed businesses and payroll customers to make large transactions in currency, and that the term “regularly” can mean something slightly different than “frequently.” However, FinCEN believes that greater clarity and ease of use by banks of the CTR exemption rules weigh in favor of using the same term – i.e., “frequently” – for both categories of exempt persons.²² In addition, FinCEN believes that utilizing the same term in both contexts will not undermine law enforcement interests because a bank still must take reasonable and prudent steps to assure itself that a person is, in fact, a payroll customer, before utilizing that specific exemption.²³

²¹ 73 FR 74010 (Dec. 5, 2008).

²² Simplifying the CTR exemption process is consistent with the recommendations in the 2008 report issued by the U.S. Government Accountability Office (“GAO”) suggesting a variety of ways to improve the CTR exemption process. *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).

²³ *See* 31 CFR 1020.315(d) and 1020.315(e).

As a result of substituting the term “frequently” for “regularly” in the context of the payroll customer exemption, FinCEN’s prior interpretation of the term “frequently” used in the non-listed business exemption to mean five or more times a year would equally apply to exemption determinations in the payroll customer context. This change is intended to harmonize the exemption standard for payroll customers and non-listed businesses to a single bright-line test that will provide greater ease of application and promote full use of the exemption for payroll customers.

As stated in the December 2008 rulemaking, allowing banks to exempt a Phase II customer after it has conducted five or more reportable cash transactions per year should make it easier for banks to exempt customers that conduct seasonal business, whether as a non-listed business or as a payroll customer.²⁴ Thus, assuming the other prerequisites are met, a bank could exempt the currency transactions of a payroll customer if the customer withdraws currency five or more times a year in order to pay its employees.

III. Notice and Comment under the Administrative Procedure Act

The Administrative Procedure Act (“APA”) allows an agency to dispense with notice and comment when it would be impracticable, unnecessary, or contrary to the public interest. By substituting the term “frequently” for “regularly,” this final rule will make it easier for banks to apply the exemption standard to their payroll customers and promote fuller use of the exemption for these customers. Consequently, this will result in a foreseeable reduction of the compliance burden on banks by eliminating the need to otherwise file a currency transaction report and perform the recordkeeping requirements that go along with such filing. FinCEN believes that this change to the rule is a desirable change for impacted banks, does not adversely impact law enforcement interests, is

²⁴ 73 FR 74014 (Dec. 5, 2008).

otherwise noncontroversial, and would not generate meaningful comment. Hence, pursuant to 5 U.S.C. 553(b), FinCEN finds that notice and comment is unnecessary. For the same reasons, this final rule is effective upon publication pursuant to 5 U.S.C. 553(d)(1) and (3).

IV. Paperwork Reduction Act

This regulation is being issued without prior notice and public comment pursuant to the APA (5 U.S.C. 553). For this reason, the collection of information contained in this regulation has been reviewed under the requirements of the Paperwork Reduction Act (44 U.S.C. 3507(j)) and approved by the Office of Management and Budget (OMB) under control number 1506-0004. 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.

V. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required by the APA (5 U.S.C. 551 *et seq.*), or by any other statute, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

VI. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that the final rule

is neither an economically significant regulatory action nor a significant regulatory action for purposes of Executive Orders 13563 and 12866.

VII. Unfunded Mandates Act of 1995 Statement

Because no notice of proposed rulemaking is required by the APA (5 U.S.C. § 551 *et seq.*), or by any other statute, FinCEN has determined that it is not required to prepare a written statement under section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (March 22, 1995).

List of Subjects in 31 CFR Part 1020

Administrative practice and procedure, Banks, Banking, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Terrorism.

Authority and Issuance

For the reasons set forth in the preamble, part 1020 of title 31 of the Code of Federal Regulations is amended as follows:

PART 1020 – RULE FOR BANKS

1. The authority citation for part 1010 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314, 5316-5332; title III, section 314, Pub. L. 107-56, 115 Stat. 307.

2. Section 1020.315(b)(7)(ii) is amended by removing the word “regularly” and adding the word “frequently” in its place.

Dated: June 1, 2012

James H. Freis, Jr.
Director,
Financial Crimes Enforcement Network

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