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Via http://www.regulations.gov

March 9, 2009

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

Attention: Chapter X

Subject: Transfer and Reorganization of Bank Secrecy Act Regulations

Dear Sir/Madam:

On behalf of our member companies, the American Council of Life Insurers submits these comments in response to a Notice of Proposed Rulemaking, Transfer and Reorganization of Bank Secrecy Act Regulations, published in the Federal Register on November 7, 2008. ACLI represents 340 member companies operating in the United States that account for 93% of total life insurance company assets, 94% of life insurance premiums, and 94% of annuity considerations in the U.S. Many of our member companies offer products covered by BSA regulations and would be affected by the proposed rule.

FinCEN has proposed to move BSA regulations to a new chapter in the Code of Federal Regulations. The new chapter would contain the BSA regulations, which would generally be reorganized by industry. The new organization is intended to allow for the renumbering of the BSA regulations in a manner that would make it easier to find regulatory requirements than under the number system currently used in the existing regulations. FinCEN also proposed to make minor technical changes to the BSA regulations such as updating mailing addresses and points of contact. In the preamble to the proposed rule, FinCEN states that the reorganization is an opportunity to restructure its regulations *without substantive change.*

ACLI generally supports a reorganization of the BSA rules. Much as it has with the recent re-design of its website, FinCEN has proposed a restructuring of the BSA rules in a manner that will make it easier to find regulatory requirements, thereby improving the efficiency and effectiveness of complying with BSA regulations. However, a review of the proposed rule indicates that the restructuring of the regulations, as presently drafted, would result in life insurers being subject to new BSA requirements, a result that we do not support and do not believe was the intention of the reorganization. Our concerns and recommended solutions are discussed below.

(1) Concern: Although Section 1010.100(t) does not include insurance companies within its definition of "financial institution," Sections 1010.200 and 1010.300 define "financial institutions" by reference to 31 U.S.C. 5312(a)(2) or (c)(1), not to the definition at Section 1010.100. The statutory provision includes insurance companies as "financial institutions." As a result, insurers selling covered products will be subject to a number of new program and reporting requirements.[1]

[1] Since FinCEN has narrowed its regulation of insurance companies to those insurers selling certain "covered products," use of the statutory definition will actually have the effect of bringing ***all*** insurance companies within the ambit of Subparts B, D, and E of the proposed regulations.

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Proposed Solution: The introductory paragraphs of Subparts B, D, and E should be removed and all references to "financial institutions" throughout the proposed reorganization should refer to, and explicitly be in the context of, the definition at Section 1010.100(t) and not 31 U.S.C. 5312(a)(2) or (c)(1). In the alternative, the introductory paragraphs of these Subparts should be revised as follows:

> Financial institutions [as defined in 31 U.S.C. 5312(a)(2) or (c)(1)] should refer to Subpart[s] [B,D, and E] of their Chapter X Part for [ ] program requirements specific to that particular category of financial institution. Unless otherwise indicated, the program requirements contained in this Subpart apply to those financial institutions as defined in 31 C.F.R. 1010.100(t).

Discussion: Sections 1010.200 and 1010.300 state that, unless otherwise indicated, the respective program and reporting requirements of Subpart B and C apply to all financial institutions as defined in 31 U.S.C. 5312(a)(2) or (c)(1). This statutory definition, unlike the definition in the proposed rule, includes insurance companies. Unless "financial institution" is instead defined throughout the reorganized regulations by reference to Section 1010.100(t), insurers selling covered products will be subject to a number of new BSA requirements, such as:

- Requirements to file reports of transactions in currency received of more than $10,000 under 31 C.F.R. 1010.311 [currently 31 C.F.R. 103.22].
- Requirements to verify and record the name and address of individuals presenting transactions identified in proposed Sections 1010.311, 1010.313, 1020.315, 1021.311 and 1021.313 [currently 31 C.F.R. 103.22(b)(1), 103.22(c)(1) and (2), 103.22(d), 103.22(b)(2)(i)-(iii), 103.22(c)(3)]. See proposed section 31 C.F.R.1010.312 . [See current 31 C.F.R. 103.28].
- Requirements to aggregate multiple currency transactions when reporting currency transactions where the insurance company either has knowledge that it is by or on behalf of any person and results in either cash in or cash out totaling more than $10,000 during any business day. See proposed 31 C.F.R. 1010.313. *Note: There does not appear to be a current regulation to which this section corresponds.*
- Requirements applicable to structured transactions. Proposed regulation 31 C.F.R. 1010.314, currently 31 C.F.R. 103.63.
- Record retention requirements applicable to extensions of credit in amounts in excess of $10,000 of each advice, request or instruction received or given regarding any transaction resulting (or intended to result and later canceled if such a record is normally made) in the transfer of currency or other monetary instruments, funds, checks, investment securities or credit of more than $10,000 to or from any person, account or place outside the United States and wire transfers found in Proposed 31 C.F.R. 1010.410, currently 31 C.F.R. 103.33.

The potential for unintended consequences is heightened by a number of statements to the effect that '[f]inancial institutions (as defined in 31 U.S.C. 5312(a)(2) or (c)(1)) should refer to their Chapter X Part for **additional requirements** specific to that particular category of financial institution.' (emphasis added) (*see, e.g.,* Section 1010.300)

Given FinCEN's stated intention to reorganize its BSA rules *without substantive change* and the inconsistency of the proposed regulation with prior FinCEN rulemaking with respect to insurance companies, we strongly recommend financial institutions throughout the proposed rule be defined in reference to, and explicitly in the context of, Section 1010.100(t).

(2) Concern: There appears to be an ambiguity in the obligations of insurance companies or of insurance companies issuing "covered products" to report currency in excess of $10,000 received in a trade or business.

Proposed Solution: Section 1025.330 should be deleted.

Discussion: All insurance companies must file the reports referred to in proposed Section 1010.330, not just those selling "covered products." As a result, Section 1025.330 is redundant and, in order to avoid any potential for confusion, should be deleted.

(3) Concern: A definitional ambiguity in current and proposed regulations as they relate to investment companies and mutual funds will sweep investment companies that are not mutual funds, such as managed separate accounts registered on Form N-3 and exchange traded funds, into the Special Measure requirements of proposed Sections 1010.651 and 1010.652.

Potential Solution: The definition of "covered financial institution" in proposed Section 1010.651(a)(3)(ii) and 1010.652(a)(3)(ii) should be revised to be consistent with the remaining regulations promulgated under Section 311 of the USA PATRIOT Act and under the Bank Secrecy Act to either apply to:

a) a "mutual fund" as defined in proposed 31 C.F.R. 1010.100(gg); or

b) "a mutual fund, which means an investment company [as that term is defined in section 3 (a)(1) of the Investment Company Act of 1940 [15 U.S.C. 80a-3(a)(1)] that is an "open-end company" [as that term is defined in section 5(a)(1) of the Investment Company Act [15 U.S.C. 80a-5(a)(1)] and that is registered or is required to register with the Commission under Section 8 of the Investment Company Act [15 U.S.C. 80a-8]."

It should be noted that proposed Subpart F, 31 C.F.R. 1024.600 refers mutual funds to Subpart F of Part 1010 of the chapter for "special measures contained in that subpart which apply to mutual funds." [73 Federal Register 66475].

Discussion: In the Notice of Proposed Rulemaking accompanying FinCEN's interim final rule prescribing minimum standards for mutual fund anti-money laundering programs, FinCEN noted

> Although the BSA includes an "investment company" among the entities defined as financial institutions, FinCEN has not previously defined the term for purposes of the BSA. The Investment Company Act of 1940 (codified as 15 U.S.C. 80a-1 et seq.) (the 1940 Act) defines investment company broadly [Section 3(a)(1)] and subjects those entities to comprehensive regulation by the Commission.
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> For purposes of the section 352 requirement that financial institutions establish anti-money laundering programs effective April 24, 2002, Treasury is limiting the application of this interim rule to those investment companies falling within the category of "open-end company" contained in section 5(a)(1) of the 1940 Act, which are commonly referred to as "mutual funds". 67 Federal Register 21117 [April 29, 2002].

Footnote 5 of the same release reported that "by interim rule published [at 67 FR 21110], Treasury is temporarily exempting investment companies other than mutual funds from the requirement that they

establish anti-money laundering programs. Treasury is also temporarily deferring determining the definition of 'investment company' for purposes of the BSA". Footnote 5, 67 Federal Register [April 29, 2002]. Proposed 31 C.F.R. 1010.205(b)(x) reflects that

Proposed 31 C.F.R. 1010.100(gg) defines a "mutual fund" in a manner consistent with the anti-money laundering program regulations for mutual funds, namely as an

> investment company [as that term is defined in section 3 of the Investment Company Act [15 U.S.C. 80a-3] that is an "open-end company" [as that term is defined in section 5 of the Investment Company Act [15 U.S.C. 80a-5] that is registered or is required to register with the Commission under Section 8 of the Investment Company Act [15 U.S.C. 80a-8].

The proposed and current regulations outlining Special Measures under Section 311 of the USA PATRIOT Act against Burma [proposed 31 C.F.R. 1010.651, current 31 C.F.R. 103.186(a)(2)(ii)] and Myanmar Mayflower Bank and Asia Wealth Bank [proposed 31 C.F.R. 1010.652, current 31 C.F.R. 103.187] include the above definition in a supplemental list of "covered financial institutions" subject to these requirements, but do not limit the definition to investments commonly known as "mutual funds". In contrast, the proposed and current regulations outlining Special Measures against Commercial Bank of Syria [proposed 31 C.F.R. 1010.653, current 31 C.F.R. 103.188]; VEF Bank [proposed 31 C.F.R. 1010.654, current 31 C.F.R. 103.192] and Banco Delta Asia [proposed 31 C.F.R. 1010.655, current 31 C.F.R. 1010.655] include among the list of "covered financial institutions" subject to these requirements "a mutual fund, which means an investment company….."

Thus, as noted above, the effect of this variation in defined terms is to sweep investment companies that fall within the above definition, but are not mutual funds, including managed separate accounts registered on Form N-3 and exchange traded funds (ETFs), into the Special Measure requirements of proposed 31 C.F.R. 1010.651 and 31 C.F.R. 1010.652.

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ACLI appreciates the opportunity to comment on FinCEN's proposed reorganization of BSA regulations. Please feel free to contact me if you have any questions or need additional information.

Sincerely,