1120 Connecticut Avenue, NW
Washington, DC 20036

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John J. Byrne
Senior Counsel and Compliance Manager
Phone: 202-663-5029
Jbyrne@aba.com

July 31, 2003

U.S. Department of the Treasury
Office of the General Counsel
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Ladies and Gentlemen:

The American Bankers Association (ABA) is submitting this letter in response to the unprecedented July 1, 2003 Notice of Inquiry (Notice) relating to final regulations issued pursuant to section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001. In your notice, you specifically request comments on (i) whether and under what circumstances financial institutions should be required to retain photocopies of identification documents relied on to verify customer identity (recordkeeping); and (ii) whether there are situations when the regulation should preclude reliance on certain forms of foreign government-issued identification to verify customer identity (documentary verification of foreign nationals.)

The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks –makes ABA the largest banking trade association in the country. For further information regarding the ABA, please consult the ABA on the Internet at http://www.aba.com.

The American Bankers Association previously commented on the notice of proposed rulemaking to implement Section 326 of the U.S.A. Patriot Act (PL 107-56), which was finalized on May 9, 2003 and scheduled to take effect on October 1, 2003. As we pointed out in our earlier comment, the Secretary of the Treasury was required to prescribe, jointly with the financial services agencies, a regulation that, among other things, "requires financial institutions to implement reasonable procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable."

ABA believed then, as we do now, that the final regulation conformed to congressional direction to develop a reasonable rule, which set forth standards reasonable in light of the individual circumstances and risk perceived. Therefore, this so-called "notice of inquiry" is ill advised and has caused tremendous uncertainty within the financial industry as to the existing rulemaking process.

Overview of the Issues Surrounding the Notice

According to the Notice, "concerns have been raised about two provisions relating to recordkeeping and the acceptance of certain forms of identification." Based on these "concerns"[1] the Treasury Department is seeking additional comments on a rule that is already final. More importantly, the mandatory compliance date of October 1 is rapidly approaching and these two issues, if modified in any way, will dramatically hamper any institution's ability to comply with the current compliance date. In fact, the entire process of requesting comments on this rule places financial institutions in a position of not being able to make final policy decisions relating to resource allocation to Section 326 compliance or to the internal approval process of their customer identification program (CIP).

With regard to congressional direction, it is important to note, that the House Financial Services Committee originated the provision that eventually became Section 326 and made clear its intent that the regulations not over burden the financial sector. It directed the Treasury to "make use of information currently obtained by most financial institutions in the account opening process." [2] It went on to state very clearly that it "is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical."

More importantly, the chairman of the committee and the ranking member emphasized their support for the final Section 326 rule in a July 24th letter to the Treasury Secretary concluding that "the final regulations reflect the results of careful analysis and study by Treasury and the regulators as informed by a comprehensive notice and comment process." Chairman Oxley and Ranking Member Frank also added "no changes to the final regulations are warranted."[3]

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[1] One member of Congress raised the concerns. This notice creates a harmful precedent that will encourage policymakers to attack final rules that they oppose even after a thorough, public, rulemaking process has been completed.

[2] H. Rept 107-250, pg 63. The Committee also reiterated the fact that banks have account opening procedures in place when it added that "[c]urrent regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services."

[3] For a copy of the letter, please go to www.aba.com

When ABA filed its original comment letter, we also commended the agencies and the Treasury Department "for recognizing that the only reasonable and effective means of implementing these requirements is by directing the institutions to adopt "risk-based" procedures that take into consideration the great variety of types of accounts that banks maintain, the different methods of opening accounts, and the varying types of identifying information available." Any changes to the final rule will largely negate this important flexible risk-based obligation.

Mandating Photocopies of Identification Documents is Contrary to Congressional Direction that Section 326 be Reasonable and is a Useless Evidence Tool

The first set of questions regarding the photocopying of documents ask:

- Should the regulations require financial institutions to make and maintain a photocopy of identification documents upon which the financial institution relies to verify identity in all cases?

- Should the regulations identify specific instances in which photocopies of documents relied upon must be made and maintained?

- Should the regulations provide guidance to financial institutions concerning risk factors indicating when photocopying identification documents relied upon may be appropriate?

The "concern" regarding whether photocopying identification documents and retaining such copies for 5 years after account closing has already been completely addressed and resolved in the rulemaking process.[4] There are a number of reasons why the agencies decided against this potential mandate. For example,

- Several states currently prohibit the photocopying of drivers licenses;

- There continues to be concern that increased access to photocopies throughout an institution could facilitate identity theft;

- Compliance officers remain concerned about issues under the Equal Credit Opportunity Act (ECOA) with retaining copies of drivers licenses in loan files since the regulators for years have discouraged such practices;

- Centralizing photocopy records is a major operational undertaking, especially with the clear movement of many institutions toward electronic

[4] See footnote 4 from the July 1 Federal Register notice. (Vol. 68, No. 126, p. 39040)

recordkeeping. A photocopy mandate will also harm, and possibly eliminate, the processing of remote applications in the credit card industry and with any banking product that is not based on face-to-face transactions; and

- Security measures are now in place in certain state drivers licenses causing photocopies of pictures to be blocked or blotched; effectively eliminating the photograph as an evidence source[5].

Retention of the Current Risk-Based Approach to Identification Verification is the Only Effective Means of Addressing the Myriad of Foreign Identification Documents

The second set of questions posed by the Notice on "documentary verification of the identity of foreign individuals" ask:

- Should the regulations preclude financial institutions' reliance on certain forms of identification issued by certain foreign governments?

- Should the regulations require financial institutions to obtain a passport number from all customers who are non-U.S. citizens?

- What are the anticipated effects on non-U.S. citizens in the United States who are not required to have a passport?

- What are the anticipated effects on non-U.S. citizens who open accounts from abroad, and thus are not required to have a passport?

- Is there sufficient empirical information to enable Treasury to assess the utility of the various forms of foreign-issued identification for purposes of accurately identifying the holder?

[5] This is a fact that directly responds to a letter sent by House Judiciary Chairman James Sensenbrenner to the Homeland Security Council that the lack of a photocopy mandate eliminates "a critical path of evidence essential to successful investigation and prosecution of terrorism." ABA received a letter from the American Association of Motor Vehicle Administrators (AAMVA) on June 19, 2003 confirming that security features in certain states will affect photocopying. See ABA's website for a copy of the letter. In addition, law enforcement can receive an actual copy of the document directly from the issuing jurisdiction based on the records required under the current final rule.

- What would the impact be on the use of the conventional financial system if financial institutions were prohibited from accepting certain forms of government-issued identification?

As mentioned above, the support within the industry for the final rule under Section 326 revolves around the decision by the Treasury and the regulatory agencies to create a risk-based approach to the challenges of account opening verification. This decision permits institutions to develop their CIP and what documents (or non-document processes) to accept based on all available information. Therefore, the government can provide the industry with updates on the types of risks inherent in a particular form of foreign (or domestic) identification and the institutions can address those risks in a manner appropriate to their own systems.[6]

The Notice seeks comment on whether there should be limits on the acceptance by financial institutions on certain forms of identification as well as information on the impact of such restrictions. To respond to these questions, we need look no further than to Administration officials. During a hearing in the House Judiciary Subcommittee on June 26th, Roberta Jacobson, Acting Deputy Assistant Secretary of State for the Bureau of Western Hemisphere Affairs, when asked about the impact of prohibiting the acceptance of documents such as the foreign consular identification cards, cautioned that the State Department:

"*believes that the U.S. Government must also carefully avoid taking action against consular identification cards that foreclose our options to document or assist American citizens abroad. The Department itself issues documentation other than a passport for U.S. citizens abroad and at times occasionally issues similar identity cards or travel documents. Should a foreign country decide to limit acceptance of such documentation or other traditional documentation such as state issued identifications or driver's licenses, the actions of American citizens abroad could be seriously restricted.*"

In addition, the Department of Treasury's own study[7] proves that the government is unable to adequately review the volume of foreign identification documents to determine reliability and that there is no uniform, standard identification number for non-U.S. persons.

[6] In late 2001, the State Department indicated that visas were ineffective forms of identification for verifying purposes. In response to that information, the ABA recommended to their members that visas be no longer used as primary forms of identification. Similar recommendations could easily be made if the government presents solid evidence on other forms of identification.

[7] See, "A Report to Congress in Accordance with Section 326(b) of the USA PATRIOT Act." October 21, 2002.

Other reasons for continuing to permit financial institutions to accept foreign identification documents after a risk-based assessment of the document include:

- Eliminating some forms of identification will further encourage foreign customers to utilize illegal underground financial practices or resort to all-cash which raises the potential for robbery and theft; and

- The argument that certain foreign identification documents are "susceptible to fraud and abuse" conveniently leaves out the fact that many domestic identification documents lack security protections and are vehicles for criminal activity[8].

This Notice of Inquiry Hampers the Industry's Ability to Meet the October 1 Compliance Date

Our members are very concerned about their ability to now meet the mandatory compliance deadline of October 1 2003. In good faith, the industry has been diligently working toward completion of the CIP process and the various operational and resource challenges inherent with what was a fairly short timeframe. As we indicated in our original comments, the Section 326 rule requires significant "systems changes, employee training and printing costs" and we added, it was "absolutely essential that institutions be provided a reasonable time to effect the necessary changes." These comments are indeed even more relevant at this time since there is no way to effectively complete an institution's CIP as long as there remains uncertainty as to whether there will be additional congressional hindrance to the public rulemaking process.

Therefore, ABA respectfully recommends that the regulatory agencies and the Treasury Department formally acknowledge that as long as an institution has begun the completion of the CIP process, there will not be any formal criticism of failure to comply with all aspects of the Section 326 obligations until after a reasonable period beyond the end of this Notice of Inquiry process.

We urge the Treasury Department to follow the clear legislative directive that the requirements of Section 326 be both "reasonable and practicable." Flexibility regarding the compliance date is the only appropriate response to the Notice of Inquiry.

[8] In fact, there is an ongoing effort to create a pilot program to enhance the issuance of secure identification credentials by the American Association of Motor Vehicle Administrators (AAMVA) because of the manufacturing and sale of fake drivers licenses, permits and ID cards.

Conclusion

The American Bankers Association has strongly supported the goals of the USA PATRIOT Act in general and Section 326 specifically. Our members have worked closely with law enforcement and the banking agencies to address terrorist financing and money laundering and will continue to do so. It is time to, once and for all, finish the Section 326 process.

Thank you for the opportunity to present our views. If you need additional information, please feel free to contact me at (202) 663-5029.

Sincerely,

John J. Byrne
Senior Counsel and Compliance Manager