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Financial Crimes Enforcement Network
Department of the Treasury
P. O. Box 39
Vienna, VA 22183

Re: Transfer and Reorganizations of Bank Secrecy Act Regulations; Chapter X; 73 Federal Register 66414; November 7, 2008

Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the proposal by the Financial Crimes Enforcement Network (FinCEN) to move existing Bank Secrecy Act regulations to a new chapter in the Code of Federal Regulations (CFR). The new chapter is designed to reorganize the rules by industry as a means to develop a user-friendly way to locate pertinent rules.

General Comments

ABA supports FinCEN's efforts to tackle this project. The effort is a laudable goal and a massive undertaking. Over time, the rules and regulations have grown and, following the adoption of the Patriot Act[2] in 2001, the reach of the nation's anti-money laundering efforts was expanded to encompass a broad variety of financial institutions, including insurance companies, securities firms, real estate companies, jewelers and others. As a result, this reorganization is particularly helpful. In addition, the reorganization builds on the experience of the depository institution financial regulators' experience with developing the *Bank Secrecy Act/Anti-Money Laundering Examination Manual.*[3] One of the great achievements of the *Examination*

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

[2] The USA PATRIOT Act, or Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, PL 107-56, was enacted on October 26, 2001 in response to the terrorist attacks of September 11.

[3] The *Examination Manual* was developed by the members of the Federal Financial Institutions Examination Council (the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision) working together with industry representatives and FinCEN and the Office of Foreign Assets Control (OFAC).

Manual is that it serves as a reference tool for depository institutions in developing and administering their anti-money laundering/counter terrorist financing AML/CTF compliance efforts. Having information organized and coordinated in one easily accessed location reduces the burden of compliance. And, by taking similar steps with this restructuring of the CFR, FinCEN is working towards the same worthwhile goal.

Recommendations for Change

While recognizing that the fundamental intent is to reorganize regulatory reporting requirements into one easily accessible tool, ABA urges FinCEN to use the restructured CFR to identify opportunities to streamline the reporting process and to take other steps to further improve the utility of the new chapter of the CFR. Many of these are suggestions for future improvement and not steps that must be taken before this restructuring is finalized. Rather, they are offered as a roadmap for the next steps that should be undertaken to achieve the goal FinCEN announced with this restructuring and that we believe will improve the usefulness of the CFR for depositories and other financial institutions.

For example, when various rules were initially promulgated, effective dates were incorporated and definitions were established for the new rule to facilitate initial implementation. As rules were being introduced, this was a logical and helpful step. However, in re-organizing all the rules in one location, it becomes apparent that some of these effective dates are no longer necessary. In addition, in the process of combining all the different regulatory requirements in one location, certain definitional redundancies appear, as more fully noted below. Given this massive undertaking, ABA realizes that it was inevitable that not all the outdated transition dates or definitional redundancies would be eliminated in the first phase. However, going forward, ABA encourages FinCEN to recognize the remaining areas that need attention and continue to eliminate redundancies and unnecessary dates where possible.

Second, ABA strongly urges FinCEN to set up a regular calendar for reviewing the CFR to ensure that it is kept up to date. For example, the Federal Reserve and other banking agencies use regularly scheduled reviews of the rules and regulations under their purview to ensure the rules are kept as up-to-date and as streamlined as possible. A regular schedule for reviewing sections of the new CFR will ensure that it is kept current. And, going forward, FinCEN may want to consider following the example of other federal regulators and hold focus groups with affected entities to test the understanding of different sections, especially since these rules affect many small businesses without sophisticated legal training. For example, there are many small money services businesses (MSBs) that are managed by individuals for whom English is a second language and where clear simple phrasing is important for compliance.

ABA welcomes several initiatives FinCEN has taken in the restructuring. First, creating a general introductory section with separate sections for different industries should facilitate compliance. Second, it should also make it easier for FinCEN to

identify elements that are common to industries and to separate those elements that are unique to a given industry and, therefore, require distinct regulatory treatment. Third, the use of a standard numbering system across the CFR will make it easier for users of this new CFR chapter to find other pertinent sections. This will also be helpful for companies that will need to refer to more than one section, as with a holding company that has an enterprise-wide risk management system encompassing both a securities firm and a bank.

Another helpful element of the CFR restructuring is its use of consistent timelines and dollar thresholds for filing obligations. For example, requiring that a suspicious activity report (SAR) be filed within 30 days after the initial detection of a suspicious transaction and using a $5,000 threshold for mandatory filing of a SAR simplifies compliance. Again, this is particularly helpful for larger companies with different entities under one holding company that are working to develop enterprise-wide risk management programs.

ABA also suggests that the final reorganization include a full table of contents at the beginning instead of putting the list in front of each sub-chapter. And finally, since many of the rules implement specific legislative mandates, if and where possible, it would be useful for the CFR to incorporate a cross-reference to the statutory provision it implements.

Comments on Specific Provisions

General Provisions

- There are a number of instances where certain terms such as "payable through account" or "correspondent account" are defined with the substantive provisions involving those terms. Generally, absent a specific reason, all defined terms should be listed with the general definitions for ease of reference.

- Given the overall structure of the new chapter X, instead of defining "casinos" and "card clubs" as a subset of financial institutions, it would be more logical and simpler to separate those terms and give them their own independent entry.

- ABA suggest FinCEN consider providing a separate definition for the term "international financial institution" used in the definition of "foreign financial agency" at section 1010.100(v).

- The updates and restructuring of the CFR and the definitions presented an ideal opportunity to address another goal announced at the same time that Treasury Secretary Henry Paulson announced this initiative in July 2007. Currently, the ***definition of a money services business*** (MSB) as found at section MSBs 1010.100(ff) frequently ensnares small businesses that do not engage in MSB activities on a regular basis. For instance, the definition of check casher and the low threshold ($1000 per person per day) causes many

small businesses to become MSBs – many inadvertently. While more work and discussion is needed, some adjustments could have been made here, e.g., raising some of the thresholds, that would reduce the impact of the restrictions and registration requirements on many small businesses that only offer check cashing or other ancillary services designed to supplement and enhance their primary business. ABA strongly encourages FinCEN to work with all interested parties to address this issue and to eliminate confusion so that the focus can shift from monitoring the conduct of MSBs engaged in routine transactions to reporting suspicious activity.

- Under the general definitions, sections (ee) and (aaa) are marked "reserved." However, there does not appear to be a clear rationale for this other than a possible inadvertent carryover during the reorganization. We recognize the logic and agree it is appropriate to reserve space for future revisions but it should be consistent.

- Section 1010, Subpart C sets out the ***filing requirements*** generally required of all financial institutions. ABA recommends that the filing requirements and the time for filing should be kept together to facilitate compliance. In the current format, those two provisions are unnecessarily separated.

- Subsection 330 regarding ***reports received in trade or business on currency over $10,000***, should clearly articulate that this report is distinct from the CTR filing requirement. As phrased, the distinction is not clear and is potentially confusing.

- Section 1010.330(a)(1), the general provision for reporting currency transactions, cross references the U. S. Code definition of "person." However, under the general definitions at 1010.100(mm), there is another definition for "person." Unless there is a valid reason for two distinct definitions, it would be simpler to have one uniform definition.

- Sections ***1010.301 and 1010.401*** are identical. Both state that, "The Secretary hereby determines that the records required to be kept by this chapter have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." It seems there should be a more efficient way to establish this presumption without repetition. Perhaps placing the finding at the very outset of the entire chapter would be simpler and help eliminate redundancy.

- The ***travel rule*** for wires of $3,000 or more is maintained in the proposed reorganization at section 1010.410(f). Some time ago, a joint proposal was made by Treasury and the Federal Reserve that would revise this requirement. It would be helpful to provide information on the status of that project in the preamble to the final rule.

- Subsection 1010.350 addresses ***reports of foreign financial accounts***. Under this provision, a person with financial interest or signature authority

over an account in a foreign jurisdiction must file a report with the Commissioner of the Internal Revenue. Separately, section 1010.420 outlines the record retention requirements for those reports. The two sections should be cross-referenced and coordinated.[4]

- Subsection 1010.540 addresses ***voluntary information sharing*** among financial institutions, as permitted by 314(b) of the Patriot Act. Paragraph (a)(2) defines an association as "a group or organization the membership of which is comprised entirely of financial institutions…" The apparent goal is to encourage trade associations, such as ABA, to assist with the voluntary communication since it is beneficial to its members, law enforcement and regulators. However, many trade associations also have ancillary members that are not financial institutions. These "corporate associates" are encouraged to join because they provide products or services for member financial institutions. However, their presence places an unneeded restriction on the communications that should be encouraged under this provision. This unintended consequence undermines the goal of the information sharing. Other means could be developed to address this issue. Therefore, the definition should be revised or some exception crafted to avoid unnecessary barriers to useful communication.

- 1010.540(b)(3) of the ***voluntary information sharing*** requires a financial institution to verify that the other entity with which it wants to share information has registered with FinCEN for information sharing purposes. This is another element that discourages use of the process and undermines its effectiveness. The ABA is working with the other representatives on the Treasury's Bank Secrecy Act Advisory Group (BSAAG) to take steps that would make it simple for financial institutions to communicate and share information while still ensuring appropriate protections for privacy and security are maintained. ABA strongly encourages FinCEN to support these efforts.

- Subsection 1010.540(c) addresses ***information sharing between financial institutions and the federal government***. The provision affirms that if, due to information shared between financial institutions, possible instances of money laundering or terrorist financing are suspected, then a suspicious activity report (SAR) should be filed. ABA questions whether this paragraph is needed. It seems to be unnecessarily redundant to other requirements that specifically address SAR filing.

[4] As an aside, when two provisions cover the same transaction or requirement, cross-referencing and coordination provides two important benefits: it facilitates compliance and ensures that when one provision is updated, all related provisions are updated at the same time so that there are not inadvertent conflicts in regulatory requirements when changes are implemented.

- The definition of "correspondent account" in section 1010.605 should be moved to the general definitions to avoid the need to repeat the definition in more than one section.

- Subsection 1010.610 is the regulatory requirement that outlines the appropriate ***due diligence for correspondent accounts for foreign financial institutions.*** Subparagraph (b) outlines the instances of enhanced due diligence for certain foreign banks while subparagraph (c) outlines which banks are subject to this enhanced due diligence. It would seem more logical to define which banks are subject to the enhanced due diligence first. In other words, subsection (c) should come before subsection (b).

- The definition of "payable through account" should be moved to the general definitions in section 1010 since it can apply in other instances, such as special measures adopted under section 311 of the Patriot Act.

- Under the provisions beginning with section 1010.651, the provisions that implement rules under ***section 311 of the Patriot Act*** pertaining to certain banks or countries, such as those licensed by Burma, there are definitions that appear redundant. ABA suggests it would streamline the rules and simplify compliance if all those could be grouped together at the front of this section.

- Subpart G applies to Administrative Rulings. ABA supports FinCEN's efforts to coordinate and organize these rulings so that they can be easily accessed. In addition, regularly updating the information in a new appendix is a welcome step.

Rules for Specific Industries

- Subsection 1020.315, on ***currency transaction report (CTR) exemptions***, should be replaced with the recently adopted final rule that was published in the *Federal Register* on December 5, 2008.

- Section 1020.315(b)*4) should be revised to take into account reorganization at NASDAQ. "Nasdaq National Market Security" should be changed to "NASDAQ Global Market and Global Select Market" and "Nasdaq Small-Cap Issues" should be changed to NASDAQ Capital Markets."[5]

- In some instances, there are provisions of the rules that were incorporated into the general provisions. However, for other subsections, requirements and ***regulatory language has been repeated for each industry***. For example, under the customer identification program (CIP) rules under section 326 of the Patriot Act, it would be simpler and more consistent with

[5] Stylistically, all references to Nasdaq should be NASDAQ while all references to the Securities and Exchange Commission's electronic filing system should be EDGAR since both terms are abbreviations.

the intended goal of having all general provisions in one place if the identical provisions were only laid out once. One example is from the next subchapter for casinos where subsection 1021.315 simply cross-references 1010.315 for exemptions from CTR filings for casinos. That avoids repetition, potential conflicts and possible confusion. It also streamlines updating when revisions are made in the future. Overall, such an approach seems cleaner and simpler than restating the entire rule. However, rather than delay the publication of the reorganized rules, ABA recommends that FinCEN incorporate this as a goal for future and regular reviews of the new Chapter X.

- Incorporating ***cross-references*** is very helpful. For example, under the subsection outlining the CTR filing obligations for broker-dealers, subsection 1023.311 states, "refer to section 1010.311 of this chapter for reports of transactions in currency filing obligations for brokers or dealers in securities." That approach simplifies and eliminates repetition. The cross-reference also provides a helpful roadmap for compliance officers. ABA encourages FinCEN to be mindful of additional opportunities for such cross-references whenever these rules are updated.

- The applicable ***restrictions on SAR disclosures*** were restated for each different financial industry. Again, ABA questions whether this repetition is necessary or whether it would be simpler to incorporate those elements under the *General Provisions*. However, it also became apparent about why there has been confusion about what information may be disclosed. The restriction states that no SAR filer "may notify any person involved in the transaction" that the SAR has been filed. It would be cleaner and less confusing to state that the filing of a SAR may not be disclosed other than to appropriate law enforcement entities or the institution's federal financial supervisor. Given the sensitivity to disclosure, ABA recommends that the regulatory provisions and statute be clarified to restrict these disclosures appropriately and avoid media sensations over SAR information.

- Another provision on the ***confidentiality of SARs***, e.g., 1025.320(e) for insurance companies, requires the financial institution to notify FinCEN whenever there is a request to disclose. Given the cooperative spirit among the federal agencies, as evidenced by the many memoranda of understanding (MOUs) between FinCEN and functional regulators – both federal and state – it would seem simpler to allow a financial institution to report to FinCEN *or* its functional regulator.

- Under the CIP rules, when a customer will be applying for a ***taxpayer identification number*** (TIN), the rule requires that the TIN application must have been filed before the person attempts to establish a bank account. Since the rules require the institution to have procedures to follow up to ensure that the TIN is in place, requiring the application to precede the account opening seems to be an unnecessary complication.

- The provisions for filing of a SAR will need to be updated and revised to reflect ***joint filing*** procedures.

- Over time, FinCEN has improved the specifications for the requirements for ***anti-money laundering program requirements*** as found at subsections 310 under the different chapters. ABA recommends that, going forward, FinCEN take steps to make these as consistent as possible across industries. In other words, absent some unique reason to depart from the standard that is now in place for depository institutions, and since most companies understand the parameters it would seem logical to eliminate any differences.

- Subsection 1027.210 for dealers in precious metals, precious stones or jewels, incorporates guidance for risk-assessment. This is helpful guidance that FinCEN may want to consider incorporating for other industries. Similarly, the information on red flags would be equally useful for other industries.

Transition Provisions

As noted at the outset, there are a number of instances where transition dates are incorporated in the reorganized CFR chapter. When different regulatory sections were initially established, these dates were appropriate and necessary. This reorganization provides an opportunity to eliminate dates that are no longer needed (or, if elements of the provision should be retained, those sections should be revised). Some examples:

- 1010.610 – correspondent accounts are all now covered since the final transition dates have passed;

- 1010.620 – the transition dates for private banking accounts have all passed making the transition dates no longer necessary;

- 1010.630 – similarly, the transition dates have passed for foreign shell accounts;

- 1010.820 – civil penalties – the transition date was October 27, 1986 – when considering the statute of limitations and other factors, it would be cleaner to combine the before and after into one overall limit.

<u>Conclusion</u>

ABA supports FinCEN's efforts to streamline and enhance the usefulness of the rules for reporting and administering the Bank Secrecy Act requirements to protect the nation's financial institutions from money laundering and terrorist financing. By reorganizing these rules, FinCEN has taken a step towards facilitating compliance and eliminating confusion. While there are additional revisions that would help, many of these changes can be done over time, as noted above. ABA remains firmly

committed to working with FinCEN and other interested parties to ensure that the rules and requirements are simple, straightforward and easily applied.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact the undersigned by e-mail at rrowe@aba.com or by telephone at 202-663-5029.

Sincerely,

Robert G. Rowe, III
Vice President & Senior Counsel