DEPARTMENT OF THE TREASURY
31 CFR Part 103

Financial Crimes Enforcement Network; Interpretive Release 2004–1—Anti-Money Laundering Program Requirements for Money Services Businesses With Respect to Foreign Agents or Foreign Counterparties

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

ACTION: Final rule; interpretive release.

SUMMARY: This Interpretive Release sets forth an interpretation of the regulation requiring Money Services Businesses that are required to register with FinCEN to establish and maintain anti-money laundering programs. Specifically, this Interpretive Release clarifies that the anti-money laundering program regulation requires such Money Services Businesses to establish adequate and appropriate policies, procedures, and controls commensurate with the risk of money laundering and the financing of terrorism posed by their relationship with foreign agents or foreign counterparties of the Money Services Business.


FOR FURTHER INFORMATION CONTACT: Office of Regulatory Policy and Programs Division, 1–800–800–2877, Office of Chief Counsel (703) 905–3590 (not a toll free number).

SUPPLEMENTARY INFORMATION: Section 5318(h) of the Bank Secrecy Act, which is codified in subchapter II of chapter 53 of title 31, United States Code, requires every financial institution to establish an anti-money laundering program. The Bank Secrecy Act regulations define financial institution to include money service businesses. On April 29, 2002, FinCEN issued interim final rules—31 CFR 103.125—concerning the application of the anti-money laundering program requirement to money services businesses. 67 FR 21114.

List of Subjects in 31 CFR Part 103
Authority delegations (government agencies), bank, banking, currency, investigations, reporting and recordkeeping requirements.

Department of the Treasury
31 CFR Chapter I

Authority and Issuance
For the reasons set forth in the preamble, part 103 of title 31 of the Code of Federal Regulations is amended as follows:

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

1. The authority citation for part 103 continues to read as follows:


2. Part 103 is amended by adding a new appendix C to read as follows:

APPENDIX C TO PART 103—INTERPRETIVE RULES

Release No. 2004–01

This Interpretive Guidance sets forth our interpretation of the regulation requiring Money Services Businesses that are required to register with FinCEN to establish and maintain anti-money laundering programs. See 31 CFR 103.125. Specifically, this Interpretive Guidance clarifies that the anti-money laundering program regulation requires Money Services Businesses to establish adequate and appropriate policies, procedures, and controls commensurate with the risks of money laundering and the financing of terrorism posed by their relationship with foreign agents or foreign counterparties of the Money Services Business.¹

Under existing Bank Secrecy Act regulations, we have defined Money Services Businesses to include five distinct types of financial services providers and the U.S. Postal Service: (1) Currency dealers or exchangers; (2) check cashers; (3) issuers of traveler’s checks, money orders, or stored

¹ This Interpretive Guidance focuses on the need to control risks arising out of the relationship between a Money Service Business and its foreign counterparty or agent. Under existing FinCEN regulations, only Money Service Business principals are required to register with FinCEN, and only Money Service Business principals establish the counterparty or agency relationships. 31 CFR 103.41. Accordingly, this Interpretive Guidance only applies to those Money Service Businesses required to register with FinCEN, that is, only those Money Service Businesses that may have a relationship with a foreign agent or counterparty.
value; (4) sellers or redeemers of traveler’s checks, money orders, or stored value; and (5) money transmitters. See 31 CFR 103.11(uu). With limited exception, Money Services Businesses are subject to the full range of Bank Secrecy Act regulatory controls, including anti-money laundering program requirements, suspicious activity and currency transaction reporting rules, and recordkeeping rules.

Many Money Services Businesses, including those that operate through a network of agents, operate through a system of agents both domestically and internationally. We estimate that a substantial majority of all cross-border remittances by money transmitters are conducted using this model. Other Money Services Businesses may operate through more informal relationships, such as the trust-based hawala system. Regardless of the form of the relationship between a Money Services Business and its foreign agents or counterparties, Money Services Business transactions generally are initiated by customers seeking to send or receive funds, in the form of the relationship between a Money Services Business to execute the transactions; the Money Services Business does not unilaterally determine the recipient of its products or services. Although the customer can use the Money Services Business’ services, the customer does not typically establish an account relationship with the Money Services Business. The focus of this Interpretive Guidance is the establishment of, and ongoing relationship between, a Money Services Business and its foreign agent or foreign counterparty that facilitates the flow of funds cross-border into and out of the United States or other financial systems, see FinCEN www.fincen.gov.

The Cross-Border Flow of Funds through Money Services Businesses and Associated Risks

Ensuring that financial institutions based in the United States establish and apply adequate and appropriate policies, procedures, and controls in their anti-money laundering compliance programs to protect the international gateway to the U.S. financial system is an essential element of the Bank Secrecy Act regulatory regime. This Interpretive Guidance forms a part of our comprehensive anti-money laundering program. The goal is to ensure that entities facilitate the flow of illicit funds, or the flow of funds from legitimate sources to persons seeking to use those funds for illicit purposes, through such relationships.

The money laundering or terrorist financing risks associated with foreign agents or counterparties are similar to the risks presented by domestic agents of Money Services Businesses. For example, the foreign agent of the domestic Money Services Business may have lax anti-money laundering policies, procedures, and internal controls. Our review of a Money Services Business, and in addition to the filing of suspicious activity reports, led to the termination of the relationship of the Money Services Business with the agent.

The cross-border nature of anti-money laundering programs is evident in the fact that some activities involving illicit activity may not be detected by the Money Services Business or its foreign agents or counterparties to facilitate the flow of funds into and out of the United States. The program must be aimed at facilitating the flow of funds into and out of the United States. The program must be aimed at facilitating the flow of funds into and out of the United States or other financial systems, see FinCEN www.fincen.gov.

The programs of Money Services Businesses must include risk-based policies, procedures, and controls in their anti-money laundering and suspicious activity reporting programs reasonably designed to prevent the Money Services Business from being used to facilitate money laundering and the financing of terrorist activities. The program must be commensurate with the risks posed by the location, size, nature, and volume of the financial services provided by the Money Services Business. Additionally, the program must incorporate policies, procedures, and controls reasonably designed to assure compliance with the Bank Secrecy Act and implementing regulations.

With respect to Money Services Businesses that utilize foreign agents or counterparties, a Money Services Business’ anti-money laundering program must include risk-based policies, procedures, and controls designed to identify and minimize money laundering and terrorist financing risks associated with foreign agents and counterparties that facilitate the flow of funds into and out of the United States. The program must be aimed at 4 FinCEN previously interpreted 31 CFR 103.125(a) to impose a similar obligation on a money transmitter with respect to its domestic agents. See Matter of Western Union, No. 2003–3 (Mar. 6, 2003) (www.fincen.gov).
preventing the products and services of the Money Services Business from being used to facilitate money laundering or terrorist financing through these relationships and detecting the use of these products and services for money laundering or terrorist financing by the Money Services Business or agent. Relevant risk factors may include, but are not limited to:

- The foreign agent or counterparty’s location and jurisdiction of organization, chartering, or licensing. This would include considering to which jurisdiction is internationally recognized as presenting a greater risk for money laundering or is considered to have more robust anti-money laundering standards.
- The ownership of the foreign agent or counterparty. This includes whether the owners are known, upon reasonable inquiry, to be associated with criminal conduct or terrorism. For example, have the individuals been designated by Treasury’s Office of Foreign Assets Control as specially Designated Nationals or Blocked Persons (i.e., involvement in terrorism, drug trafficking, or the proliferation of weapons of mass destruction)?
- The extent to which the foreign agent or counterparty is subject to anti-money laundering requirements in its jurisdiction and whether it has established such controls.
- Any information known or readily available to the Money Services Business about the foreign agent or counterparty’s anti-money laundering record, including public information in industry guides, periodicals, and major publications.
- The nature of the foreign agent or counterparty’s business, the markets it serves, and the extent to which its business and the markets it serves present an increased risk for money laundering or terrorist financing.
- The types and purpose of services to be provided to, and anticipated activity with, the foreign agent or counterparty.
- The nature and duration of the Money Services Business’ relationship with the foreign agent or counterparty.

Specifically, a Money Services Business’ anti-money laundering program should include procedures for the following:

1. Conduct of Due Diligence on Foreign Agents and Counterparties

Money Services Businesses should establish procedures for conducting reasonable, risk-based due diligence on potential and existing foreign agents and counterparties to help ensure that such foreign agents and counterparties are not themselves complicit in illegal activity involving the Money Services Business’ products and services, and that they have in place appropriate anti-money laundering controls to guard against the abuse of the Money Services Business’ products and services. Such due diligence must, at a minimum, include reasonable procedures to identify the owners of the Money Services Business’ foreign agents and counterparties, as well as to evaluate, on an ongoing basis, the operations of those foreign agents and counterparties and their implementation of policies, procedures, and controls reasonably designed to help assure that the Money Services Business’ products and services are not subject to abuse by the foreign agent’s or counterparty’s customers, employees, or contractors. The extent of the due diligence required will depend on a variety of factors specific to such agent or counterparty. We expect Money Services Businesses to assess such risks and perform due diligence in a manner consistent with that risk, in light of the availability of information.

2. Risk-based Monitoring of Foreign Agents or Counterparties

In addition to the due diligence described above, in order to detect and report suspected money laundering or terrorist financing, Money Services Businesses should establish procedures for risk-based monitoring and review of transactions from, to, or through the United States that are conducted through foreign agents and counterparties. Such procedures should also focus on identifying material changes in the agent’s risk profile, such as a change in ownership, business, or the regulatory scrutiny to which it is subject.

The review of transactions should enable the Money Services Business to identify and, where appropriate, report as suspicious such occurrences as: instances of unusual wire activity, bulk purchases or sales of sequentially numbered instruments, multiple purchases or sales that appear to be structured, and illegible or missing customer information. Additionally, Money Services Businesses should establish procedures to assure that their foreign agents or counterparties are effectively implementing an anti-money laundering program and to discern obvious breakdowns in the implementation of the program by the foreign agent or counterparty.

Similarly, money transmitters should have procedures in place to enable them to review foreign agent or counterparty activity for signs of structuring or unnecessarily complex transmissions through multiple jurisdictions that may be indicative of layering. Such procedures should also enable them to discern attempts to evade identification or other requirements, whether imposed by applicable law or by the Money Services Business’ own internal policies. Activity by agents or counterparties that appears aimed at evading the Money Services Business’ own controls can be indicative of complicity in illicit conduct; this activity must be scrutinized, reported as appropriate, and corrective action taken as warranted.

3. Corrective Action and Termination

Money Services Businesses should have procedures for responding to foreign agents or counterparties that present unreasonable risks of money laundering or the financing of terrorism. Such procedures should provide for the implementation of corrective action on the part of the foreign agent or counterparty or for the termination of the relationship with any foreign agent or counterparty that the Money Services Business determines poses an unacceptable risk of money laundering or terrorist financing, or that has demonstrated systemic, willful, or repeated lapses in compliance with the Money Services Business’ own anti-money laundering procedures or requirements.

While Money Services Businesses may already have implemented some or all of the procedures described in this Interpretive Guidance as a part of their anti-money laundering programs, we wish to provide a reasonable period of time for all affected Money Services Businesses to assess their operations, review their existing policies and programs for compliance with this Advisory, and implement any additional necessary changes. We will expect full compliance with this Interpretive Release within 180 days.

Finally, we are mindful of the potential importance that this Interpretive Guidance may have on continuing efforts to bring informal value transfer systems into compliance with the existing regulatory framework of the Bank Secrecy Act. Experience has demonstrated the challenges in securing compliance by, for instance, hawalas and other informal value transfer systems. Further specification of Bank Secrecy Act compliance obligations carries with it the risk of driving these businesses underground, thereby undermining our ultimate regulatory goals. On balance, however, we believe that outlining the requirements for dealing with foreign agents and counterparties, including informal networks, is appropriate in light of the risks of money laundering and the financing of terrorism.

William J. Fox,
Director.

[FR Doc. 04–27287 Filed 12–13–04; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD001–04–146]

Drawbridge Operation Regulations: Merrimack River, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the drawbridge operation