



Department of the Treasury Financial Crimes Enforcement Network

Guidance

FIN-2009-G003

Issued: August 31, 2009

**Subject: Guidance on Determining Eligibility for Exemption from
Currency Transaction Reporting Requirements**

The Financial Crimes Enforcement Network (“FinCEN”) is issuing this guidance to help banks¹ determine whether a customer is eligible for exemption from currency transaction reporting requirements.² This guidance provides examples and answers to commonly asked questions regarding the final rule³ that FinCEN issued in December, 2008, which amended the currency transaction report (“CTR”) exemption requirements (“the final rule”).

I. Background:

The Bank Secrecy Act and its implementing regulations require banks to file a CTR on any transaction in currency of more than \$10,000.⁴ The regulations in the Bank Secrecy Act also provide banks with the ability to exempt certain customers from currency transaction reporting.⁵

A. 2008 GAO Report

In 2008, the Government Accountability Office (“GAO”) issued a report⁶ concluding, among other things, that the information provided on CTRs provides unique and reliable information essential to a variety of efforts, including law enforcement investigations, regulatory and counter-terrorism matters. In this same report, the GAO recommended several changes to the exemption requirements, which FinCEN addressed in the final rule. The GAO also concluded that additional web-based guidance was necessary to help banks determine eligibility for exemption, which FinCEN is addressing in this guidance document.

¹ Pursuant to the Bank Secrecy Act, the term “bank” includes *inter alia* each agent, agency, branch, or office within the United States of any person doing business as a commercial bank, a savings and loan association, a thrift institution, a credit union, or a foreign bank. 31 C.F.R. § 103.11(c).

² FinCEN consulted with the staffs of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision prior to issuing this guidance.

³ See 73 FR 74010.

⁴ 31 CFR § 103.22.

⁵ 31 CFR § 103.22(d).

⁶ See “Bank Secrecy Act: Increased Use of Exemption Provisions Could Reduce Currency Transaction Reporting While Maintaining Usefulness to Law Enforcement Efforts” GAO–08–355 (GAO: Washington, D.C.: Feb. 21, 2008).

B. 2008 Final Rule – CTR Exemption Changes

Overview of the requirements of the final rule:

The final rule, which went into effect on January 5, 2009, makes the following substantive changes to the previous CTR exemption system:

- Elimination of designation and annual review for most Phase I customers.⁷ Banks are no longer required to file a designation of exempt person (“DOEP”) form for, or conduct an annual review of, customers who are other depository institutions operating in the United States, U.S. or State governments, or entities acting with governmental authority. The DOEP filing and annual review are still required for businesses listed on a major national stock exchange (“listed businesses”), non-listed businesses, and payroll customers.
- “Frequently” decreased to five reportable transactions. Banks may designate an otherwise eligible non-listed business customer⁸ for exemption after the customer has within a year conducted five or more reportable transactions in currency (previously, eight or more reportable transactions were required).
- Waiting time for eligibility decreased. Banks may use a hybrid approach to designate an otherwise eligible customer for a Phase II exemption: The customer may be eligible for exemption after maintaining a transaction account for two months (previously twelve months were required); or, the customer may be eligible for exemption in less than two months if the bank conducts a risk-based analysis to form a reasonable belief that the customer has a legitimate business purpose for conducting frequent or regular large currency transactions.
- Biennial renewals eliminated. Banks are no longer required to file a biennial renewal or record and report a change of control for an exempt Phase II customer.

⁷ Entities commonly known as “Phase I” are defined in 31 CFR § 103.22(d)(2)(i-v).

⁸ Entities commonly known as “Phase II” are defined in 31 CFR § 103.22(d)(2)(vi) and (vii).

These changes, along with the existing requirements established by previous rulemakings, have simplified the exemption process by generally authorizing a bank to treat a customer as exempt from currency transaction reporting under the following circumstances:

	Type of Customer	Transaction Frequency	Waiting Period	Ineligible activity	File DOEP Form	Annual Review
Phase I	Banks operating in the U.S.	N/A	None	N/A	No	No
	Federal, state, local, or inter-state governmental departments, agencies, or authorities	N/A	None	N/A	No	No
	Entities listed on the major national stock exchanges	N/A	None	N/A	Yes	Yes
	Subsidiaries (at least 51% owned) of entities listed on the major national stock exchanges	N/A	None	N/A	Yes	Yes
Phase II	Non-listed businesses	Five or more transactions per year	Two months; or less after risk-based analysis	No more than 50% of gross revenues derived from ineligible activity	Yes	Yes
	Payroll Customers	Regularly conducts large cash withdrawals for payroll	Two months; or less after risk-based analysis	N/A	Yes	Yes

The chart above indicates that for Phase I customers, a bank may immediately treat as exempt any eligible entity without concern for the time it has been a customer of the bank or the number of reportable transactions it has conducted. Additionally, since the “ineligible businesses” provision applies only to non-listed business exemptions, a Phase I customer may be treated as

exempt regardless of their involvement in such activities. For all Phase I customers other than listed businesses and their subsidiaries, no DOEP or annual review is required.

Before treating a non-listed business customer as exempt, a bank must first determine that the customer has conducted five or more transactions within the previous year, has been a customer of the bank for at least two months (or less time on a risk-assessed basis), and derives no more than 50% of its gross revenues from any ineligible business activity.⁹

Before treating a payroll customer as exempt, a bank must first determine that the customer has been a customer of the bank for at least two months (or less time on a risk-assessed basis) and engages regularly¹⁰ in reportable withdrawals to pay its U.S. employees in currency.

Banks must file DOEP forms and conduct annual reviews for all Phase II customers (whether they are non-listed businesses or payroll customers), as well as for listed businesses and their subsidiaries.

The final CTR exemption rule does not relieve banks of their separate obligation to conduct suspicious activity monitoring and reporting for both Phase I and Phase II exempt customers.¹¹

II. Frequently asked questions:

Since the publication of the final rule in 2008, FinCEN has received questions regarding various provisions. FinCEN is issuing answers to these questions to assist banks in understanding the scope and application of the final rule.

A. Timing

Question: When should a bank make a risk-based determination to exempt an otherwise eligible Phase II customer before they have been a customer for two months?

Answer: The preamble to the final rule provides some examples of criteria that may be appropriate when making such a risk-based decision. For example, banks could consider the nature of the market the customer serves, the type of services offered, the location of the business, and whether the bank had a past relationship with the customer. In light of such factors, possible examples of customers who may qualify for exemption prior to two months may include the following:

- Returning customers that reopen a previously maintained exempt transaction account with the bank;

⁹ For additional discussion of the “50% rule” relating to ineligible businesses, *see* http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2009-g001.pdf.

¹⁰ With respect to CTR exemptions for payroll customers, neither Congress nor FinCEN has previously defined or interpreted the term “regularly” in law, regulation, or guidance. Accordingly, a bank wishing to exempt a payroll customer must conclude reasonably, based on its knowledge of that customer, that the customer regularly conducts reportable transactions. FinCEN hopes to further clarify in future action the extent to which a payroll customer must conduct reportable transactions before being exempted.

¹¹ *See* 31 CFR § 103.18.

- Customers whose exempt status has changed (for example, when a customer that was a publicly listed company privatizes and is otherwise eligible for Phase II exemption).

The above examples are not intended to be exhaustive, but rather representative of the types of customer relationships where a risk-based determination to exempt prior to two months may be appropriate. Readers should note that for each of the examples provided above, there is some factor contributing to a bank's level of knowledge exceeding what is typical for a new customer being considered for exemption. Such knowledge, or other mitigating factors, could assist the bank in forming a reasonable conclusion that the risk of exempting the customer prior to two months was low.

Banks are not required to use the risk-based approach. FinCEN originally proposed¹² removing any prescribed amount of time before a bank could consider a Phase II customer for exemption, enabling a bank to make a risk-based determination of when to exempt in all instances. Due to comments submitted in response to that proposal, however, FinCEN implemented a hybrid approach that allows banks to choose the flexibility of a risk-based approach or the simplicity of the two-month threshold.

Banks should remember that even if using the two month approach, they are required at least annually to conduct a review of the customer to determine continued eligibility for exemption and to monitor for suspicious activity.

B. Frequency

Question: Using the risk-based approach, can a bank exempt a non-listed business customer prior to the two month mark even if the customer has conducted fewer than five transactions?

Answer: No. The risk-based approach for determining when to exempt a Phase II customer gives latitude with respect to the timeframe only (i.e., allowing for exemption of customers that have been customers for less than two months). None of the other criteria necessary for Phase II exemption can be adjusted as part of that risk-based approach, including the criteria to for a non-listed business to engage frequently in reportable transactions. Thus, before a bank may exempt a non-listed business, that customer must have conducted at least five reportable transactions. FinCEN believes that without such a frequent large cash transaction volume, a bank could not reasonably expect to have sufficient knowledge of its customer to justify the risk-based approach.

C. Corporate structure and reorganization

Question: What is the status of an exempt customer that previously was a listed public company but has reorganized as a private company?

Answer: If a Phase I customer no longer is a publicly-traded company, the customer is ineligible for a Phase I exemption. However, the bank could evaluate the customer for potential

¹² See 73 FR 22101.

exemption as a non-listed business customer. If the bank's assessment indicates that the private company does not derive more than 50% of its gross revenues from ineligible lines of business,¹³ has conducted five or more reportable transactions in the previous year, and otherwise meets all of the exemption criteria, the bank may exempt the company as a non-listed business.

Banks should note that a business's eligibility for exemption under the "listed business" provision may change over time, for example, as it makes an initial public offering or is privatized. This is the primary reason that listed businesses and their subsidiaries are the only Phase I exempt customers under the final rule for which banks must continue to file DOEP forms and conduct annual reviews. As part of those requirements, banks should have procedures for verifying whether a listed business remains eligible for exemption at least once per year. Annual reports, stock quotes from newspapers, or other information, such as electronic media can be used to document the review.

Question: Does the Phase I exemption available to certain subsidiaries of listed businesses apply to franchises or other affiliated entities when the listed company does not have a 51% or greater ownership stake in the affiliated entity?

Answer: No. To be eligible for exemption, any affiliated entity must meet the definition of "subsidiary" found at 31 C.F.R. § 103.22(d)(2)(iv), which requires that the listed business own at least 51% of the common stock or analogous equity interest of the entity in question. For example, a privately-owned restaurant franchise operating under the corporate name of a listed fast food company would not be eligible for Phase I exemption. A retail business location at least 51% owned by the same listed fast food company and operating under the same corporate name as the franchise, however, would be eligible for Phase I exemption.

Question: What is the exempt status of a Phase II customer who reorganizes his business? For example, what is the recourse for an exempt customer with a doing business as ("DBA") account who forms a limited liability corporation as his business grows.

Answer: Since the restructuring of a business may cause that business to become ineligible for exemption or otherwise make the original DOEP filing inaccurate or incomplete with respect to the newly restructured business, banks should consider evidence of a business restructuring as part of their annual review or ongoing customer due diligence. Potential evidence of such restructuring could include changes in the customer's management, business purpose, operations, customers, ownership, or account relationship with the bank. More specifically, changes to a customer's account relationship with the bank could include the issuance of a new taxpayer identification number,¹⁴ modifications to the names on the account, changes in account activity, or the addition or removal of signors or controllers of an account.

Banks should use a risk-based approach when determining which factors to consider to ensure that a customer remains eligible for exemption and that the original DOEP filing continues to

¹³ See 31 CFR § 103.22(d)(6)(viii).

¹⁴ In some instances, such as the formation of a single member limited liability corporation or certain types of partnerships in some states, a change in corporate structure may not result in the issuance of a new taxpayer identification number.

identify that customer accurately and completely. To the extent that such changes make the original DOEP filing inaccurate or incomplete with respect to the newly restructured business, a bank should reevaluate the business for exemption. In such cases, the bank may consider using the risk-based approach for exempting the newly restructured business prior to the two month waiting period. If the restructured business is eligible for exemption and the bank wishes to treat them as such, a new DOEP form must be filed with FinCEN.

In the example used in the question, an unincorporated business that incorporates would likely need reevaluation for the purposes of CTR exemption eligibility.¹⁵ Accordingly, after verifying that the newly restructured business was eligible for exemption, a bank wishing to treat that customer as exempt would need to file a new DOEP form.

D. Ineligible businesses

Question: Does FinCEN consider a hospital or doctors office to be engaged in the practice of medicine and therefore ineligible for exemption as a non-listed business?¹⁶

Answer: FinCEN interprets the term “the practice of medicine” broadly, rather than focusing on the technicalities of individual state laws governing the licensing of medical practitioners. Accordingly, any entity that derives more than 50% of its gross revenues by offering medical services is ineligible for exemption as a non-listed business. This interpretation would likely exclude most privately-owned hospitals, doctors’ offices, or other medical practices from being eligible for exemption as non-listed businesses.

E. Customers no longer eligible for exemption

Question: What should a bank do if, during its annual review of a listed business or Phase II customer, it discovers that the customer no longer meets all the criteria for exemption?

Answer: During the annual review of a Phase II exempt customer, a bank may conclude that a customer is no longer eligible for exemption (for example, if an exempt non-listed business customer conducted only four reportable currency transactions during the year under review). At the time the customer’s ineligibility is discovered, the bank should document its determination of ineligibility and cease to treat the customer as exempt.¹⁷ The bank is not required to back file CTRs with respect to a designated Phase II customer that had met the eligibility requirements in a preceding year, but was subsequently found to be ineligible during the bank’s timely completion of its annual review.

F. Suspicious activity of an exempt customer

¹⁵ A bank should also consider potential customer identification program obligations under 31 CFR § 103.121.

¹⁶ The practice of medicine is one of several business activities that make a customer ineligible for exemption as a non-listed business. *See* 31 CFR § 103.18(d)(6)(viii).

¹⁷ In the event the customer meets the eligibility requirements in the future, the bank must file a new DOEP to begin treating the customer as exempt.

Question: Is a customer that has been the subject of a Suspicious Activity Report eligible for initial or continued exemption?

Answer: A Bank is required to file a SAR, where appropriate, regarding the activities of any of its exempt customers.¹⁸ However, if an exempt person is involved in a transaction that has been reported in a SAR, the bank is not required to cease treating the person as exempt. The decision to exempt, or to retain or revoke a customer's exemption, should be made by the bank in accordance with its risk-based anti-money laundering policies, procedures, and controls.

G. Completing the Designation of Exempt Person form

Question: The DOEP form (FinCEN Form 110) and instructions were not updated with the final rule to account for the various changes to the CTR exemption process. How should a bank complete the DOEP when exempting a new customer?

Answer: The preamble to the final rule clarified that certain elements of the DOEP form should be disregarded by filers since they are no longer applicable under the new exemption requirements. Because the final rule removed several existing requirements but did not add any new requirements, the DOEP form now contains a limited number of extraneous fields but remains fully sufficient to designate any eligible customer as an exempt person. Accordingly, filers should disregard references on the form as well as in the instructions to biennial renewals and to types of Phase I customers that no longer require a DOEP filing.¹⁹ FinCEN has disabled the unnecessary fields in the E-filing system as well as in the version of FinCEN Form 110 available on its website.

H. Exemptible transaction accounts

Question: The definition of a Phase II "exempt person" in 31 CFR § 103.22(d)(2)(vi) and (vii) includes the phrase "only with respect to transactions conducted through its exemptible accounts." Does this mean that certain transactions of Phase II exempt customers require the filing of a CTR?

Answer: Yes. The scope of the exemption for non-listed businesses and payroll customers is limited by several criteria. While the final rule reduced those criteria with respect to the number of transactions and the waiting period before a bank could treat those customers as exempt, it did not alter the remaining criteria for Phase II customers, including the provision that a Phase II customer is exempt "to the extent of its domestic operations and only with respect to transactions conducted through its exemptible accounts."²⁰ For transactions conducted by the customer outside of the criteria for Phase II customers, the customers would not meet the definition of "exempt person" and could not be treated as exempt by the bank.

For example, a bank may have a convenience store as an exempt non-listed business customer. This customer might regularly make deposits into its transaction account exceeding \$10,000 in

¹⁸ 31 CFR § 103.18.

¹⁹ See 73 FR 74015, Section V.

²⁰ See 31 CFR § 103.22(d)(2)(vi)(C) and (vii)(C).

currency, none of which would require the bank to file a CTR. However, if the convenience store presents more than \$10,000 in currency in exchange for a cashier's check, whether the bank is required to file a CTR will depend on whether the transaction was processed "through [the] exemptible account." Specifically, the bank would not be required to file a CTR if the bank credited the customer's transaction account as a deposit and then debited the account to fund the cashier's check, or otherwise processed the transaction in such a way that it resulted in a line item entry into the customer's transaction account statement. The bank would be required to file a CTR, however, if the currency was deposited into and the cashier's check was drawn upon the bank's general ledger account(s), or otherwise did not result in a line item entry into the customer's transaction account statement.

Banks may generally use the test of whether a transaction results in a line item entry into a Phase II exempt customer's transaction account statement to determine whether a transaction was "conducted through [the] exemptible account." For any reportable transaction not conducted through the exemptible account, the customer would not meet the definition of "exempt person" only with respect to that transaction and a CTR must be filed.

I. Revoking an exemption

Question: If a bank ceases to treat a customer as exempt, and begins or intends to begin filing CTRs on that customer for the next reportable transaction, must the bank formally revoke the exemption by filing the DOEP form and selecting the "exemption revoked" box?

Answer: Banks have never been required to formally revoke an exemption using the DOEP form. Generally, examiners or other users of BSA data would be able to rely on a pattern of reporting to know that a customer is no longer being treated as exempt. For purposes of clarity or creating internal documentation, however, many banks voluntarily revoke exemptions using the DOEP form. For example, if during its annual review of an exempt non-listed business customer a bank discovers that the customer conducted no reportable transactions in the previous year, the bank could no longer treat that customer as exempt. If the exemption is not formally revoked using the DOEP form and the customer continues the pattern of not conducting reportable transactions, a law enforcement agent investigating the company would likely conclude incorrectly from the lack of CTR filings that the customer is still being treated as exempt. While revoking an exemption in such instances may benefit both the filing bank and users of BSA data, banks may choose to do so entirely on a voluntary basis.

* * * * *

Questions or comments regarding the contents of this Guidance should be addressed to the FinCEN Regulatory Helpline at 800-949-2732.