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July 7, 2006

Via Email

Financial Crimes Enforcement Network
P.O. Box 39,
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Re: Provision of Banking Services to MSBs
RIN 1506-AA85
71 *Federal Register* 12308 (March 10, 2006) and
71 *Federal Register* 27980 (May 15, 2006)

To the Staff of the Regulatory Policy and Programs Division:

The American Bankers Association (ABA) files this letter in response to the solicitation of comments published as an advance notice of proposed rulemaking by the Financial Crimes Enforcement Network (FinCEN) on March 10, 2006 as part of its ongoing effort to address, in the context of the Bank Secrecy Act (BSA), the issue of access to banking services by money services businesses (MSBs.) We also offer the testimony of Wayne A. Abernathy before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit dated June 21, 2006.[1]

The American Bankers Association, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks--makes ABA the largest banking trade association in the country.

Summary of ABA Recommendations

Although FinCEN and the federal banking agencies attempted to redress the trend toward discontinuance of bank services to MSBs attributable to unintended or uncertain regulatory expectations with respect to BSA/AML obligations of insured banks vis-à-vis their MSB customers, the Interagency Interpretive Guidance on Providing Banking Services to Money Services Businesses Operating in the U.S. (the Guidance) and the Interagency BSA/AML Examination Manual (the Manual) have not achieved that goal.

[1] A copy of Mr. Abernathy's testimony is attached as Exhibit A. It is also available at http://www.aba.com/NR/rdonlyres/C029EFA2-D64A-419E-BC3C-6B3D69728977/43488/ABATestimonyOnMSBJune212006.pdf

ABA believes this shortcoming is fundamentally a failure to match the policy pronouncement that insured banks are "not expected ...to act as the *de facto* regulators of the money services business industry" with the standards applied by examiners following the Guidance or the Manual. In order to correct this misalignment, ABA recommends the following steps:

- Expressly state in the Guidance and the Manual that the federal banking agencies rely on FinCEN, the state licensing authorities and the Internal Revenue Service (IRS) to regulate and supervise the BSA/AML obligations of MSBs.
- Simplify the Guidance and eliminate any due diligence statement that suggests that a bank review or evaluate the policies, controls, training or testing an MSB employs to comply with its BSA/AML obligations.
- Recognize that most MSBs serving low-income or immigrant markets are generally lower risk for money laundering or terrorism financing.
- Decriminalize the compliance obligations of banks that serve their communities' MSBs in good faith.
- Conduct joint industry/agency training to promote more consistent application of the Guidance and the Manual.

ABA expands on these recommendations below:

<u>Stress that banking agencies rely on MSB direct regulators for assuring an MSB's BSA compliance</u>

As Julie Williams stated as Acting Comptroller a year ago with respect to her agency's role vis-à-vis national banks, "the OCC does not supervise MSBs and does not expect national banks to supervise their MSB customers. Rather, it is our job to assess the systems and controls that banks employ to comply with the BSA...."[2] If it is the job of the federal banking agencies <u>to assess the systems and controls that banks employ</u> to comply with the BSA—and it is—then it follows that it is the job of the licensing states, FinCEN and the IRS—the MSBs' direct regulators—<u>to assess the systems and controls that MSBs employ</u> to comply with the BSA.

The federal banking agencies must make it clear to their own examiners and to the banking industry that they rely on FinCEN, the states that license MSBs and the IRS to regulate, supervise, examine and enforce against MSBs whatever BSA/AML compliance obligations they must observe. This should be expressly stated in the Guidance and the Manual and underscored in any internal agency directions to examiners and their managers. Unless this Washington policy position is absorbed into the examiner culture and examiners are assured that exercising their judgment consistent with the policy is supported by their superiors, no real change will result at the field level.

It is increasingly clear that the IRS and the states have taken concrete steps to oversee MSB compliance with their BSA/AML obligations. The April

[2] Testimony of Julie L. Williams, Acting Comptroller of the Currency, Before the Committee on Banking, Housing and Urban Affairs of the U.S. Senate, April 26, 2005.

announcement that IRS entered into information-sharing agreements with 33 states and Puerto Rico covering BSA compliance among MSBs illustrates that the rightful regulators of the money services industry are mobilized to leverage their resources for enforcing registration, cash transaction reporting and suspicious transaction reporting obligations. The IRS has also expanded their BSA examination capacity with the dedication of more than 300 agents to the task of evaluating MSB compliance. If any gap remains in MSB oversight it is not for the banks to fill, but for the state and federal governments to address by applying direct MSB supervision and by appropriating the necessary regulatory agency resources.

To underscore that banks do not have an MSB supervisory role, ABA recommends that the Guidance make clear that banks are not under an obligation to evaluate or report (via a SAR or otherwise) on the quality of an MSB's AML compliance program.

Simplify the Guidance and eliminate expectations to review MSB AML Programs

Part I of the Guidance should clearly state that the baseline expectations applicable to MSB accounts are limited to normal business customer identification, licensing and/or registration status, and appropriate monitoring of the MSB in accordance with the institution's risk-based AML controls for its business customers. ABA urges FinCEN to provide an on-line system to enable rapid confirmation of the registration status of MSBs and to share its capacity with the states, or facilitate state systems, to enable on-line verification of state licensing of MSBs.

In addition, a requirement for a bank to file a SAR when coming across an unlicensed or unregistered MSB should be satisfied by filing a single report. It is up to the government agencies involved to take appropriate action when a SAR for non-licensing or non-registration occurs, and the burden should not be shifted to the banks to police the licensing or registration requirements after making an initial SAR filing. It should not be a requirement for the bank to continue filing SARs in the absence of evidence of other suspicious behavior or criminally questionable conduct on the part of the MSB.

Part II should be extensively re-written. Currently this part of the Guidance applies to supposedly high risk MSBs a checklist of "actions as part of an appropriate due diligence review or risk assessment of a money services business seeking to establish an account relationship." With the possible exception of on-site visits, each of the suggested actions is a "review" intended to *evaluate the operation* of the MSB's anti-money laundering program. Such expectations are plainly inconsistent with the Guidance's commitment not to hold banks responsible for their customers' compliance with BSA. After all, the FAQs issued with the Guidance denied that any educational obligation was being imposed on banks vis-à-vis their MSB customers and went on to state unequivocally that "the Bank Secrecy Act does not require, and neither FinCEN nor the Federal Banking Agencies expect, banking organizations to serve as the *de facto* regulators of the money services businesses for which they maintain accounts." It follows that the due diligence elements recited in Part II of the Guidance over-commit banks to be *de facto* regulators, and therefore, consistent with the separation of supervisory responsibility for bank BSA compliance from MSB BSA compliance, they should be eliminated.

As with other regulated financial services customers with supposedly higher risk operations, any supervisory expectation that a bank consider whether an MSB operates consistent with its BSA obligations should be satisfied by a certification executed by the MSB. This certification would recite the MSB's implementation of the components of an AML compliance program appropriate to its own risk profile.

Obtaining an MSB's self-certification should suffice as the sole due diligence expected from banks regarding an MSB customer's BSA compliance program. FinCEN and the federal banking agencies should not impose nor imply any more stringent role for banks in connection with the AML programs of any of its MSB customers than one satisfied by MSB self-certification.[3]

Finally, it must be expressly stated and stressed in the Guidance that banks have no responsibility to monitor the conduct or transaction activity of an MSB's own customers.

Re-balance the risk attributes of MSBs serving emerging markets

Treasury and the banking agencies have repeatedly promoted the importance of serving all segments of the marketplace—including some of those "hard to reach" markets in which MSBs have been recognized as effective competitors, such as in the provision of remittance services. For example, in Treasury testimony before the House of Representatives: "The fact is that there are few domestic, artificial barriers to competition in remittances. Workers can send cash through the mail, they can send a money order, they can use a money transfer business, they can use a bank or other financial institution. We should not, however, take this competition for granted. It would be easy for well-intentioned, but ill-advised, government initiatives in this area to hurt competition. It is important that we do not raise the costs of providing remittance services as one of many products. For example, grocery stores and convenience stores offer the services. We must avoid raising compliance costs to the point where these providers decide to discontinue the service."[4]

It has also been noted by then Governor Bernanke in a similar context that "in some cases nonbanks can provide better service or greater convenience than banks can."[5] In addition, the Federal Reserve Bank of Boston reported that "the heavy use of MTCs [money transfer companies] by remittance senders stems from MTC's convenience and reliability. In the U.S., MTCs have a strong presence in immigrant communities and are often located in grocery stores and other convenient places. Most are open evenings and weekends....Perhaps more important than convenience,

[3] ABA believes that suitable certification forms can be developed in the normal course of business between banks and MSBs or with the assistance of their respective association representatives.

[4] Assistant Secretary Wayne Abernathy's Testimony on Remittances to House Financial Services Committee, October 1, 2003, JS-773, available at http://www.treas.gov/press/releases/js773.htm.

[5] Federal Reserve Board Governor Ben S. Bernanke, Financial Access for Immigrants: The Case of Remittances, Address at the Financial Access for Immigrants: Learning from Diverse Perspectives conference of the Federal Reserve Bank of Chicago (April 16, 2004) http://www.federalreserve.gov/boarddocs/speeches/2004/200404162/default.htm

MTCs have built a reputation for fast, reliable service."[6] Furthermore, the U.N. Conference on Trade and Development (UNCTAD) has also addressed regulatory impacts on the availability of remittance services, noting that "[t]he international community can best address the channels through which remittances are transmitted by helping construct a financial architecture that reduces the transaction costs of intermediation and increases its transparency."[7]

FinCEN and the federal banking agencies should consider operationalizing these policy endorsements for serving under-served or immigrant markets by including reliable MSBs that focus on these groups among the ranks of low-risk activities recited in the Guidance.

In addition, until greater geographic precision is applied, the agencies should eliminate from the list of high risk red flags the factor that the MSB is located in an area designated as a High Risk Money Laundering and Related Financial Crimes Area or a High-Intensity Drug Trafficking Area. These designations encompass large geographic areas within which many financial services customers actually live, work, worship, and otherwise spend most of their time. Are these people themselves high risks just because of where they live, and if so, is their risk to be reduced only by finding another neighborhood to live in? Moreover, these imprecise geographic designations visit an ill-defined burden in the urban areas of the East, Gulf and West Coasts, even though banks serving MSBs in these markets are themselves directly familiar with the characteristics of criminal conduct that can be encountered in such designated areas and are able to distinguish those activities among their customers without making an indiscriminate assignment of "high risk" to their entire customer base.

The factor of offering multiple types of money services products should also be eliminated from among the high risk indicators. As the Boston Fed Remittance Study notes, among the conveniences afforded by money transmitters is that "many provide one-stop shopping by offering other financial services such as check cashing and money orders."[8] Monitoring one-stop, multiple service MSBs can be adequately addressed by banks employing techniques suitable to the compound operations without characterizing the MSB as "high risk." The "new business" factor in the Guidance should also be eliminated. Being a new business does not warrant an automatic assignment to a high risk level independent of the nature of its underlying operations and the extent to which the bank may have other familiarity with the owners or managers of the business.

ABA recommends that all of the above indicators be changed to reduce misperceived risk and to convey a more accurate baseline for evaluating MSB AML risks going forward.

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[6] International Remittances: Information for New England Financial Institutions, Mamie Marcus, Federal Reserve Bank of Boston, July 2005 (Boston Fed Remittance Study) at p. 7. http://www.aba.com/aba/documents/news/remittances.pdf Although the study notes the relatively high fees charged by some MSBs, the market since the study has vindicated the notion that competition would drive prices down.

[7] Devesh Kapur, G-24 Discussion Paper, United Nations Conference on Trade and Development (UNCTAD), *Remittances: The New Development Mantra?*, No. 29, April 2004.

[8] Boston Fed Remittance Study *Id.* at p. 7.

Finally, ABA encourages FinCEN to consider modifying its definition of MSBs to exclude those businesses that exceed the $1,000 threshold by cashing payroll or government benefit checks. Currently, 31 C.F.R. 103.11(uu)(2) encompasses all persons cashing checks in an amount greater than $1,000 for any person in a day in one or more transactions. Yet many people take advantage of the convenience of local stores and nearby businesses to cash their payroll or benefit checks that often exceed $1,000. These transactions are virtually risk free for money laundering and should not trigger a registration requirement or treatment as an MSB for purposes of the BSA regulations.

Decriminalize bank compliance obligations for serving MSBs

As Acting Comptroller Williams noted in her testimony last year, state and municipal prosecution of banks for serving MSBs whose customers have engaged in money laundering have contributed to bank reluctance to continue banking MSBs. Prosecutors who pursue banks for the activity of a customer's customer ignore the responsibility of their own state agencies to regulate effectively the AML compliance of their licensed MSBs and their agent networks. ABA urges state regulators to place the onus for MSB AML compliance on their licensees and not criminalize the efforts of banks that in good faith and with reasonable diligence provide accounts to enable their communities' MSBs to conduct business. If zealous prosecutors blame banks for the failure of state licensing oversight, the risks of unwarranted criminal litigation and unfounded injury to reputation will adversely impact a bank's risk assessment for providing account services to MSBs and affect their willingness to take on MSBs as customers.

ABA believes that the state regulatory bodies are well-positioned to oversee MSB anti-money laundering compliance without the intervention of criminal sanctions against banks for the actions of the MSBs or their customers. Accordingly, ABA urges FinCEN, as Treasury's outreach agency to law enforcement, to work with state regulators, state attorneys general and county district attorneys to strengthen MSB enforcement at the source and to leave bank compliance with BSA to the federal banking agencies or their state chartering authorities.

Conclusion

In the past several years, banks have made enormous strides in improving BSA/AML compliance and enhancing their detection and reporting of suspicious transactions. Yet despite these advances, federal regulatory pressures make serving licensed MSBs less and less attractive to banks on a burden/benefit basis and jeopardize long standing business relationships that are much better controlled for AML risk today than they were when those account relationships were started. We can only undermine these accomplishments by driving a regulatory wedge between banks and legitimate MSBs that threatens to force large segments of America's financial services customers into the hands of informal, poorly monitored and often illicit mechanisms. Such an outcome would be anathema to the goals of the Bank Secrecy Act and our national anti-money laundering policy.

ABA believes the key to restoring bank confidence in safely and compliantly serving MSB customers is a significant simplification and revision of the Guidance. Only by drawing brighter risk distinctions and more directly linking them to well-defined and simplified due diligence steps will bankers have a reasonable basis for a more favorable consideration of whether to serve MSBs. The fundamental elements of such a redraft are:

- A direct statement in the Guidance and the Manual that the federal banking agencies rely on FinCEN, the state licensing authorities and the IRS to regulate and supervise the BSA/AML obligations of MSBs—and that it is not the role of the banks to review MSBs' AML programs.
- A more accurate identification of genuine levels of risk presented by MSBs that serve emerging markets rather than a blanket designation of all such MSBs as high risks.
- A firm endorsement of self-certified MSB AML questionnaires, by those few MSBs considered high risk, as meeting banking agency supervisory expectations of the due diligence responsibilities of banks.
- A strong statement that federal and state banking regulators have primary jurisdiction over a bank's BSA obligations in connection with serving MSBs and that state or local prosecution of money laundering by an MSB's customer is not grounds for law enforcement to take BSA enforcement action against banks that serve community MSBs in good faith and are subject to banking agency regulatory remedies.

ABA further encourages FinCEN and the banking agencies to promote joint agency/industry training on any revised Guidance or Manual to reinforce the modifications and underscore the supervisory policy intent of shifting MSB oversight to their direct regulators and to redress the burden/benefit imbalance that has adversely affected bank service to MSBs.

ABA urges FinCEN and the federal banking agencies to make the above-recommended actions priorities, and to help stem further unwarranted disruption of banking services to legitimate MSBs.

Respectfully submitted,

Richard R. Riese
Director, Center for Regulatory Compliance

EXHIBIT A

Testimony of

Wayne A. Abernathy

On Behalf of the

AMERICAN **BANKERS** ASSOCIATION

Before the

Subcommittee on Financial Institutions and Consumer Credit

Of the

Committee on Financial Services

United States House of Representatives

On

"Bank Secrecy Act's Impact on Money Services Businesses"

June 21, 2006

AMERICAN
BANKERS
ASSOCIATION ®

Testimony of Wayne A. Abernathy

on behalf of the

American **Bankers** Association

before the

Subcommittee on Financial Institutions and Consumer Credit

Of the

Committee on Financial Services

United States House of Representatives

June 21, 2006

Mr. Chairman and members of the Committee, I am Wayne Abernathy, Executive Director for Financial Institution Policy and Regulatory Affairs with the American Bankers Association (ABA). ABA appreciates this opportunity to discuss how the recent enforcement and supervisory priorities of the regulatory agencies with respect to the Bank Secrecy Act has impacted the banking industry's relationships with money services businesses (MSBs).

ABA, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country.

ABA and our members continue to work closely with the Financial Crimes Enforcement Network (FinCEN), our supervisory agencies and other government authorities in the challenging area of detecting and reporting the myriad financial crimes that involve fraud, identity theft, money laundering and terrorist financing. Despite our mutual support for cooperation, there are a number of concerns regarding how to achieve compliance. These problems are illustrated by the current challenges experienced by banks seeking to serve MSBs while meeting regulatory expectations for Bank Secrecy Act (BSA) and anti-money laundering (AML) due diligence.

Recent Developments

Historically, virtually all banks have had customer relationships with businesses engaged in a range of money services. However, the general regulatory approach toward bank BSA/AML compliance, particularly demonstrated in its application toward MSB customers, has lately adversely impacted those relationships by changing the cost/benefit calculus of maintaining MSB accounts.

Increased costs from the regulatory oversight of MSB activity have caused all banks to take a harder look at the risks and benefits of serving MSBs. In many situations banks have raised fees to cover the added compliance costs of serving MSBs. Some banks have discontinued accounts for MSB customers after a case-by-case analysis of their perceived money laundering regulatory risk. Finally, a few banks have re-evaluated their business strategies and concluded that serving MSBs in general is not an economically attractive option given the bank's reputation risk or regulatory risk tolerance.

The result, of course, while predictable has been unfortunate for all parties. Banks lose customers, customers lose access to banking services, and some financial activities move out of the supervised financial mainstream. It will take supervisory, regulatory, and perhaps even legislative change to redress this. The good news is, I believe, that all involved are earnestly engaged in the effort to find solutions to this situation.

Last year, FinCEN and the banking agencies began the attempt to redress the trend toward discontinuance of bank services to MSBs, particularly where attributable to unintended or uncertain regulatory expectations with respect to BSA and AML obligations of insured banks vis-à-vis their MSB customers. An important step was issuing the Interagency Interpretive Guidance on Providing Banking Services to Money Services Businesses Operating in the U.S. (the Guidance) and the Interagency BSA/AML Examination Manual (the Manual). Despite all parties' good intentions in developing these resources, the Guidance and the Manual have fallen short of their goal to stem bank discontinuance of MSB accounts. They were an essential part of the process, but more needs to be done.

ABA believes that more success is needed to match the policy pronouncement that insured banks are "not expected …to act as the *de facto* regulators of the money services business industry" with the specific standards recited in the Guidance and interpreted by examiners. In order to strengthen this alignment, ABA recommends the following steps:

- Announce that the federal banking agencies rely on FinCEN, the state licensing authorities, and the Internal Revenue Service (IRS) to regulate and supervise the BSA/AML obligations of MSBs and amend the Guidance and the Manual accordingly;

- Recognize that licensed MSBs that serve low-income or emerging markets in their communities are generally not high risk and deserve basic commercial customer due diligence;
- Decriminalize the compliance obligations of banks that serve their communities' MSBs in good faith; and
- Initiate joint industry/government training of bankers, MSBs and examiners on BSA/AML obligations, procedures and supervisory scenarios.

MSBs, Banks, and Responsible Regulatory Oversight

In the Spring of last year, the cooperative efforts of industry and government representatives on the Bank Secrecy Act Advisory Group (BSAAG) and its subcommittees on examinations and non-bank financial institutions resulted in interagency guidance intended to clarify regulatory expectations for banks conducting BSA due diligence for their customers who were MSBs. The hope was that the Guidance would enable banks to develop appropriate BSA risk assessments of MSB activity without imposing regulatory burdens that would discourage banks from serving such customers.

Unfortunately, the Guidance has not provided a firm enough separation between low and high risk profiles and their corresponding due diligence expectations to achieve its intended ends.

Rather, the banks' experiences with their internal auditors and their examiners have prompted the adoption of the high risk due diligence criteria as a minimum standard by most institutions serving MSBs. Although MSBs are only customers, <u>not</u> agents of banks, this distinction is often lost when applying the Guidance. The resulting level of regulatory impact is often excessive and unwarranted by the true risk profile of the MSBs, but it is frequently deemed necessary for those banks still serving MSBs in order to avoid supervisory criticism.

Some institutions have discontinued serving particular MSBs or large segments of the MSB sector. They have evaluated their business options in light of the costs of performing extensive due diligence on MSB accounts and their exposure to the reputation risk derived from the threat of aggressive supervisory or enforcement activities, including those from local law enforcement officials. They have concluded that despite established relationships and proffers of elaborate MSB programs backed by extensive independent testing, the risks/costs outweigh the benefits of maintaining accounts that in many cases bring in relatively marginal revenues for the banks.

Reliance on the Responsible Regulatory Authorities Covering MSBs is the Key

As administrator of the Bank Secrecy Act, FinCEN establishes the BSA/AML regulatory requirements for all participants in the financial services industry. Each industry segment's respective supervisory agency is then responsible for overseeing compliance and undertaking enforcement. This division of regulatory responsibility can be key to apportioning the compliance obligations properly among the various industry participants and their regulators.

This is entirely consistent with the Frequently Asked Questions (FAQs) issued with the Guidance. The FAQs denied that any educational obligation was being imposed on banks with respect to their MSB customers and went on to state unequivocally that "the Bank Secrecy Act does not require, and neither FinCEN nor the federal banking agencies expect, banking organizations to serve as the *de facto* regulators of the money services businesses for which they maintain accounts."

It is increasingly evident that IRS and the states have taken concrete steps to oversee compliance by MSBs with their BSA/AML obligations. The recently announced milestone of IRS achieving information-sharing agreements with 33 states and Puerto Rico covering BSA compliance among MSBs illustrates that the rightful regulators of the money services industry are mobilized to leverage their resources for enforcing registration, cash transaction reporting, and suspicious transaction reporting obligations. The IRS has also expanded its BSA examination capacity with the dedication of significantly more agents to the task of evaluating MSB compliance. If any gap remains in MSB regulatory oversight, it is not for the banks to fill, but for the state and federal governments to address by applying direct MSB supervision and by appropriating the necessary regulatory agency resources.

The federal banking agencies must make it clear to their own examiners and to the banking industry that they rely on FinCEN, the states that license MSBs and the IRS to regulate, supervise, examine and enforce against MSBs whatever BSA/AML compliance obligations they must observe. This should be expressly stated in the Guidance and the Manual and underscored in any internal agency directions to examiners and their managers. Unless this Washington policy position is instilled in the examiner culture, and bank examiners are assured that exercising their judgment consistent with the policy is supported by their superiors, no supervisory differences will result at the field level, and current bank reluctance to serve MSBs will persist.

Amend Guidance and Manual to Reinforce Responsible Regulatory Oversight

The Guidance and the Manual must be amended to reflect and reinforce this reliance on the established federal/state supervisory regime. Currently, the Guidance recites a checklist of "actions as part of an appropriate due diligence review or risk assessment of a money services business seeking to establish an account relationship." With the possible exception of on-site visits, each of the suggested actions is a "review" intended to evaluate the operation of the MSB's anti-money laundering program. Each of these components rightfully belongs in the exclusive realm of the MSB's government regulator.

Such supervisory expectations are plainly inconsistent with the Guidance's commitment not to hold banks responsible for their customers' compliance with BSA. In addition, this degree of involvement could expose banks to liability for deficiencies in the compliance program of the MSBs, a position that no banker can feel comfortable occupying. It is inconsistent with good supervisory principles, which should rely upon parties being responsible for their own actions. It follows that the due diligence elements recited in Part II of the Guidance effectively require banks to be *de facto* regulators, and therefore these elements should be eliminated.

Permit Certified Questionnaire Responses to Satisfy Due Diligence Expectations

The bank's treatment of any MSB that actually deserves categorization as high risk should parallel that expected of other commercial customers in such a category by applying appropriate heightened monitoring to the MSB's own financial activity, not monitoring the activity of the MSB's customers. As with other regulated financial services' customers, any supervisory expectation that a bank consider whether an MSB operates consistent with its legal obligations should be able to be satisfied by a questionnaire executed, and certified to, by the MSB reciting its implementation of the components of an AML compliance program appropriate to its own risk profile.

ABA believes that suitable certification forms can be developed as part of the normal course of business between banks and high risk MSBs. Similar questionnaires, for example, have been developed and used by banks to ascertain the BSA compliance posture of foreign correspondent banks.

Obtaining such certification should serve as appropriate due diligence that supervisory agencies expect from banks concerning a high risk MSB's BSA compliance program. To do otherwise forces upon banks not only an unfunded mandate, but a mandate they are not able or legally deputized or authorized to enforce.

More Accurately Reflect the Risk Profile of Community MSBs

Our members know the importance of providing all legitimate customers, throughout all segments of society, with banking services. For low-income and emerging markets, simple check-cashing and financial transactions are essential financial products that consumers seek through MSBs as well as banks.

At current regulatory thresholds, many small businesses find themselves swept into the scope of check cashing by virtue of cashing payroll checks at their convenience stores, supermarkets and other similar community business locations. These so-called non-core MSBs have a low level of money laundering risk, but even in these instances the basic hurdles of registration or licensing and simple BSA controls are matters that impose significant compliance challenges often beyond their resources or expertise.

In addition to check-cashing, money transmitters are a common form of MSBs serving the emerging markets. Remittance flows are an important and stable source of funds for many countries and constitute a substantial part of financial inflows for countries with a large migrant labor force working abroad, financial flows that are usually much more successful in providing financial help to needy families than are government and international aid programs. Where there is a concern that remittance systems can be misused, surely the risk of misuse would be reduced if transfers were channeled through remittance systems that are part of the supervised financial mainstream.

To address the risks, a two-prong approach is evolving – one prong involves efforts by governments to encourage the use of formal systems (such as banks and licensed MSBs) by lowering the costs and increasing the access of users and recipients to the formal financial sector. Such efforts should concentrate on the reduction of artificial barriers such as unnecessary regulatory standards that impose costs ultimately borne by consumers.

The second prong includes initiatives by governments to implement clear, direct, and effective anti-money laundering standards for entities such as MSBs. These initiatives are progressing in the United States and, as we have heard from other witnesses, the MSB regulatory infrastructure is increasingly robust and effective.

An underlying challenge is that there exists in the United States and most other countries a large pool of individuals outside of the financial mainstream. Such individuals are often accustomed to using both formal (and regulated) financial institutions and informal (sometimes very "informal") financial services providers. Economic and social incentives that move this group towards "underground" financial services providers ultimately harm the interests of the individuals, of law-abiding financial services providers, and of the general public. As we can easily surmise, the underground financial services providers may service law-abiding persons as well as criminals. Thus, governmental actions that discourage people from entering banks and other depository institutions may have the effect of also making anti-money laundering goals far more difficult to achieve. Therefore, it is the view of the ABA that the current MSB-bank regulatory environment must change if we are to advance the goals of effectively serving particular market segments while reducing the risks of money laundering and terrorist financing.

FinCEN and the federal banking agencies should underscore their policy endorsements for bringing more people into the financial mainstream by including among the ranks of low-risk activities recited in the Guidance those MSBs that have effective programs that reach out to these individuals.

The banking industry certainly understands and appreciates the need to analyze the levels of risk involved with maintaining MSB relationships. Each bank must evaluate those risks and match them with their business capabilities and prospects. At times, banks will appropriately exit relationships due to the risk perceived with a particular MSB. This practice is consistent with the service relationships it has with any customer. At other times, banks may want to continue valued relationships. In either instance, the best decisions of each individual bank will be made when an MSB's BSA risk is fairly evaluated based on a true understanding of the underlying business operations and banking history of the customer and not skewed by a plethora of red tape and potential regulatory pitfalls when in reality there are low BSA/AML risks applicable to a substantial majority of established MSB customers.

ABA is preparing specific suggestions on modifying the current Guidance to delineate better the differences between low risk and high risk MSBs that it will submit as part of its comment letter in connection with the pending Advanced Notice of Proposed Rulemaking issued by FinCEN to address the issue of access to banking services by money services businesses.[1] We will be pleased to provide our suggestions to this subcommittee as well.

Decriminalize BSA Compliance

As then Acting Comptroller of the Currency Julie Williams noted in her Senate testimony last year, state and municipal prosecution of banks for serving MSBs when the customers of the MSBs have engaged in money laundering have contributed to bank reluctance to continue banking MSBs. Prosecutors who pursue banks for the activity of a customer's customer ignore the responsibility of their own state agencies to regulate effectively the AML compliance of their licensed MSBs and their agent networks. ABA urges state regulators to place the onus for MSB anti-money laundering compliance on their licensees and not criminalize the efforts of banks that in good faith and with reasonable diligence provide accounts to enable their communities' MSBs to conduct business. If zealous prosecutors blame banks for the failure of state licensing oversight, the risks of unwarranted criminal litigation and unfounded injury to reputation will adversely impact a bank's risk assessment for providing account services to MSBs—and those services will likely diminish.

[1] See, 71 Fed. Register 12308 (March 10, 2006.)

Frankly, ABA believes that the state regulatory bodies and their associations, such as the Conference of State Bank Supervisors and the Money Transmitters Regulatory Association, are well-positioned to oversee MSB BSA compliance without the intervention of criminal sanctions against banks. Accordingly, ABA urges FinCEN, as Treasury's outreach agency to law enforcement, to work with state regulators, state attorneys general and county district attorneys to strengthen MSB enforcement at the source and to reinforce the apportionment of BSA compliance oversight among federal and state authorities consistent with the regulatory responsibilities in a dual financial services system.

Conduct Joint Industry/Agency Training

ABA believes that consistency in implementing regulatory policy can be promoted by conducting joint industry/agency training. ABA has encouraged this type of initiative in prior testimony and urges its application in this instance. Placing bank staff, MSB agents and examiners in the same room to hear the same explanations and authorized interpretations helps ensure a consistent message consistently communicated. Having a mixed industry/agency audience work through supervisory case studies improves all participants' comprehension and judgment in applying available guidance. And, most importantly, it reinforces the teamwork approach that is likely to prove most successful in cutting off the flow of funds for criminal activities.

ABA offers to work with all involved to develop such joint training not only on the MSB guidance, but with respect to BSA compliance generally, or on any of its component topics.

Conclusion

In the past several years, both banks and money services businesses have made enormous strides in improving BSA/AML programs and enhancing their detection and reporting of suspicious transactions. Yet despite these advances, federal regulatory pressures continue to make serving licensed MSBs unattractive to banks on a cost/benefit basis and jeopardize long standing business relationships. As we build on the progress made, let us take the next steps to make the first steps effective. Neither banks, nor their customers, nor our BSA/AML efforts are served by driving a regulatory wedge between banks and legitimate MSBs, pushing large segments of America's economy into the hands of informal, poorly monitored, and often illicit payment mechanisms. Such an outcome should be anathema to the goals at the core of the Bank Secrecy Act and national anti-money laundering policy.

Mr. Chairman and members of the committee, ABA has been in the forefront of efforts to develop a strong public-private partnership to combat financial crime, including money laundering and terrorist financing. This partnership has achieved important successes, but we know that more can be accomplished. ABA will continue our support for these efforts and will contribute its constructive and specific suggestions to improve the regulatory process going forward, so that we can all focus more on stopping criminal activities and eliminate efforts that too often target legitimate businesses and their customers.