

March 3, 2009

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

Electronically: <http://www.regulations.gov/search/index.jsp>
Attention: Chapter X

**Re: Transfer and Reorganization of Bank Secrecy Act Regulations; Proposed Rule
(31 CFR Chapter X)**

The New York State Society of Certified Public Accountants, representing 30,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the above captioned proposed rule. The NYSSCPA thanks the Department of the Treasury for the opportunity to comment.

The NYSSCPA's Anti Money Laundering and Counter Terrorist Financing Committee deliberated the proposed rule and drafted the attached comments. If you would like additional discussion with us, please contact Timothy Hedley, Committee Chair, at (212) 758-9700, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,



Sharon Sabba Fierstein
President

Attachment



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**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

**TRANSFER AND REORGANIZATION OF BANK SECRECY ACT
REGULATIONS; PROPOSED RULE**

(31 CFR Chapter X)

March 3, 2009

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New York State Society of Certified Public Accountants

Anti Money Laundering and Counter Terrorist Financing Committee

Transfer and Reorganization of Bank Secrecy Act Regulations; Proposed Rule (31 CFR Chapter X)

Introduction

The New York State Society of Certified Public Accountants (“NYSSCPA” or the “Society”) applauds the initiative of the Financial Crimes Enforcement Network (“FinCEN”) to enhance compliance with “The Currency and Foreign Transactions Reporting Act of 1970,” also known as “The Bank Secrecy Act” (“BSA”), and its implementing regulation, 31 CFR 103, by gathering relevant BSA regulations into one chapter and organizing the chapter by financial industry. The NYSSCPA shares FinCEN’s stated belief that “... making the regulatory obligations more clear in their structure and more readily accessible to regulatory institutions will facilitate compliance and thereby advance the purposes of the BSA.”

The members of the Society’s Anti Money Laundering and Counter Terrorist Financing Committee (“AML&CTF Committee”) who participated in providing comments collectively have BSA experiences that include industry, regulatory, law enforcement, prosecutorial, and accounting perspectives. The AML&CTF Committee conducted various research queries beginning with the assigned Industry-Specific Parts and referencing into the General Provisions Part as directed by the Industry-Specific Part. Each Industry-Specific Part of Chapter X along with the relevant General Provisions references was evaluated using the following criteria as requested by FinCEN:

A. Structure of Chapter X

FinCEN proposes to organize Chapter X by financial industry so as to create a user-friendly way to find regulations which apply to a particular industry. This methodology and format is currently used by several state jurisdictions. In this new structure, definitions and regulatory obligations applicable to all or a number of regulated persons and financial institutions will be located in a Part titled “General Provisions.” Regulatory obligations applicable to a particular industry will be located in an industry-specific Part. If a regulatory obligation in the General Provisions Part is applicable to a particular industry, there will be a statement in the industry-specific Part referring the industry to the obligation contained in the General Provisions Part. FinCEN is proposing this structure so that individuals interested in finding the rules applicable to a particular category of financial institution need only to look in two places.

...

V. Request for Comments

FinCEN invites comment on all aspects of the proposed restructuring of the regulations, and specifically seeks comment on the following issues:

- 1. Whether the structure and numbering logic of the sections and parts within Chapter X makes FinCEN regulations more easily accessible.***
- 2. Whether alphabetical order and the maintenance of alphabetical order is clear, effective and of such value that FinCEN should renumber the definitions at this time and each time a new one is added.***

The AML&CTF Committee conducted its examination from the perspective of a good-faith user with limited familiarity of the BSA requirements for a particular financial industry. An example is a newly designated AML Compliance Officer for a securities broker/dealer. The Society concluded that this perspective would be particularly useful in evaluating FinCEN's objectives relating to user friendliness. Due to the growing number of financial industries, designated non-financial businesses, and professions that come under provisions of the BSA, user-friendly regulations will be a critical driver for compliance.

Consistent with this perspective, the AML&CTF Committee was aware of the risks of **not** identifying all of the BSA requirements for each Industry-Specific Part. This included the clarity of definitions and use of "[Reserved]" for each Industry-Specific Part. Regulatory compliance assumes a completeness assertion on behalf of all covered financial institutions, businesses, and professions. The regulatory expectation is that all applicable BSA requirements have been addressed in the applicable AML compliance program. Accordingly, anything that tends to undermine user confidence in identifying and understanding the full array of a covered industry's regulatory requirements, conflicts with FinCEN's objective of facilitating BSA compliance.

The AML&CTF Committee was required to support each of their comments or recommendations with specific examples referenced to the relevant cites within Chapter X.

In the "Conclusions and Recommendations" section of this comment letter, the AML&CTF Committee's responses to each of FinCEN's three specified requests for comments appear in the paragraphs titled "Conclusions." The paragraph titled "Recommendations" contains the complete listing of the the AML&CTF Committee's recommendations relating to Chapter X.

Industry-Specific Analysis

- Regarding FinCEN's first request: Whether the structure and numbering logic of the sections and parts within Chapter X makes FinCEN regulations more easily accessible.***

The structure, explanations, and examples contained in III. “Proposed Changes” B. “Renumbering Logic” are readily understood. The numbering logic is consistent throughout Parts 1020 through 1028 and Part 1010 –“General Provisions.” For example, in Part 1021 Rules for Casinos and Card Rooms, reports of transactions in currency are found in section 1021.310. A search for the same type of information for Money Services Business is found in section 1022.310 and in Part 1010.310 –“General Provisions.” The text is consistent throughout Chapter X.

The proposed numbering system will facilitate enterprise-wide AML Programs with multiple industries when researching specific regulatory requirements for various industries, businesses, or professions. The numbering system also can be expected to facilitate the identification of relevant regulatory requirements related to reliance arrangements.

The Distribution Table appearing on pages 16 through 21 is particularly useful in gaining familiarity with the new numbering system. The Distribution Table can be used to design training and reprogramming software related to BSA compliance.

- ***Regarding FinCEN’s second request: Whether alphabetical order and the maintenance of alphabetical order is clear, effective and of such value that FinCEN should renumber the definitions at this time and each time a new one is added***

Alphabetical Order

Frequently the format of the sections is confusing. For example: on page 156 in the “Banking” section, the definition of “Customer” is indicated with a lower case “(c).” The next subsection is “(1)” followed by “(i)” and “(A)” and “(B).” After that, the sections are indicated by “(2)” and “(ii)” and “(iii).” This sequence of subsets is illogical and seems to indicate a new section.

In researching the requirements for a Customer Identification Program for banks, the starting point is 1020.220(a)(1) on page 157 – “In General” requires that a bank implement a written CIP appropriate for its size and type of business that, at a minimum, includes each of the requirements of paragraphs (a)(1) through (5) of this section. At this point, the user is already in paragraph (a)(1). Requirement (a)(2) appears next. Before the user gets to requirement (a)(3) on page 162 they are confronted with references (i)(A) (1), (2) on page 158; (3), (i), (ii), (iii) (4) (i), (ii) (B) on page 159; (C) , (ii), (A), (1), (2) and (B) on page 160; (1), (2), (C), (iii) and (A) on page 161 and (B), (C), and (D) before arriving at (3) Recordkeeping. At this point the user has no reference to indicate that (3) is the subpart of (a) on page 157 and is one of the required elements of a bank’s CIP.

A properly designed document requires the alphanumeric architecture to have definite denotations when perusing the document. For example, page 267, Subpart B-Programs, section 1025.210 Anti-money laundering programs for insurance companies, denotes (a), (b), (1), (2), (i), (ii), (iii), (3), (4), (c), (d). While this configuration does denote

differentiating concepts, it is not easily followed due to all the tab margins being similar. The document becomes difficult to follow, cumbersome, and tedious. Failing to delineate between paragraphs and their subdivisions does not allow for a break in the flow of paragraphs and ideas. The aforementioned architecture is consistent throughout the document and requires attention prior to publication.

Furthermore, under Part 1010.100 “General Definitions,” the number of definitions exceeds the number of letters in the alphabet (*i.e.*, (a) “Accept” through (z) “Intermediary Bank”). The alphabetical order addresses this by utilizing first double letters and then triple letters before finally ending with (jjj) “U.S. Postal Service.” If “abatement” or another term that alphabetically precedes “accept” is added to the list of definitions, the alphabetical order of all of the terms will have to be changed. This non-intuitive approach pales in comparison to a simple alphabetical listing of key words relevant to BSA compliance.

Definitions

Some “definitions” simply fail as meaningful definitions. For example, on page 29 (f) “Beneficiary” is defined as “The person to be paid by the beneficiary’s bank.” Other definitions refer the user to a source outside Chapter X. For example, on page 28 (4) “Insured Institution” is defined as “An insured institution as defined in section 401 of the National Housing Act.” A reference to an appropriate authority should not preclude a meaningful definition within Chapter X.

The manner in which the definitions relating to Casinos and Card Clubs and Money Services businesses frequently requires the user to flip back and forth between the relevant Industry-Specific sections and the definitions contained in Chapter X. Some of the definitions for Casinos and Card Clubs are somewhat less than user friendly in terms of day-to-day practical application. Common usage definitions accompanied by examples would minimize the prospect of misunderstanding.

Part 1010.210 states, “Financial institutions (as defined in 31 U.S.C. 5312(a)(2) or (c)(1)) should refer to Subpart B of their Chapter X Part for anti-money laundering program requirements specific to that particular category of financial institution.” It would be more user-friendly to list those financial institutions in Chapter X.

Rules for Brokers or Dealers in Securities, Page 228, Part 1023.100 (a) (2) (i) “Account does not include: (i) An account that the broker-dealer acquires through any acquisition, merger, purchase of assets, or assumption of liabilities.” This presentation confuses the definition of an “account” with a regulatory exemption from performing CIP. The current regulation is clearer in its presentation and is more easily understood.

Part 1025, Rules for Insurance Companies Section 1025.100 Definitions, lists numerous covered products in section (b)(1)(2)(3). These definitions could be more clearly defined to include “whole” or “term” insurance products.

Finally, in Part 1010.100 the statement that "... terms may have different meanings in different parts or subparts" is troublesome. In any context and particularly in regulatory compliance, terms must be clearly defined and given a context with sufficient examples in order to minimize misunderstandings.

- ***Regarding FinCEN's third request: Comment on all aspects of the proposed restructuring of the regulations, specifically:***
 - *Does the proposed structure enable individuals interested in finding the rules applicable to a particular category of financial institution to look only in two places (i.e., Industry-Specific Part and General Provisions).*

In Subpart B-Programs Section 1021.200 the text provides, "... casinos and card clubs should also refer to Subpart B of Part 1010 of this chapter for program requirements contained in that subpart which apply to casinos and card clubs." Going further, section 1021.210(a) provides that, "a casino shall be deemed to satisfy the requirements of 31 U.S.C. 5318(h) (1) if it implements and maintains a compliance program described in paragraph (b) of this subsection." When one turns to paragraph (b), one finds the following: "Each casino shall develop and implement a written program reasonably designed to assure and monitor compliance with the requirements set forth in 31 U.S.C. chapter 53, subchapter II and regulations contained in this chapter." We did not find the same provision in the section for card clubs.

Under the Money Services program "Section 1022.210 (a) Each money services business, as defined by Section 1010.100(ff) shall develop, implement and maintain an effective anti-money laundering program. An effective anti-money laundering program is one that is reasonably designed to prevent the money services business from being used to facilitate money laundering and the financing of terrorist activities." We did not find a similar statement in 1021.210 for Casinos; instead, there is a reference to 31 U.S.C. 5318(h)(1). To identify regulatory requirements, a user needs to "move around" both within Chapter X and outside of it.

Part 1023 Rules for Brokers or Dealers in Securities at Page 241 (c), (ii) refers to 17 CFR 240.17a-8 or 17 CFR 405.4 and does not provide any factual information within Chapter X.

Other references that direct a user outside of Chapter X without providing enough information to obtain an understanding were found at the following locations:

- Page 45 and 47 referencing 31 USC 5312(a)(2) and (c)(1), and 5318(h) (1)
- Page 52 (1010.320 (a) refers to USC 5313
- Page 52 (1010.320 (a) (2) Section 60501 of Title 26 and 31 USC 5331
- Page 59 references to define collectible 26 USC 408(m)(3)
- Page 89 1010.520 (a) (1) – definition of financial institution – refers to 31 USC 5312 (a) (2)

There are numerous other examples throughout Chapter X in which references are made to 31 U.S.C. 5318 and other 5300 subdivisions.

- *Does the proposed organization of Chapter X by financial industry create a user-friendly way to find all regulations which apply to a particular financial industry.*

Referring back and forth between the definitions in Parts 1010 and 1020 was inefficient counterintuitive as to where the definition being sought could be found.

All of the Subparts refer the user back to Part 1010 to garner the information needed.

Pages 47 through 49, 1010.306 – Filing of Reports, there is too much cross referencing to be user friendly. Filing requirements should appear in the industry-specific parts.

Part 1027 Rules for Dealers in Precious Metals and Precious Stones or Jewels – Subpart A of this section should contain definitions specific to dealers in precious metals and precious stones or jewels. Additionally, under “Covered Goods” (1), jewels should be defined here rather than taking you to another section within this section for the definition (*i.e.*, as defined in paragraph (c) of this section). The same would hold true for the definitions for precious metals and precious stones.

Part 1027.330, Reports relating to currency in excess of \$10,000 received in a trade or business, currently states, “Refer to § 1010.330 of this chapter for rules regarding the filing of reports relating to currency in excess of \$10,000 received by operators of credit card systems.” We suggest that the rule should be listed here rather than having to refer back to Part 1010.

Subpart B should contain all program requirements that apply to dealers in precious metals, precious stones, or jewels. Subpart C should contain all reporting requirements that apply to these dealers. Further, Subpart D should contain all recordkeeping and records retention requirements for such dealers. Subpart E should contain all special information related to sharing procedures to deter money laundering and terrorist activity for dealers in precious metals, precious stones, or jewels. Subpart F should contain all special standards of diligence, prohibitions, and special measurements for dealers in these commodities.

Part 1028.330 Rules for Operators of Credit Card Systems, Reports relating to currency in excess of \$10,000 received in a trade or business currently states: “Refer to § 1010.330 of this chapter for rules regarding the filing of reports relating to currency in excess of \$10,000 received by operators of credit card systems.” We suggest that the rule should be listed here rather than having to refer back to Part 1010.

One other section which would be of particular interest to the researcher is that on exemptions from specific provisions. Sections 1021.315 Exemptions states, “Refer to Section 1010.315 of this chapter for exemptions from the obligation to file reports of transactions in currency for casinos.” Section 1010.315 Exemption for non-bank financial institutions, states, “A non-bank financial institution is not required to file a report

otherwise required by Section 1010.311 with respect to a transaction in currency between the institution and a commercial bank.” Section 1010.311 Filing obligations for reports of transactions in currency, states in part, “Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than \$10,000, except as otherwise provided I this section.” A user-friendly alternative would be to state the exemption clearly in the Industry-Specific Part.

The use of “[Reserved]” in Chapter X was reviewed to identify potential risk of misunderstandings. At the beginning of each part, sections are listed as applicable to the specific industry. Unused sections are titled, “reserved,” with no explanation noted. For new or infrequent users of this document, complementing the use of “[Reserved]” with appropriate explanatory text such as “No CTR filings are required at this time” would better inform the user and enhance confidence in his or her understanding of the regulatory requirement. It would also alert users to potential areas of future changes in regulatory requirements.

In Part 1027.320, Rules for Dealers in Precious Metals, Precious Stones, or Jewels the use of “[Reserved]” Subpart C § 1027.320 is currently reserved given that dealers in precious metals, precious stones, or jewels are not required to file SAR’s. Explanatory text such as, “While dealers in precious metals, precious stones, or jewels are not currently required to file SAR’s, they are encouraged to adopt procedures for voluntarily filing Suspicious Activity Reports with FinCEN and for reporting suspected terrorist activities to FinCEN using its Financial Institutions Hotline (1-866-556-3974).”

Two sections in Part 1023 that are “[Reserved]” mimic the “[Reserved]” sections in Part 1010.530 and 1010.640. The user has no idea to what this may relate and, as a consequence, no awareness of what additional regulatory requirements may need to be monitored.

Part 1024.310, Rules for Mutual Funds is “[Reserved],” while Part 1010.310 pertains to reports of transactions in currency. Explanatory text could contribute to a user’s understanding of why these reports are not required at this time.

Part 1024.315 is “[Reserved],” while Part 1010.315 refers to exemptions for non-bank financial institutions. In Part 1010.310, it states that sections 1010.310 through 1010.314 apply to all financial institutions, unless otherwise indicated. Part 1010.315 would also apply to a mutual fund, if it involved a currency transfer between itself and a commercial bank. The opportunity to complement the use of “[Reserved]” with informative text appears throughout Chapter X.

Section 1025.320 “Reports by insurance companies of suspicious transactions,” part (e) page 273, “Confidentiality of reports; limitation of liability” delineates when SAR’s need to be provided in legal matters. This regulation can be stated in a much easier manner such as, “do not disclose SAR’s information without the express permission of FinCEN in any legal matters.”

Conclusions and Recommendations

Conclusions

- ***Regarding FinCEN's first request for comments: "Whether the structure and numbering logic of the sections and parts within Chapter X makes FinCEN regulations more easily accessible."***

The numbering logic of the parts and sections within Chapter X are readily understandable and consistently applied. The numbering provides a logical framework for accessing regulatory requirements. It also serves to minimize misunderstanding in that each section that ends with .320 pertains only to suspicious activity reporting requirements. The numbering logic will facilitate financial institutions with enterprise-wide AML Programs by providing an elegant means of researching a single regulatory requirement across multiple industries.

The advantages of having a "General Provisions" section that consolidates definitions and regulatory requirements applicable to all or a number of regulated persons and financial institutions are appreciated; however, the structure of Chapter X is problematic. We found that the proposed structure causes the user to refer back between the industry-specific and General Provisions parts continuously to attempt to verify regulatory requirements. This holds true in determining definitions. As a result, confidence that all regulatory requirements have been identified and fully understood is undermined.

- ***Regarding FinCEN's second request for comments: "Whether alphabetical order and the maintenance of alphabetical order is clear, effective and of such value that FinCEN should renumber the definitions at this time and each time a new one is added."***

The alphabetical order and maintenance of alphabetical order is frequently distracting. The alphabetized sub-parts are redundant given the clarity of the numbering logic. The maintenance of the alphabetical order within the subsections tends to diversify key regulatory information unnecessarily, such as the Customer Identification Program example provided under "Alphabetical Order" on Page 3 of this document. In that instance and in others, we found the regulation content is stated more clearly in the existing Part 103 sections.

Mutually agreed-upon definitions are essential to avoid misunderstandings. That is particularly critical in the context of regulatory compliance. To that point, the last sentence appearing in 1010.100 "General Definitions" states, "terms may have different meanings in different parts or subparts." Terms related to BSA regulations should be clearly defined and, should contextual differences occur between industries, be explained. For example, the definition of "Account" as it appears at 1020.100 (a)(1) and (2)(i) taken together provide an understandable definition of account. Text contained in (2)(ii) and 2(iii) state that acquired accounts and government accounts are not accounts when, in fact, they are accounts (however, they do not require CIP to be performed).

Other definitions fail the test for an acceptable definition. For example, in Part 1010.100 (f) “Beneficiary” is defined as “The person to be paid by the beneficiary’s bank.”

- ***Regarding FinCEN’s third request for comments: “Comment on all aspects of the proposed restructuring of the regulations.”***
 - *Does the proposed structure enable individuals interested in finding the rules applicable to a particular category of financial institution to look only in two places (i.e., Industry-Specific Part and General Provisions).*
 - *Does the proposed organization of Chapter X by financial industry create a user-friendly way to find all regulations which apply to a particular financial industry.*

In addition to these conclusions, the use of “Reserved” is often insufficiently informative. The example offered on Page 7 of the *Notice of Proposed Rulemaking* makes the point. Part 1027.320 simply states, “Reserved.” It would be more meaningful for a good faith user if the text stated that currently SARs are not required to be filed, but instead are encouraged to be filed and will be covered by the same safe harbor protections provided to those who are required to file SARs.

Recommendations

We make the following specific recommendations:

- Transferring existing BSA regulations into a separate Chapter X of the *Code of Federal Regulations*(CFR)
- Organizing Chapter X into Industry-Specific Parts
- Including all relevant regulations into each Industry-Specific Part
- Implementing the proposed numbering logic
- **Not** implementing the proposed alphabetical order and redesigning the subpart structure to another format
- Eliminating the General Provisions Part
- Creating an “Introduction” Part that includes only the following:
 - Description of the actual structure of Chapter X
 - Description of the re-numbering system
 - Distribution Table
 - List of appropriate contact information
- Creating a Chapter X “Glossary” that provides clear and uniform definitions for all key terms applicable to BSA regulations
- Reviewing each use of “Reserved” and providing substantive guidance or explanations
- Adding emphasis to extremely important sections such as “non-disclosure” issues to heighten the attention of the user
- Conducting additional outreach to each covered industry to develop “plain English” text designed to maximize the identification and understanding of all regulatory requirements
- Repeating code sections atop each page