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DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1505-AA87

Financial Crimes Enforcement Network; Anti-Money Laundering Requirements B Correspondent Accounts for Foreign Shell Banks; Recordkeeping and Termination of Correspondent Accounts for Foreign Banks.

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

ACTION: Final Rule.

SUMMARY: The Department of the Treasury (Treasury), through the Financial Crimes Enforcement Network (FinCEN), is issuing this final rule to implement new provisions of the Bank Secrecy Act that: prohibit certain financial institutions from providing correspondent accounts to foreign shell banks; require such financial institutions to take reasonable steps to ensure that correspondent accounts provided to foreign banks are not being used to indirectly provide banking services to foreign shell banks; require certain financial institutions that provide correspondent accounts to foreign banks to maintain records of the ownership of such foreign banks and their agents in the United States designated for service of legal process for records regarding the correspondent account; and require the termination of correspondent accounts of foreign banks that fail to comply with or fail to contest a lawful request of the Secretary of the Treasury (Secretary) or the Attorney General of the United States (Attorney General).

DATES: This final rule is effective [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Office of the Chief Counsel (FinCEN), (703) 905-3590; Office of the Assistant General Counsel for Banking & Finance (Treasury), (202) 622-0480, or Office of the Assistant General Counsel for Enforcement (Treasury), (202) 622-1927 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Public Law 107-56) (the Act). Title III of the Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA), which is codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Two of these provisions became effective on December 26, 2001.

First, section 313(a) of the Act added a new subsection (j) to 31 U.S.C. 5318 that prohibits a covered financial institution¹ from providing correspondent accounts² in the United States to foreign banks that do not have a physical presence in any country (foreign shell banks). Section 313(a) also requires those financial institutions to take reasonable steps to ensure that correspondent accounts provided to foreign banks are not being used to provide banking services indirectly to foreign shell banks.

Second, section 319(b) of the Act added a new subsection (k) to 31 U.S.C. 5318 that requires any covered financial institution that provides a correspondent account to a foreign bank to maintain records of the foreign bank's owners and to maintain the name and address of an agent in the United States designated to accept service of legal process for the foreign bank for records regarding the

correspondent account. Subsection (k) also authorizes the Secretary and the Attorney General to issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and to request records relating to such account, including records maintained outside the United States relating to the deposit of funds into the foreign bank. If a foreign bank fails to comply with or to contest the summons or subpoena, any covered financial institution with which the foreign bank maintains a correspondent account must terminate the account upon notice from the Secretary or the Attorney General.

Under the Act, Treasury is authorized to interpret and administer these provisions. On November 20, 2001, Treasury issued Interim Guidance¹ to banks, savings associations, and other depository institutions to assist them in meeting their compliance obligations under sections 5318(j) and (k).² The Interim Guidance included definitions of key terms in sections 5318(j) and (k) and a model certification that depository institutions were authorized to use as an interim means to assist them in meeting their obligations related to dealing with foreign shell banks under section 5318(j) and recordkeeping under section 5318(k).

On December 28, 2001, Treasury published for comment a notice of proposed rulemaking (NPRM)³ to codify the Interim Guidance, with some modifications, as regulatory standards, and proposed to apply the requirements of these two provisions to securities brokers and dealers in the same manner as they apply to depository institutions.⁴ The NPRM also carried forward from the

¹ 66 FR 59342 (Nov. 27, 2001).

² Treasury issued the interim guidance after consultation with the staffs of the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the Department of Justice. Treasury also consulted with staffs of these agencies in preparing the NPRM defined below and this final rule.

³ 66 FR 67460 (Dec. 28, 2001).

⁴ When issuing the Interim Guidance, Treasury deferred addressing the compliance obligations of securities brokers and dealers with respect to the requirements of sections 5318(j) and (k), because the Act requires Treasury to define by regulation, after consultation with the SEC, the types of accounts maintained by brokers and dealers for foreign banks that are similar to correspondent accounts that depository institutions maintain for foreign banks.

Interim Guidance, with some modifications, the model certification that covered financial institutions may use to assist them in meeting the requirements of sections 5318(j) and (k), and that would provide a covered financial institution with a safe harbor for purposes of compliance with those sections. Treasury also proposed that covered financial institutions must verify the information provided by a foreign bank, or otherwise relied upon for purposes of sections 5318(j) and (k), every two years or at any time a covered financial institution has reason to believe that the previously provided information was no longer accurate. The NPRM included a model recertification that would provide a covered financial institution with a safe harbor in connection with the updating of previously provided information. The NPRM also provided special rules and safe harbors for a covered financial institution that, consistent with the Interim Guidance and the NPRM, requests information from a foreign bank before the effective date of the final rule and receives such information not later than the date that is 90 days after the publication of the final rule.

As an administrative matter, the NPRM proposed to codify its provisions in a new Part 104 of title 31 of the Code of Federal Regulations.⁵ Treasury has since determined to codify the final rule with Treasury's other BSA regulations in Part 103.

II. Summary of Comments

Treasury received 23 comments regarding the proposed rule, including ten from financial services trade associations, four from U.S. financial institutions, four from foreign financial institutions, three from regional development banks, and two from members of Congress. Although comments were received on many issues, by far the most significant issues addressed by the commenters were the breadth of the definition of "correspondent account" in the NPRM and the

⁵ The proposed sections were 104.10 (Definitions); 104.40 (Records concerning owners of foreign banks and agents and prohibition on correspondent accounts for foreign shell banks); 104.60 (Summons or subpoena of foreign bank records); and 104.70 (Termination of correspondent relationship).

treatment of foreign branches of U.S. depository institutions as covered financial institutions. Other commenters raised issues concerning the means for obtaining and using the certification, requirements for termination of accounts, and certain other definitions. These issues are discussed below in the section-by-section analysis.

III. Section-by-Section Analysis

A. Section 103.175 Definitions

Certification and Recertification

Treasury has included “certification” and “recertification” as defined terms in the final rule for ease of reference. These terms refer to the certification and recertification forms in appendices A and B to Subpart I of 31 CFR Part 103. These forms have been revised consistent with the substantive changes in regulatory text. In addition, in response to comments, the certification appended to the final rule includes the definition of the term “foreign bank.”

Correspondent account

The term “correspondent account” is defined in the Act for sections 313 and 319(b) by reference to the definition in section 311. The definition in the NPRM was taken verbatim from section 311 (but made applicable to “foreign banks” rather than “foreign financial institutions”).⁶ More comments dealt with this definition than any other single subject. Every comment letter from the private sector regarding this topic took the position that the definition in the proposed rule was too broad. The commenters stated that this definition, and particularly the clause “or handle other transactions related to such bank,” extends well beyond the commonly understood meaning of the term⁷ (and even beyond the meaning of the term “account”), to bring within its scope numerous types

⁶ The NPRM defined “correspondent account” to mean “an account established to receive deposits from, make payments on behalf of a foreign bank, or handle other financial transactions related to such bank.”

⁷ A correspondent account is commonly understood to mean a deposit account established by one bank for another bank to receive deposits and make payments. *See* Federal Reserve Regulation O (12 CFR 215.21(c); Dictionary of

of accounts, as well as many types of transactions that don't involve an account as such, and that pose little or no risk of money laundering. Some commenters stated that, although such a broad definition may be appropriate for section 313, which prohibits correspondent accounts with foreign shell banks, the definition should be refined and narrowed for other provisions of the Act, including section 319(b). The commenters urged that it could actually be counterproductive to apply a broad statutory definition to all provisions of the Act dealing with correspondent accounts, in that it would require covered financial institutions to devote limited resources to focus on a broad range of accounts and transactions that have little susceptibility to money laundering, thereby reducing the attention that can be given to the types of accounts and activities presenting more serious risks.

Accordingly, many commenters urged Treasury to narrow the definition so as to exclude transactions and accounts that do not present a meaningful risk of money laundering or terrorist financing. Among the types of transactions and accounts that the commenters sought to exclude from the definition are the following:

- (a) Transactions in which a foreign bank is acting as principal and not for a customer (as is often the case with overnight and short-term deposits, foreign exchange, derivatives, and other securities transactions), and accounts used exclusively to facilitate such transactions. The primary argument for this exclusion is that if there are no customer funds contained in accounts, then the accounts are functionally no different than accounts maintained by covered financial institutions for any nonfinancial company and would seem to pose a minimal risk for money laundering.
- (b) Accounts for foreign banks established for a specific purpose through which funds are received and disbursed under limited defined conditions to identified parties, such as

escrow, corporate trust, paying agency, custody, and clearing accounts.

- (c) Accounts for foreign banks for which ownership has been subject to close scrutiny by a credible authority. Under this approach, accounts for foreign banks that are publicly traded, are qualified intermediaries (as designated by the IRS), are subject to the laws of FATF member countries, or are permitted to hold pension plan assets under regulations of the Department of Labor could be exempted from this requirement, on the theory that such foreign banks are highly unlikely to present a significant risk of money laundering.

Other commenters noted that covered financial institutions may conduct occasional, isolated transactions with a foreign bank with which they have no established relationship. They sought clarification as to whether the term “correspondent account” includes infrequent transactions with foreign banks that do not involve an “account” relationship in any customary sense, and asked that Treasury set forth some means of determining the extent to which an isolated or occasional transaction would not constitute a “correspondent account” under these provisions.

A Congressional commenter stated that the regulations should define the term “correspondent account” “broadly to maximize the scope of the protections provided by the Act,” and to use a single definition in all the regulations to be issued and then to specify for each section the particular subset of correspondent accounts being addressed.

Treasury believes that, for the purposes of sections 313 and 319(b), the broad statutory definition is appropriate. Congress addressed shell banks separately in section 313, determining that they pose such a significant risk for money laundering that an absolute ban on correspondent accounts is justified. Section 319(b) requires that covered financial institutions maintain records regarding the ownership and an agent for service of process of any foreign bank for which it maintains a correspondent account. There is no clear justification for limiting the requirement to only certain

foreign banks or to only those foreign banks for which certain types of correspondent accounts are maintained. Moreover, the principal argument asserted for adopting a more restrictive definition is to reduce the compliance burden that results from a broad definition, so that industry compliance resources may be focused on areas presenting a potentially greater risk. With respect to this rulemaking, however, covered financial institutions will generally achieve compliance with the requirements of both sections 313 and 319(b) by obtaining one certification from the foreign bank. Thus, requiring the ownership and process agent information in each case where the covered financial institution must already obtain the foreign bank's certification regarding its shell bank status should impose little additional burden on the covered financial institution. Accordingly, Treasury does not believe that the costs of complying with section 319(b) for all correspondent accounts outweigh the risks of excluding from the scope of coverage of section 319(b) foreign banks for which only certain types of accounts are maintained. Thus, for purposes of the final rule, Treasury is essentially retaining the proposed definition, with technical changes that clarify the definition. The final definition for purposes of these sections includes accounts for making "other disbursements" as well as payments "on behalf of a foreign bank." No inference should be drawn from this determination concerning the appropriate definition of "correspondent account" for purposes of section 312 of the Act.⁸

Treasury is further clarifying the definition of "correspondent account" by defining the term "account" for this purpose. With respect to banks, section 311 of the Act provides that the term account "(i) means a formal banking or business relationship established to provide regular services, dealings, and other financial transactions, and (ii) includes a demand deposit, savings deposit, or

⁸ Section 312 of the Act, which amends the BSA to add new subsection (i) to 31 U.S.C. 5318, requires financial institutions to establish due diligence policies, procedures and controls to detect and report money laundering through correspondent accounts and private banking accounts maintained for non-U.S. persons. *See* FinCEN; Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts, 67 FR 37736 (May 30, 2002).

other transaction or asset account and a credit account or other extension of credit.” Treasury believes that the use of the term “regular” in the definition requires an arrangement to provide ongoing services, and would generally exclude infrequent or occasional transactions. Inasmuch as section 311 specifically applies this definition of “account” for purposes of section 313, Treasury is modifying the final rule by adding this definition of “account,” for purposes of defining “correspondent account.” This results in a definition of “correspondent account” that includes any transaction account, savings account, asset account, or extension of credit maintained for a foreign bank, as well as any other relationship with a foreign bank to provide regular services, dealings, and other financial transactions. Treasury anticipates that most isolated or occasional transactions that a covered financial institution conducts with a foreign bank would not constitute a correspondent account for purposes of the final rule.⁹

The NPRM proposed the same definition of “correspondent account” for securities broker-dealers. After consultation with the Securities and Exchange Commission (SEC), Treasury is adopting the same definition of “correspondent account” for purposes of securities brokers= and dealers= compliance with sections 313 and 319(b). *See* 31 U.S.C. 5318A(e)(2). Treasury is taking this approach in order to ensure parity between different types of covered financial institutions and to treat functionally equivalent accounts in the same manner. Thus, under the final rule, brokers and dealers must comply with these two sections with respect to any account they establish, maintain, administer, or manage in the U.S. for a foreign bank that permits the foreign bank to engage in securities transactions, funds transfers, or other financial transactions through that account. Such accounts would include, for example, the following, whether such accounts are for transactions by the foreign bank as principal or for its customers: (1) accounts to purchase, sell, lend or otherwise

⁹ Treasury notes further that accounts maintained by foreign banks for covered financial institutions are not

hold securities; (2) prime brokerage accounts that consolidate trading done at a number of firms; (3) accounts for trading foreign currency; (4) various forms of custody accounts; (5) over-the-counter derivatives accounts; and (6) accounts for trading futures or commodity options, which would be maintained by broker-dealers that are dually registered as futures commission merchants.

Several commenters noted that section 319(b) refers to “correspondent relationships” and requested that the meaning of the term be clarified. The final rule defines the term “correspondent relationship” as having the same meaning as “correspondent account” for purposes of section 319(b).

Covered financial institution. The proposed definition of “covered financial institution,” which includes primarily depository institutions and securities broker-dealers, was essentially taken from the section 313 statutory definition,¹⁰ but with the addition of foreign branches of insured banks. The inclusion of foreign branches of insured banks generated more comments than any issue other than the definition of “correspondent account.” Commenters cited, as reasons for their objections, the plain language of the statute, the history of BSA implementation, the anti-competitive impact, and a likely ineffective impact on preventing money laundering.

As for the plain language, commenters noted that section 313 of the Act provides that a covered financial institution shall not “establish, maintain, administer, or manage a correspondent account *in the United States*” for a foreign shell bank and that any covered financial institution that establishes, maintains, administers, or manages a correspondent account “*in the United States* for a foreign bank” must take reasonable steps to ensure that it is not used to indirectly provide banking

“correspondent accounts” subject to this regulation.

¹⁰ Section 5318(j) defines “covered financial institution” as “a financial institution described in subparagraphs (A) through (G) of section 5312(a)(2).” This includes (A) any insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h))); (B) a commercial bank or trust company; (C) a private banker; (D) an agency or branch of a foreign bank in the United States; (E) a credit union; (F) a thrift institution; or (G) a broker or dealer registered with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). See 31 U.S.C. 5318(j)(1), 5312(a)(2). Covered financial institutions include, by virtue of the definition of “insured bank,” insured banks organized in U.S. Territories and Insular Possessions; the term also includes corporations acting under section

services to foreign shell banks; and that section 319(b), which requires maintenance of records regarding foreign bank owners, applies to “[a]ny covered financial institution which maintains a correspondent account *in the United States* for a foreign bank.” (emphasis added in each case). These commenters urged that Congress’ repeated use of the phrase “in the United States” shows a clear intent to limit the application of these provisions to correspondent accounts maintained at offices in the U.S. Moreover, commenters noted that many accounts maintained by foreign branches of U.S. banks for foreign banks are not in fact established, maintained, administered or managed in the U.S.

Furthermore, commenters pointed out that to impose this requirement on foreign branches of U.S. financial institutions would place the U.S. institutions at a distinct competitive disadvantage with foreign banks in foreign countries, which would not be subject to the requirements imposed by this rule. If foreign banks wishing to maintain a correspondent account at the foreign branch of a U.S. bank must appoint an agent for service of process in the U.S., subject themselves to subpoena by U.S. authorities, submit information regarding their ownership, and make certifications about the use of their accounts, they are less likely to use the services of a U.S. bank’s foreign branch. Commenters also pointed out that U.S. banks would be at a particular disadvantage with respect to foreign banks with U.S. branches. Such banks could offer their foreign bank customers access to the U.S. financial system through their non-U.S. offices without the need for such foreign bank customer to complete the certification or to appoint a process agent to accept subpoenas from U.S. authorities. This construction thus would not prevent foreign banks from gaining access to the U.S. financial system, but would more likely result in this occurring outside the due diligence process required of covered financial institutions.

25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*).

In addition, commenters noted that historically, in implementing the BSA, Treasury has confined the scope of its coverage to entities and activities “within the United States.” In the current BSA rules, a foreign branch of a U.S. bank is included in the definition of a “foreign bank”¹¹ rather than in the definition of a “bank,” and, as such, is not subject to BSA requirements such as suspicious activity reporting. Similarly, foreign offices of securities broker-dealers are not subject to this requirement.¹² Others questioned whether it is appropriate or even permissible under general concepts of jurisdiction to require a foreign bank with no contacts with the U.S. (other than having an account with a foreign branch of a U.S. bank) to agree to be subject to subpoena authority and to appoint an agent for process. Commenters also noted that this construction could, in certain cases, require a foreign branch to be in conflict with local law, such as situations where it could be required to close an account with a foreign bank.

A Congressional commenter stated that including foreign branches of U.S. banks within the definition of “covered financial institution” is appropriate and is consistent with legislative intent.

Treasury has determined, based upon the plain language of the Act, as well as the policy considerations discussed above, that foreign branches of insured banks should not be included within the definition of “covered financial institution,” and, thus, that correspondent accounts for foreign banks that are clearly established, maintained, administered or managed only at foreign branches should not be subject to the final regulation. Of course, if such an account actually is established, maintained, administered, or managed in the United States, then it would be subject to the final rule.

As a result of this determination, a foreign branch of an insured bank is treated as a “foreign bank” under the final rule, and any correspondent account maintained for it by a covered financial institution will be subject to the final rule. This means that insured banks will be required to take

¹¹ 31 C.F.R. 103.11(o).

reasonable steps to ensure that such accounts they maintain for any of their foreign branches are not used to indirectly provide banking services to a foreign shell bank.

Although the Act does not define “covered financial institution” for purposes of section 5318(k), the NPRM proposed that the term be given the same meaning as the identical term in section 5318(j), which includes securities brokers and dealers. This was because both sections deal with anti-money laundering efforts related to correspondent relationships between financial institutions and foreign banks, and to treat securities broker-dealers otherwise would be inconsistent with the statutory scheme and would not reflect a comprehensive approach to implementing the Act’s money-laundering requirements. This definition is retained in the final rule.

As a result of Treasury’s inclusion in the final rule of the BSA definition of the “United States,” branches of foreign banks in the U.S. Territories and Insular Possessions will be treated as “covered financial institutions.” In the NPRM, they fell within the definition of “foreign banks.”

Foreign bank. The NPRM proposed to define a “foreign bank” as any organization that (i) is organized under the laws of a foreign country; (ii) engages in the business of banking; (iii) is recognized as a bank by the bank supervisory or monetary authority of the country of its organization or principal banking operations; and (iv) receives deposits in the regular course of its business. The proposed definition excluded an agency or branch of a foreign bank located in the United States or an insured bank organized in a territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, as those entities are covered financial institutions¹² under the statute. In addition, the definition excluded a foreign central bank or foreign monetary authority that functions as a central bank, as well as certain other international financial institutions, including multinational development banks of which the U.S. is a member.

¹² 31 CFR 103.19(a)(1), 67 FR 44048, 44052 (July 1, 2002).

A Congressional commenter stated that this definition is too narrow, in that it includes the requirement that such an organization “(iv) receives deposits in the regular course of its business.” The commenter suggested that this may provide a loophole for an organization that is appropriately classified as a foreign shell bank but could evade the requirements of this section by not generally receiving deposits. Another commenter expressed the view that this definition may be too broad, in that it may include nonbank financial institutions such as investment companies, investment advisers, insurance companies, commodity pools and commodity trading advisers within the definition.

On further consideration, Treasury has determined to adopt the existing BSA definition of “foreign bank.”¹³ Treasury believes that the existing BSA definition, which defines “foreign bank” by reference to U.S. depository institutions (and includes foreign branches of U.S. banks), will generally include the institutions at which the statutory provisions are directed, is more precise, and will result in fewer interpretive issues. Treasury believes that adopting the current BSA definition of “foreign bank” for this regulation resolves the concerns of the commenters noted above, and will not require the exceptions contained in the NPRM for foreign central banks, foreign monetary authorities that function as central banks, and international financial institutions and regional development banks, since they clearly would not fall within this definition. Treasury thus confirms that the definition of foreign bank does not include any foreign central bank or monetary authority that functions as a central bank, or any international financial institution or regional development

¹³ Current BSA regulations define “foreign bank” as “a bank organized under foreign law, or an agency, branch or office located outside the United States of a bank.” The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law. 31 CFR 103.11(o). The regulations define “bank” to include U.S. offices of commercial banks or trust companies, national banks, thrift institutions, credit unions, other organizations (other than money services businesses) chartered under state banking laws and supervised by state banking supervisors, corporations acting under section 25(a) of the Federal Reserve Act, and banks organized under foreign law. 31 CFR 103.11(c).

bank formed by treaty or international agreement.¹⁴

Foreign shell bank. The proposal defined “foreign shell bank” as a foreign bank that does not have a physical presence in any country. The definition in the final rule is unchanged.

Owner. The NPRM proposed to define “owner” as any “large direct owner,” “indirect owner,” or “small direct owner,” each of which was in turn defined. Although the definition as proposed was intended to reduce reporting burden, many commenters found the definition overly complicated, particularly considering that it must be interpreted by thousands of foreign banks, and suggested that it be simplified or clarified. Treasury agrees that a simpler definition is preferable. Accordingly, the final rule adopts, as a definition of owner, any person who, directly or indirectly, (i) owns, controls, or has power to vote 25 percent or more of any class of voting securities or other voting interests of a foreign bank, or (ii) controls in any manner the election of a majority of the directors (or individuals exercising similar functions) of a foreign bank.

Treasury continues to believe that the 25 percent ownership threshold contained in the NPRM is appropriate based in part on the fact that section 312 of the Act amends the BSA to require that, as an element of enhanced due diligence, covered financial institutions take reasonable steps to ascertain the owners of certain foreign banks whose shares are not publicly traded.¹⁵ As this requirement under section 312 applies only to foreign banks operating under licenses deemed to be of a high risk for money laundering, it is unreasonable to require the same level of disclosure regarding the ownership of the thousands of other foreign banks for which covered financial

¹⁴ Such institutions include, for example, the Bank for International Settlements, International Bank for Reconstruction and Development (the World Bank), International Monetary Fund, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Finance Corporation, North American Development Bank, International Development Association, Multilateral Investment Guarantee Agency, European Investment Bank, Nordic Investment Bank, and Council of Europe Development Bank.

¹⁵ 31 U.S.C. 5318(i)(2)(B)(i).

institutions maintain correspondent accounts that do not operate under high-risk licenses.¹⁶ Similarly, foreign banks whose shares are publicly traded will not be required to report their owners.

For purposes of the definition of “owner” in the NPRM, *Aperson*[®] was defined as any individual, bank, corporation, partnership, limited liability company, or any other legal entity, except that members of the same family¹⁷ shall be considered one person, and each family member who has an ownership interest in the foreign bank must be identified. The term “voting shares or other voting interests[®]” was defined to mean shares or other interests that entitle the holder to vote for or select directors (or individuals exercising similar functions). These definitions are unchanged in the final rule, except for a technical conforming change of the word “shares” to “securities.”

Person. The NPRM defined “person” (other than for purposes of the definition of “owner”) to have the same meaning as provided in section 103.11(z). The final rule adopts the proposed definition without change.

Physical presence. The NPRM proposed the same definition of “physical presence” as that contained in section 5318(j): a place of business that (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank employs 1 or more individuals on a full-time basis and maintains operating records related to its banking activities; and (iii) is subject to inspection by the banking authority that licensed the foreign bank to conduct banking activities.”

Although no written comments addressed the proposed definition, Treasury received questions as to the meaning of the phrase “subject to inspection,” which is not defined in the Act.

¹⁶ See 67 FR 37743, *supra* note 8.

¹⁷ The same family means parents, spouses, children, siblings, uncles, aunts, grandparents, grandchildren, first cousins, stepchildren, stepsiblings, and parents-in-law, and spouses of any of the foregoing.

For purposes of this provision, Treasury generally considers a foreign bank to be “subject to inspection” if it is subject to the oversight of a government agency whose mission is to supervise the operations and condition of the foreign bank, including the prevention and detection of money laundering and other criminal conduct.

Regulated affiliate. The NPRM proposed the same definition of “regulated affiliate” as that contained in section 5318(j): a foreign bank that (1) is an affiliate of a depository institution, credit union, or foreign bank that maintains a physical presence in the United States or a foreign country, as applicable, and (2) is subject to supervision by a banking authority in the country regulating such affiliated depository institution, credit union, or foreign bank. For purposes of this definition, the NPRM proposed to define “affiliate” as any company that controls, is controlled by, or is under common control with another company. In the final rule, for consistency, Treasury is amending the definition of “affiliate” to conform to the definition set forth in section 5318(j)(4): “a foreign bank that is controlled by or under common control with a depository institution, credit union, or foreign bank.”

The NPRM proposed to define “control” for purposes of the “regulated affiliate” definition to mean: (1) ownership, control, or power to vote 25 percent or more of any class of voting shares or other voting interests of another company; or (2) control in any manner of the election of a majority of the directors (or individuals exercising similar functions) of another company. A Congressional comment takes the position that the proposed threshold for affiliation of 25 percent ownership is too low, and that a threshold of 80 percent would be more appropriate, in order to preclude an entity 75 percent of whose stock is not owned by a regulated affiliate from qualifying for the “regulated affiliate” exception. Treasury’s selection of the 25 percent threshold was based

in part on the definition of “control” contained in the Bank Holding Company Act¹⁸ and the Federal Reserve’s Regulation Y thereunder,¹⁹ which define “control” to exist at the 25 percent threshold. On further consideration, Treasury has determined to increase the threshold required to meet the “regulated affiliate” definition from 25 to 50 percent.²⁰ Treasury notes that, in order to qualify for the exemption, the foreign bank also must be “subject to supervision” by a banking authority in the country regulating the affiliate. Treasury interprets this phrase, which is not defined in the Act, as having the same meaning as “subject to inspection,” discussed above in connection with the term “physical presence.” In order for a foreign bank to qualify for this exemption, the degree of supervision would not be as high as that required in order for the Board of Governors of the Federal Reserve System (“Federal Reserve”) to find that the foreign bank is subject to comprehensive supervision or regulation on a consolidated basis by the supervisor in the country regulating the affiliate.²¹

Finally, definitions of the terms “United States” and “Territories and Insular Possessions” have been added to the final rule in order to simplify and clarify the definitions of “covered financial institution” and “foreign bank.” These terms are defined by reference to the current definitions in 31 CFR Part 103.11 (nn) and (tt) respectively.

**B. Section 103.177 -- Prohibition on Correspondent Accounts for Foreign Shell Banks;
Records concerning owners of foreign banks and agents for service of process;**

Prohibition on correspondent accounts for foreign shell banks. BSA section 5318(j) (added by section 313 of the Act) provides that a *Acovered financial institution@* shall not establish, maintain, administer, or manage a *Acorrespondent account@* in the United States for, or on behalf of, a shell

¹⁸ 12 U.S.C. 1841(a)(2) and (k).

¹⁹ 12 CFR 225.2(a) and (c)(1).

²⁰ The 50 percent threshold is used in 12 U.S.C. 221a.

²¹ 12 CFR 211.24(c)(1); *See* 67 FR 37740, *supra* note 8.

bank that is not a regulated affiliate. This prohibition was set forth in the NPRM, and is unchanged in the final rule. As Treasury stated in the NPRM, it expects that covered financial institutions will have terminated all correspondent accounts with any foreign bank that they know to be a shell bank that is not a regulated affiliate.

As discussed above, for purposes of this section, the term “correspondent account” essentially parallels the broad statutory definition. It thus includes, for example, transaction accounts and time and money market deposit accounts,²² clearing and settlement accounts, fiduciary accounts, as well as transactions with foreign banks in securities, derivatives, repurchase agreements, foreign exchange, and other instruments, to the extent that these transactions constitute an “account.”

This provision also includes the statutory requirement and NPRM requirement that a covered financial institution must take reasonable steps to ensure that any correspondent account established, maintained, administered, or managed by the covered financial institution in the United States for a foreign bank is not being used by that foreign bank to indirectly provide banking services to a foreign shell bank that is not a regulated affiliate. As Treasury noted in the NPRM, it expects covered financial institutions to terminate any correspondent account with a foreign bank that it knows is being used to indirectly provide banking services to a foreign shell bank. The final rule retains the provision of the NPRM that proposed to permit correspondent accounts for foreign shell banks that qualify as regulated affiliates. The final rule does not include the provision in the NPRM that proposed to require that correspondent accounts established, maintained, administered, or managed by a foreign branch of a covered financial institution be deemed to be established, maintained, administered or managed in the United States.

²² 12 CFR 204.2(e) and (f)(1).

Records of owners and agents of foreign banks with correspondent accounts. The NPRM proposed to codify the requirement contained in BSA section 5318(k), as added by section 319(b) of the Act, that any covered financial institution that maintains a correspondent account in the United States for a foreign bank must maintain records in the United States identifying: (1) the owner(s) of such foreign bank; and (2) the name and address of a person who resides in the United States and is authorized to accept service of legal process for records regarding the correspondent account.²³

Section 5318(k) does not define *owner* for purposes of this requirement. As discussed above, Treasury is amending in the final rule the definition of “owner” in the NPRM for purposes of this provision.

The NPRM also, as an option, permitted the use of the relevant portion of a foreign bank’s FR Y-7 to meet the recordkeeping obligation for foreign banks that file this form. The form requires disclosure of ownership information starting at a threshold of 5 percent of a foreign banking organization’s stock. Commenters supported the use of the FR Y-7 as an alternative means to satisfy this requirement, but some requested that the regulation be clarified in this regard. Another commenter noted that an individual’s ownership interest in a foreign bank may be confidential in the foreign bank’s home country for a variety of legitimate reasons, and asserted that the Federal Reserve recognizes such concerns and permits the ownership information contained in the FR Y-7 to be kept confidential.²⁴ The commenter requested that, in such cases, the foreign bank should not be required to disclose the information to a covered financial institution if the information is available to the appropriate U.S. government agencies.

To minimize recordkeeping burdens, Treasury has modified the final rule to except from the

²³ The use of an embassy or consular office as process agent is not acceptable.

²⁴ The FR Y-7 is available to the public upon request on an individual basis. A foreign bank may request confidential treatment for specific information on the form based on a demonstration that public release of such information would be exempt under the Freedom of Information Act. Such requests are considered on a case-by-

ownership recordkeeping requirement any foreign bank that is required to file its ownership information with the Federal Reserve on Form FR Y-7.²⁵ Inasmuch as the ownership information filed with the Federal Reserve on Form FR Y-7 will be available upon request to the Secretary or Attorney General, there is no purpose served in requiring covered financial institutions to maintain records separately in these cases.²⁶

Safe harbor. In order to comply with the limitations on the direct and indirect provision of correspondent accounts to foreign shell banks, a covered financial institution must ensure that each foreign bank for which it provides a correspondent account is not a shell bank, and must take reasonable steps to ensure that correspondent accounts provided to such foreign banks are not being used to indirectly provide banking services to foreign shell banks.²⁷ A covered financial institution must also obtain information regarding owners and an agent for service of process for foreign banks for which it maintains correspondent accounts. Although the NPRM did not prescribe the manner in which a covered financial institution may satisfy its obligations under sections 5318(j) and 5318(k), it provided a safe harbor with respect to both sections if a covered financial institution uses the model certifications appended to the NPRM. The certification was designed to provide a simple and straightforward means of complying with these requirements.²⁸

case basis.

²⁵ A covered financial institution may verify that a foreign bank is required to file an FR Y-7 by checking the list of foreign banks with U.S. offices at www.federalreserve.gov/releases/ibn/.

²⁶ There is no indication in the Act that the purpose of this recordkeeping requirement is other than to provide the information to a Federal law enforcement officer.

²⁷ Treasury interprets this to mean that the foreign bank is not using the correspondent account to provide banking services to a foreign shell bank that is the foreign bank's direct customer. Thus, a foreign bank could certify that it is not using a correspondent account with a covered financial institution to provide banking services to any foreign shell bank, without in turn asking each of its foreign bank customers to provide it with a similar certification. To interpret this requirement otherwise would lead to an endless chain of certifications.

²⁸ Obtaining the certification is not the only means for compliance with the regulation. For example, an insured bank that maintains a correspondent account for any of its foreign branches is not required to obtain a certification from such branches.

Many commenters posed questions and sought clarification regarding the use of the certification. As a threshold matter, nothing in this final regulation modifies, limits, or supercedes section 101 of the Electronic Records in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (15 U.S.C. 7001). Thus, certifications and recertifications may be distributed, completed, returned, and stored in electronic form so long as the records are maintained in accordance with any other applicable regulations, and a foreign bank could post and update its certification on its website. In addition, facsimile copies are also acceptable as originals.

Commenters sought clarification regarding the extent to which more than one covered financial institution may rely on a certification. A separate certification need not be produced for each covered financial institution; a certification may be relied upon by each covered financial institution that is named or referred to therein (as well as each branch of a covered financial institution that maintains a correspondent account for the foreign bank executing the certification). A foreign bank may also execute a global certification that is applicable to all correspondent accounts maintained for it by covered financial institutions. Commenters also asked for clarification as to whether a covered financial institution must obtain an individual certification from each foreign branch of a foreign bank for which it maintains a correspondent account. Again, this would be governed by the way in which the certification is completed. If a foreign bank wishes to complete one certification that covers all its branches, it may do so, so long as it expresses this in the certification. In such a case, the certification should reflect whether any of the foreign bank's branches provides shell banks with access to any correspondent account.

Commenters also inquired whether a covered financial institution must obtain a certification directly from each foreign bank for which it maintains a correspondent account, or whether it may satisfy the safe harbor in this section by obtaining an electronic copy of such certification from a

central registry or database that may be organized to facilitate compliance with this regulation, or from another covered financial institution. A covered financial institution may satisfy the safe harbor by obtaining a copy of a foreign bank’s certification either directly from the foreign bank or indirectly, such as from a central database or from another covered financial institution, so long as the form and content of the certification is otherwise sufficient and reliable. In the case of a certification filed with a central database, the foreign bank would presumably complete the certification without specifying particular covered financial institutions, but rather would certify as to all correspondent accounts maintained at covered financial institutions generally.

Commenters also sought clarification of the meaning of the phrase “received, reviewed and accepted” at the end of the certification, and, in particular, whether this implies that covered financial institutions must verify or otherwise determine the accuracy of the information provided by the foreign bank. Treasury expects the covered financial institution to review the form to ascertain that all information required by the applicable statutory provisions is included (responses to Parts C and D in all cases; names of owners (if required) in Part E and name and street address of a process agent in Part F); and should seek to obtain any other information that is missing from the certification. In addition, the covered financial institution is expected to determine that the information provided is internally consistent.²⁹ To avoid confusion the word “accepted” has been deleted from the certification.

Recertification and verification requirements. The NPRM proposed to require that a covered financial institution obtain a verification of the information provided every two years, or any time that it “has reason to believe” that the information upon which it is relying may be inaccurate. The

²⁹ For example, if the foreign bank checks the second box in part C, the location of the foreign bank’s regulated affiliate should be consistent with the designated banking authority that supervises the foreign bank and its regulated affiliate.

final rule extends from two to three years the safe harbor period for obtaining either a new certification or a recertification of a prior certification, and changes the operative term from “verification” to “recertification” to avoid confusion. In addition, in response to a Congressional comment, the final rule requires the covered financial institution to “take appropriate measures” to verify any information that it “knows, suspects, or has reason to suspect” may be incorrect. For example, information obtained by a covered financial institution in conducting due diligence required pursuant to the final rule to be issued implementing section 312 of the Act³⁰ may provide reason to suspect that the information obtained in a certification may not be accurate and may require the covered financial institution to either obtain a new certification or to take other appropriate measures to verify the accuracy of the information provided. In addition to these substantive changes, the final rule reorganizes and simplifies these provisions.

Closure of correspondent accounts. The NPRM proposed that, in order to obtain the benefit of the safe harbor, a covered financial institution must obtain a certification from the foreign banks for which it maintains correspondent accounts existing on the date that is 30 days after the publication of the final rule, within 90 days after publication of the final rule. With respect to accounts established after the date that is 30 days after the publication of the final rule, the NPRM stated that the safe harbor was available if the certification was obtained within 60 days of opening for new accounts established before January 1, 2003, and within 30 days of opening for accounts established thereafter. Commenters focused on two issues relating to these requirements: the time period allowed for satisfying the requirements after which account closure would be required, and the difficulties anticipated when closure is required.

³⁰ See 67 FR 37736, *supra* note 8.

With respect to existing accounts, commenters requested that, given the potentially large number of foreign banks for which they maintain correspondent accounts, a longer period of 120 to 180 days should be given. A Congressional comment urged Treasury to reduce the period. On balance, and considering the fact that covered financial institutions have been aware of this pending requirement for many months, Treasury is adopting this requirement with the 90 day period as proposed. With regard to new accounts, under the final rule covered financial institutions will have 30 days to obtain the initial certification and to remain within the safe harbor, regardless of whether the new account is opened before or after January 1, 2003.

The NPRM required that, if a covered financial institution does not obtain the information necessary to fulfill its obligations under sections 5318(j) and (k) within the prescribed time periods, it must terminate all correspondent accounts with the concerned foreign bank. Many commenters noted significant problems with this requirement, including the difficulties of terminating account relationships within a limited time when open positions or transaction accounts are involved, the potential for economic harm to result in many situations, and the potential liability of a covered financial institution resulting from such a termination. Commenters also questioned the extent to which the safe harbor from liability resulting from closure required in these situations that Treasury provided in the NPRM would be given effect in litigation, particularly in foreign jurisdictions. Due to these concerns, commenters sought greater flexibility in these situations, including the ability to keep accounts open pending resolution of these issues.

Because some correspondent accounts at the time of required termination may involve transactions that include open securities or futures positions, or may involve transaction accounts with outstanding checks or other transactions that need to be accounted for, a covered financial institution may exercise commercially reasonable discretion in determining the time frame for

liquidating such open positions or otherwise completing the closing of an account. The measures a covered financial institution may take would include, but would not be limited to, following its customary practices upon the default of a customer, including when appropriate taking steps to close out positions in an orderly manner or temporarily freezing an account so as to avoid suffering a loss or unduly penalizing a foreign bank. However, a covered financial institution must ensure that an account that must be closed is not permitted to establish new positions.

As described above, the NPRM provided that if a covered financial institution has reason to believe that a foreign bank's certification may be inaccurate, it must undertake to verify such information. The NPRM also provided that if the covered financial institution has not obtained satisfactory verification within 90 or 60 days after commencing the process (depending on whether the verification was initiated before or after January 1, 2003), it must close all correspondent accounts for such foreign bank. The final rule requires that, if the covered financial institution has not obtained satisfactory verification within 90 days, it must close the accounts within a commercially reasonable time.

The final rule also carries over from the NPRM the provision stating that a covered financial institution may not establish a new correspondent account with a foreign bank with which it was required to close an account under this rule until it obtains the information required under this section.

Recordkeeping requirement. This provision, which sets forth the time period for retention of certifications and other information relied upon by the covered financial institution, is unchanged in the final rule.

Special rules concerning information requested prior to the effective date of the final rule. The NPRM proposed to permit the use by a covered financial institution of information described in

either Treasury's Interim Guidance dated November 20, 2001 or the NPRM, that was requested of a foreign bank prior to 30 days after the publication of the final rule with respect to accounts in existence on or before such date, so long as such information is obtained on or before 90 days after the date of publication of the final rule. Several commenters sought confirmation that a covered financial institution would be in compliance with the final rule if it obtained information pursuant to the model certification attached to the Interim Guidance with respect to such accounts, so long as the covered financial institution makes the request within 30 days following publication of the final rule, and receives the information within 90 days following publication. Treasury confirms that this is the case. This provision has been clarified and condensed in the final rule.

C. 103.185 -- Summons or subpoena of foreign bank records; Termination of correspondent relationship.

Issuance of process to foreign bank. The NPRM proposed to codify the provisions of section 5318(k) that authorize the Secretary or the Attorney General to issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and to request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank. The summons or subpoena may be served on the foreign bank in the United States if the foreign bank has a representative in the United States, or in a foreign country pursuant to any mutual legal assistance treaty, multilateral agreement, or other request for international law enforcement assistance. These provisions are unchanged in the final rule.

Issuance of process to covered financial institution. The NPRM proposed that, upon receipt of a written request from a Federal law enforcement officer for information required to be maintained by a covered financial institution under this section, the covered financial institution shall provide

the information to the requesting officer not later than 7 days after receipt of the request. This provision is unchanged in the final rule.

Termination of correspondent relationships upon receipt of notice. The NPRM proposed to codify the provisions of section 5318(k) that require a covered financial institution to terminate any correspondent relationship with a foreign bank not later than 10 business days after receipt of written notice from the Secretary or the Attorney General (in each case, after consultation with the other) that the foreign bank has failed either: (1) to comply with the summons or subpoena issued; or (2) to initiate proceedings in a United States court contesting such summons or subpoena. This provision is unchanged in the final rule.

Limitation of liability. The NPRM proposed to codify the provision in section 5318(k) that provides that a covered financial institution shall not be liable for terminating a correspondent account in accordance with the rule. This provision is unchanged in the final rule.

Failure to terminate relationship. The NPRM proposed to codify the provision of section 5318(k) that provides that a covered financial institution that fails to terminate the correspondent relationship upon receiving notice from the Secretary or the Attorney General is subject to a civil penalty of up to \$10,000 per day until the correspondent relationship is so terminated. This provision is unchanged in the final rule.

IV. Regulatory Flexibility Act

It is hereby certified that this final rule is not likely to have a significant economic impact on a substantial number of small entities. Covered financial institutions that are subject to the recordkeeping requirements in the statute and the final rule tend to be large institutions. Moreover, any economic consequences that might result from the prohibition on dealings with foreign shell banks, or from the failure of a foreign bank to provide the information necessary for a covered

financial institution to fulfill its recordkeeping obligations, flow directly from the underlying statute. Accordingly, the analysis provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

V. Executive Order 12866

The Department of the Treasury has determined that 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 collections of information contained in Appendix A to Subpart I of Part 103 had been previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and assigned OMB Control Number 1505-0184.

The collection of information contained in Appendix B to Subpart I of Part 103 and the recordkeeping requirement in section 103.177(e) was submitted to OMB for review in conjunction with the issuance of the NPRM in accordance with the requirements of the Paperwork Reduction Act. These requirements have been approved by OMB and assigned OMB Control Number 1505-0184. The estimated average annual reporting burden associated with Appendix A is 20 hours per respondent; the estimated average annual reporting burden associated with Appendix B is 5 hours per respondent; and the estimated average recordkeeping burden associated with section 103.177(e) is 9 hours per recordkeeper. Comments concerning the accuracy of these burden estimates and suggestions on how to minimize the burdens should be sent (preferably by fax (202-395-6974)) to the Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503 (or by the

Internet to jlackeyj@omb.eop.gov), with a copy to FinCEN by mail to P.O. Box 39, Vienna, VA 22183 or by e-mail to regcomments@fincen.treas.gov. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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 in the preamble, 31 CFR part 103 is amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 is revised 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. 312, 313, 314, 319, 352, Pub. L. 107-56, 115 Stat. 307.

2. Add new §§103.175 and 103.177 to subpart I immediately after undesignated centerheading “SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS” to read as follows:

' 103.175 Definitions.

Except as otherwise provided, the following definitions apply for purposes of ' ' 103.176 through 103.190:

(a) *Attorney General* means the Attorney General of the United States.

(b) [Reserved]

(c) Certification and Recertification mean the certification and recertification forms described in Appendices A and B, respectively, to this subpart.

(d) Correspondent account. (1) The term correspondent account means:

(i) [Reserved]

(ii) For purposes of ' ' 103.177 and 103.185, a correspondent account is an account established by a covered financial institution for a foreign bank to receive deposits from, to make payments or other disbursements on behalf of a foreign bank, or to handle other financial transactions related to the foreign bank.

(2) For purposes of this definition, the term account:

(i) Means any formal banking or business relationship established to provide regular services, dealings, and other financial transactions; and

(ii) Includes a demand deposit, savings deposit, or other transaction or asset account and a credit account or other extension of credit.

(e) Correspondent relationship has the same meaning as correspondent account for purposes of ' ' 103.177 and 103.185.

(f) Covered financial institution means:

(1) [Reserved]

(2) For purposes of ' ' 103.177 and 103.179:

(i) An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));

(ii) A commercial bank or trust company;

(iii) A private banker;

(iv) An agency or branch of a foreign bank in the United States;

(v) A credit union;

(vi) A thrift institution;

(vii) A corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*); and

(viii) A broker or dealer registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(g) Foreign bank. The term foreign bank shall have the meaning provided in ' 103.11(o).

(h) [Reserved]

(i) Foreign shell bank means a foreign bank without a physical presence in any country.

(j) [Reserved]

(k) [Reserved]

(l) Owner. (1) The term owner means any person who, directly or indirectly:

(i) Owns, controls, or has power to vote 25 percent or more of any class of voting securities or other voting interests of a foreign bank; or

(ii) Controls in any manner the election of a majority of the directors (or individuals exercising similar functions) of a foreign bank.

(2) For purposes of this definition:

(i) Members of the same family shall be considered to be one person.

(ii) The term same family means parents, spouses, children, siblings, uncles, aunts, grandparents, grandchildren, first cousins, stepchildren, stepsiblings, and parents-in-law, and spouses of any of the foregoing.

(iii) Each member of the same family who has an ownership interest in a foreign bank must be identified if the family is an owner as a result of aggregating the ownership interests of the members of the family. In determining the ownership interests of the same family, any voting interest of any family member shall be taken into account.

(iv) Voting securities or other voting interests means securities or other interests that entitle the holder to vote for or select directors (or individuals exercising similar functions).

(m) Person has the same meaning as provided in ' 103.11(z).

(n) Physical presence means a place of business that:

(1) Is maintained by a foreign bank;

(2) Is located at a fixed address (other than solely an electronic address or a post-office box) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank:

(i) Employs 1 or more individuals on a full-time basis; and

(ii) Maintains operating records related to its banking activities; and

(3) Is subject to inspection by the banking authority that licensed the foreign bank to conduct banking activities.

(o) [Reserved]

(p) Regulated affiliate. (1) The term regulated affiliate means a foreign shell bank that:

(i) Is an affiliate of a depository institution, credit union, or foreign bank that maintains a physical presence in the United States or a foreign country, as applicable; and

(ii) Is subject to supervision by a banking authority in the country regulating such affiliated depository institution, credit union, or foreign bank.

(2) For purposes of this definition:

(i) Affiliate means a foreign bank that is controlled by, or is under common control with, a depository institution, credit union, or foreign bank.

(ii) Control means:

(A) Ownership, control, or power to vote 50 percent or more of any class of voting securities or other voting interests of another company; or

(B) Control in any manner the election of a majority of the directors (or individuals exercising similar functions) of another company.

(q) *Secretary* means the Secretary of the Treasury.

(r) [Reserved]

(s) *Territories and Insular Possessions* has the meaning provided in ' 103.11(tt).

(t) *United States* has the meaning provided in ' 103.11(nn).

' 103.177 Prohibition on correspondent accounts for foreign shell banks; Records concerning owners of foreign banks and agents for service of legal process.

(a) *Requirements for covered financial institutions.* (1) *Prohibition on correspondent accounts for foreign shell banks.* (i) A covered financial institution shall not establish, maintain, administer, or manage a correspondent account in the United States for, or on behalf of, a foreign shell bank.

(ii) A covered financial institution shall take reasonable steps to ensure that any correspondent account established, maintained, administered, or managed by that covered financial institution in the United States for a foreign bank is not being used by that foreign bank to indirectly provide banking services to a foreign shell bank.

(iii) Nothing in paragraph (a)(1) of this section prohibits a covered financial institution from providing a correspondent account or banking services to a regulated affiliate.

(2) *Records of owners and agents.* (i) Except as provided in paragraph (a)(2)(ii) of this section, a covered financial institution that maintains a correspondent account in the United States for a foreign bank shall maintain records in the United States identifying the owners of each such foreign bank whose shares are not publicly traded and the name and street address of a person who resides in the United States and is authorized, and has agreed to be an agent to accept service of legal process for records regarding each such account.

(ii) A covered financial institution need not maintain records of the owners of any foreign bank that is required to have on file with the Federal Reserve Board a Form FR Y-7 that identifies the current owners of the foreign bank as required by such form.

(iii) For purposes of paragraph (a)(2)(i) of this section, *publicly traded* refers to shares that are traded on an exchange or on 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)).

(b) *Safe harbor*. Subject to paragraphs (c) and (d) of this section, a covered financial institution will be deemed to be in compliance with the requirements of paragraph (a) of this section with respect to a foreign bank if the covered financial institution obtains, at least once every three years, a certification or recertification from the foreign bank.

(c) *Interim verification*. If at any time a covered financial institution knows, suspects, or has reason to suspect, that any information contained in a certification or recertification provided by a foreign bank, or otherwise relied upon by the covered financial institution for purposes of this section, is no longer correct, the covered financial institution shall request that the foreign bank verify or correct such information, or shall take other appropriate measures to ascertain the accuracy of the information or to obtain correct information, as appropriate. See paragraph (d)(3) of this section for additional requirements if a foreign bank fails to verify or correct the information or if a covered financial institution cannot ascertain the accuracy of the information or obtain correct information.

(d) *Closure of correspondent accounts*. (1) *Accounts existing on [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION]*. In the case of any correspondent account that was in existence on [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION], if the covered financial institution has not obtained a certification (or recertification) from the foreign

bank, or has not otherwise obtained documentation of the information required by such certification (or recertification), on or before [INSERT DATE THAT IS 90 DAYS AFTER THE DATE OF PUBLICATION], and at least once every three years thereafter, the covered financial institution shall close all correspondent accounts with such foreign bank within a commercially reasonable time, and shall not permit the foreign bank to establish any new positions or execute any transaction through any such account, other than transactions necessary to close the account.

(2) Accounts established after [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION]. In the case of any correspondent account established after [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION], if the covered financial institution has not obtained a certification (or recertification), or has not otherwise obtained documentation of the information required by such certification (or recertification) within 30 calendar days after the date the account is established, and at least once every three years thereafter, the covered financial institution shall close all correspondent accounts with such foreign bank within a commercially reasonable time, and shall not permit the foreign bank to establish any new positions or execute any transaction through any such account, other than transactions necessary to close the account.

(3) Verification of previously provided information. In the case of a foreign bank with respect to which the covered financial institution undertakes to verify information pursuant to paragraph (c) of this section, if the covered financial institution has not obtained, from the foreign bank or otherwise, verification of the information or corrected information within 90 calendar days after the date of undertaking the verification, the covered financial institution shall close all correspondent accounts with such foreign bank within a commercially reasonable time, and shall not permit the foreign bank to establish any new positions or execute any transaction through any such account, other than transactions necessary to close the account.

(4) Reestablishment of closed accounts and establishment of new accounts. A covered financial institution shall not reestablish any account closed pursuant to this paragraph (d), and shall not establish any other correspondent account with the concerned foreign bank, until it obtains from the foreign bank the certification or the recertification, as appropriate.

(5) Limitation on liability. A covered financial institution shall not be liable to any person in any court or arbitration proceeding for terminating a correspondent account in accordance with this paragraph (d).

(e) Recordkeeping requirement. A covered financial institution shall retain the original of any document provided by a foreign bank, and the original or a copy of any document otherwise relied upon by the covered financial institution, for purposes of this section, for at least 5 years after the date that the covered financial institution no longer maintains any correspondent account for such foreign bank. A covered financial institution shall retain such records with respect to any foreign bank for such longer period as the Secretary may direct.

(f) Special rules concerning information requested prior to [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION]. (1) Definition. For purposes of this paragraph (f) the term Interim Guidance means:

(i) The Interim Guidance of the Department of the Treasury dated November 20, 2001 and published in the *Federal Register* on November 27, 2001 (66 FR 59342); or

(ii) The notice of proposed rulemaking published in the *Federal Register* on December 28, 2001 (66 FR 67460).

(2) Use of Interim Guidance certification. In the case of a correspondent account in existence on [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION], the term “certification” as used in paragraphs (b), (c), (d)(1), and (d)(3) of this section shall also include the certification appended to the Interim Guidance, provided that such certification was requested

prior to [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION] and obtained by the covered financial institution on or before [INSERT DATE THAT IS 90 DAYS AFTER THE DATE OF PUBLICATION].

(3) *Recordkeeping requirement.* Paragraph (e) of this section shall apply to any document provided by a foreign bank, or otherwise relied upon by a covered financial institution, for purposes of the Interim Guidance.

(Approved by the Office of Management and Budget under Control Number 1505-0184.)

3. Add new undesignated centerheading and ' 103.185 to subpart I to read as follows:

LAW ENFORCEMENT ACCESS TO FOREIGN BANK RECORDS

' 103.185 Summons or subpoena of foreign bank records; Termination of correspondent relationship.

(a) *Definitions.* The definitions in ' 103.175 apply to this section.

(b) *Issuance to foreign banks.* The Secretary or the Attorney General may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and may request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank. The summons or subpoena may be served on the foreign bank in the United States if the foreign bank has a representative in the United States, or in a foreign country pursuant to any mutual legal assistance treaty, multilateral agreement, or other request for international law enforcement assistance.

(c) *Issuance to covered financial institutions.* Upon receipt of a written request from a Federal law enforcement officer for information required to be maintained by a covered financial institution under paragraph (b) of this section, the covered financial institution shall provide the information to the requesting officer not later than 7 days after receipt of the request.

(d) Termination upon receipt of notice. A covered financial institution shall terminate any correspondent relationship with a foreign bank not later than 10 business days after receipt of written notice from the Secretary or the Attorney General (in each case, after consultation with the other) that the foreign bank has failed:

- (1) To comply with a summons or subpoena issued under paragraph (b) of this section; or
- (2) To initiate proceedings in a United States court contesting such summons or subpoena.

(e) Limitation on liability. A covered financial institution shall not be liable to any person in any court or arbitration proceeding for terminating a correspondent relationship in accordance with paragraph (d) of this section.

(f) Failure to terminate relationship. Failure to terminate a correspondent relationship in accordance with this section shall render the covered financial institution liable for a civil penalty of up to \$10,000 per day until the correspondent relationship is so terminated.

DATED: _____, 2002

James Sloan
Director