

# Aldrich Bonnefin & Moore, PLC

## [ B A N K I N G O P E R A T I O N S U P D A T E ]

DECEMBER 2011

### FINCEN CLARIFIES PROCESS FOR FILING CORRECTED OR AMENDED REPORTS

In an effort to modernize the process for filing Bank Secrecy Act (BSA) reports, on November 1, 2011 FinCEN issued a notice clarifying the procedures for filing corrected or amended BSA reports, particularly reports that were initially submitted in paper form.

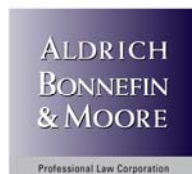
According to the notice, when correcting or amending a previously filed paper report, filers must check the appropriate amendment or correction box and complete the form in its entirety. While filers are not required to submit reports electronically, they are strongly encouraged to do so. FinCEN notes that the instructions to some forms, for example, the instructions for filing an amended Report of Foreign Bank and Foreign Financial Accounts (TDF.90-22.1), direct the filer to attach copies of previously filed reports to the corrected or amended forms. According to the notice, copies of previously filed reports should not be attached to a corrected or amended form. In fact, as of December 1, 2011, FinCEN will not accept corrected or amended forms that include attachments. FinCEN will require corrections submitted in this fashion to be resubmitted using the updated instructions.

FinCEN is in the process of revising the instructions on all of its BSA forms to reflect this updated process. To view specific correction or amendment instructions, refer to FinCEN's "Forms" webpage and select a specific form type, at [http://www.fincen.gov/forms/bsa\\_forms/](http://www.fincen.gov/forms/bsa_forms/)

Financial institutions and others that use the BSA E-filing system should note that no changes have been made to the instructions pertaining to e-filing corrections and amendments.

### IMPORTANT UPCOMING DATES AND CHANGES TO ATM ACCESSIBILITY UNDER THE 2010 ADA STANDARDS

The Department of Justice (DOJ) revised its ADA Standards for Accessible Design under the Americans with Disabilities Act on September 15, 2010 (the "2010 Standards"). The 2010 Standards generally became effective on March 15, 2011, with March 15, 2012 as an important date for certain provisions as discussed below. Two important changes made by the 2010 Standards with respect to the accessibility of automated teller machines (ATMs) include new requirements for communication-related elements of ATMs which went into effect March 15, 2011, as well as new height and reach specifications



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which may require compliance under certain conditions by March 15, 2012. Only one ATM at a location is required to comply with the 2010 Standards, however, interior and exterior ATMs are considered to be separate locations. Additionally, ATMs that are designated to be accessible to individuals with disabilities must provide the same functions as provided by inaccessible ATMs.

**2010 Height and Reach Standards.** The 2010 Standards have very specific requirements for the height and reach specifications of the operable parts of ATMs. The DOJ requires compliance with the height and reach requirements under the 2010 Standards by March 15, 2012, unless the safe harbor discussed below applies or compliance is not “readily achievable.” Under the safe harbor, an ATM that is compliant with the 1991 Standards before March 15, 2011 may not have to be modified to comply with 2010 Standards on or after March 15, 2012, unless an “alteration” (defined below) is later made to the ATM. “Readily achievable” is defined as easily accomplishable and able to be carried out without much difficulty or expense. The test for readily achievable involves consideration of five factors which essentially consider the nature and cost to comply, and the financial resources of the individual branch and the bank as a whole.

“Alteration” is defined as a change to a facility that affects or could affect the usability of the facility or any part thereof. The DOJ provides examples of alterations which include remodeling, renovation, changes or rearrangements in structural parts or elements. However, changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility. An alteration to an ATM made after March 15, 2012, functions as a trigger which requires an ATM to be brought up to compliance with the 2010 Standards to the “maximum extent feasible,” even if the ATM was under the safe harbor and already compliant with the 1991 Standards.

**Communication-related Elements.** Communication-related elements have been defined by the DOJ as auxiliary aids or services, which includes methods to assist individuals who are sight or hearing impaired. Some specific requirements for ATMs under the 2010 Standards include: speech output devices, Braille instructions to initiate speech output, specific display screen requirements, and tactilely discernible input controls, numeric keys, and function keys. Compliance, however, is not required if the institution can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or would result in an “undue burden,” *i.e.*, significant difficulty or expense. Given the nature of ATMs, in most cases the likely applicable exception would be “undue burden.” To qualify for the “undue burden” exception the DOJ provides five factors which are the same factors considered for “readily achievable.” It is important to note that communication-related elements of ATMs are not subject to the safe harbor.

**Penalties.** The ADA allows for civil suits by individuals and suits by the attorney general. If an individual brings a lawsuit, the ADA allows for injunctive relief (*e.g.*, an order to comply) and damages authorized by state law, which in California is limited to three times the actual damages, but no less than \$4,000. The court may award attorney fees as well. For suits by the attorney general, in addition to injunctive relief, the court may award any other relief it deems appropriate which includes monetary damages to those injured, but not punitive damages. The court may also assess a “civil penalty” not to exceed \$55,000 for the first violation and \$110,000 for subsequent violations. Additionally, non-compliance with the ADA can create difficult public relations problems for financial institutions.

We will discuss the 2010 ADA Standards as they impact ATMs at the January BCG Monthly Telephone Briefing, which will be held on Friday, January 20, 2012.