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Honorable James F. Sloan
Director
Financial Crimes Enforcement Network
2070 Chain Bridge Road, Suite 200
Vienna, VA 22182

Attention: Section 312 Regulations

Re: Comments of the Non-Bank Funds Transmitters Group to the Notice of Proposed Rulemaking -- Section 312 Regulations

Dear Director Sloan:

On May 30, 2002, the Department of the Treasury and FinCEN (the "agencies") published in the Federal Register a notice of proposed rulemaking (67 Fed. Reg. 37736 et seq.) to implement section 312 of the Patriot Act, "Special Due Diligence for Correspondent Accounts and Private Banking Accounts." The Non-Bank Funds Transmitters Group (the "Group") is composed of the leading national money services businesses ("MSBs"): Thomas Cook, Inc./Travelex; Travelers Express Company, Inc./MoneyGram Payment Systems, Inc.; Western Union Financial Services, Inc.; American Express Travel Related Services Company, Inc.; Comdata Network Inc.; and RIA Financial Services.

These companies engage in the businesses of issuing and selling travelers checks and money orders and providing money transmitter services as those terms are defined in the Bank Secrecy Act ("BSA") regulations set forth at 31 C.F.R. § 103.11. For the reasons set forth below, the Group believes that section 312 of the U.S. Patriot Act was not intended to apply to remittances to MSBs, such as Group members, from their sales outlets, and, therefore, the proposed regulations

to implement section 312 should be amended to exclude such MSB remittance transactions from the rule.

In addition, even if the statutory provision is broad enough to encompass such MSB transactions, discretion should be exercised to exclude these transactions from the scope of the regulations. In short, in response to the specific inquiry raised by the agencies (67 Fed. Reg. at 37741) as to whether "all of these U.S. financial institutions maintain correspondent accounts for foreign financial institutions," i.e., is the "application of the proposed rule to covered financial institutions (as defined) appropriate," (Id.) the Group believes that the proposal is overbroad since MSB remittances from sales outlets are not "correspondent accounts."

Section 312 of the U.S. Patriot Act deals with "special due diligence" measures which financial institutions must employ "for correspondent accounts and private banking accounts." That is, as pointed out in the preamble to the notice (67 Fed. Reg. at 37736), "each U.S. financial institution that establishes, maintains, administers or manages a private banking account or a correspondent account in the United States, for a non-U.S. person, [must] take certain anti-money laundering measures with respect to such accounts." In a nutshell, therefore, with regard to MSBs, the issue as appropriately framed by the agencies is whether "the application of the proposed rule to covered financial institutions (as defined) is appropriate?" For the reasons set forth below, MSBs which sell or issue money orders, travelers checks and/or provide money transmission services, do not, in the ordinary course of their businesses, maintain "correspondent accounts" for foreign financial institutions. Because of the extremely broad nature of the definition of "correspondent account," however, the Group seeks clarification from the agencies that the term "correspondent account" is not intended to cover remittances made from foreign financial institutions to certain kinds of MSBs in the ordinary course of their money services businesses.[1]

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[1] Group members, when contracting with sales outlets, evaluate the background and ownership of these entities to insure, to the maximum extent practicable, that these sales outlets are legitimate businesses, worthy of providing "MSB" services.

- **The Agencies Have the Authority to Fine-Tune the Definition of Correspondent Accounts.**

The agencies recognize that they possess the legal authority to fine tune these regulations to reflect the realities of the marketplace. While the Group acknowledges that "the statutory definition of a correspondent account is not limited to a traditional banking account" (67 Fed. Reg. at 37738), nonetheless the scope of the regulation should not be so broad as to encompass activity and transactions which do not realistically or logically comport with any reasonable definition of "account," much less "correspondent account."

- **Money Orders and Travelers Checks Are Instruments**

As indicated above, Group members are MSBs because, among other things, they sell or issue travelers checks and/or money orders. (see, 31 C.F.R. § 103.11(uu)(3)). It is axiomatic that money orders and travelers checks are not "accounts" – these items are instruments.[2] Thus, a money order is merely a form of "check, even though it is described on its face by another term such as 'money order'." (see U.C.C. § 3-104(f) and Official Comment 4). Likewise, a travelers check is also not an account but merely a payment instrument "drawn on or payable at or through a bank . . . designated on its face by the term 'travelers check' and requiring as a condition to payment a countersignature by a person whose . . . signature appears on the instrument." (see, U.C.C. § 3-104(i) and Official Comment 4) While other definitions for these instruments exist, (see, e.g., 12 C.F.R. § 229.2(k)), no authority has been found that treats a payment instrument, such as a money order or travelers check, as an "account," much less a "correspondent account." In fact, authority exists (see, e.g., regulation CC of the Federal Reserve Board, 12 C.F.R. Part 229) which clearly distinguishes between the concept of an "account" and an instrument such as a "check." In sum, the purchase of a payment instrument such as a money order or travelers check should not be deemed to constitute a "correspondent account" even if the domestic MSB

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[2] With the advent of new technology, certain travelers checks and travelers checks and money order substitutes are being issued by MSBs in "stored value" form. The same issues arise with regard to such stored value products which are sold in a manner similar to traditional paper money orders and travelers checks.

entity which issues such instruments sells the instruments through foreign institutions.

- **Remittances to Instrument Issuers Are A Return of the Issuer's Funds.**

The issue of the scope of the section 312 regulations could arise, for example, when travelers checks are "sold" by a foreign sales outlet, an "agent" in BSA terminology, of a domestic MSB issuer.[3] In such a case, since the foreign sales outlet presumably would be deemed a "foreign financial institution" under § 103.175(f)[4] (money order and travelers check sales "agents" in the U.S. are MSBs), when the foreign sales outlet sells travelers checks in foreign countries and remits the proceeds to the domestic MSB issuer, the rule would appear to be triggered. That is, the remittance of funds to the domestic MSB issuer from the sale of travelers checks could be deemed to involve the "handl[ing of] other financial transactions related to [a foreign financial] institution . . . ." However, this makes no sense, because the purpose of the rule and the underlying statute is to focus on the establishment of "accounts" in the U.S. by foreign financial institutions, i.e., an "account" representing funds owned or controlled by a foreign financial institution.

Clearly, remittance to the domestic MSB issuer of the proceeds from the sales of individual travelers checks pursuant to the contractual relationship between the U.S. based travelers check issuer and its foreign sales "agents" does not amount to the establishment of an "account" -- the necessary predicate for the imposition of section 312. The funds from the sales of the instruments belong to the MSB issuer -- not the foreign entity -- from the time the instruments are sold. In fact, typically the contract between the issuer and the agent requires the latter to hold such proceeds "in trust" for the benefit of the domestic issuer even if the funds are commingled at the point of sale. This underscores the fact that the sums

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[3] Some domestic travelers check issuers sell these instruments abroad to retail customers through wholly owned sales outlets. The decision to exempt such foreign branch outlets from the definition of "foreign financial institution" in § 103.175(f) is correct.

[4] Under § 103.175(f), the dollar limitations in §§ 103.11(uu)(1) through 4 are inapplicable.

remitted are not held by the domestic MSB issuer on "account" for the foreign sales outlet; rather, the reverse is the case.[5]

- **Domestic Money Transmitters Do Not Hold Accounts For Foreign "Agents."**

A similar situation involves money transmission activities. Those Group members which engage in the business of foreign funds transmissions have international reputations for the safe and sound transmission of funds to locations overseas. As in the case of payment instruments, the mechanics of wire transmission do not involve the establishment of an "account." While all money transmitters do not operate in precisely the same manner, the essential elements of money transmission are similar whether the funds transmission is instituted in the U.S. for transmission abroad, or initiated abroad for transmission to the U.S. For example, in the case of a foreign to U.S. transmission, the scenario is as follows. The customer arrives at a money transmission sales outlet of the domestic transmitter located in a foreign country. This outlet presumably will be a foreign financial institution under § 103.175(f), since money transmitter "agents" in the U.S. are MSBs under the BSA (31 C.F.R. § 103.11(uu)).

The "send" agent accepts cash from the retail customer and in many cases obtains the customer's instructions concerning the name of the recipient, the name of the purchaser, the amount, etc. This data is transmitted by electronic means to the domestic MSB which operates the transmission network. When the recipient arrives at a receive "agent" location in the U.S. or elsewhere, that receive outlet can access the domestic money transmitter's electronic system to obtain the information necessary to pay the recipient by check or cash.

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[5] While domestic money order and travelers check issuers and money transmitters maintain records of the funds due these entities from sales activities by all sales outlets, domestic and foreign, none of these records are "correspondent accounts" or similar thereto. While the Group understands that the agencies are considering whether "accounts receivable" in some contexts should be treated within the ambit of the rule, in this situation the funds at the point of receipt from the retail customer belong to the domestic MSB and are so treated in the formal contractual relationship between the domestic MSB and the sales outlet.

However, while the data relating to the transaction flows electronically, usually within minutes of the sender's initiation of the send transaction, the money which the sender has given to the send agent travels through a different route. Typically, the sending agent will deposit each day the aggregate amount of money received for send transmissions in a specially designated bank account which is periodically "swept" or otherwise accessed by the money transmitter pursuant to a contract which provides that from the inception of the transaction, the funds belong to the domestic money transmitter, not the foreign entity. It may take a matter of days for the money transmitter to obtain its cash from the sending agent for a transaction through normal banking channels. Interestingly, in the case of money transmissions, many times the money transmitter will have paid out to the recipient the sum sent before the U.S.-based money transmitter receives the funds from the send agent, since the data related to the transaction moves faster than the money. Of course, this fact also underscores that the funds being remitted belong only to the domestic transmitter -- the entity solely responsible for the pay out or refund of the sum transmitted.

When the pay out agent pays the recipient, it will notify the domestic MSB money transmitter and the money transmitter will fund the pay out agent with the amount paid the recipient. In short, in such systems, it is quite clear that no "account" exists. Neither the sending customer, nor the foreign sending agent (a "foreign financial institution" under the proposed rules) have a "correspondent account" with the money transmitter. As indicated, the foreign sending agent has no right to or interest in the sum sent to the money transmitter.

- **The Foreign Sales Outlets Have No Interest in the Funds Remitted.**

In sum, whether the focus is on money orders, travelers checks or wire transmissions conducted by MSBs, no "correspondent account" exists for a "foreign financial institution." The concept of "account," as set forth in the preamble (67 Fed. Reg. at 37737), would include "any account . . . for receiving deposits from, making payments on behalf of, or handling other transactions related to such foreign financial institution." However, in the case of the MSB businesses above described, no "account" is established or "maintained" "on behalf of" the MSB's "agents" (i.e., foreign financial institutions) or otherwise, to "handle" remittance transactions. The funds remitted to the domestic MSB are its funds-- not the funds of the foreign entity. That is, in any of the situations above-

described, the U.S. based MSB is merely receiving the funds collected on its behalf by the sales "agent" from the sale of the financial products and services, whether characterized as payment instruments or money transmissions.

- **Section 312 Does Not Apply Where the Funds Remitted From a Foreign Source are Owned by a Domestic MSB.**

The statute, while not a model of clarity, appears to be aimed at imposition of "due diligence" in the establishment of the "accounts" for the funds of foreign institutions. The logical import of this mandate is that, as an essential threshold to trigger the regulatory requirement, the foreign institution must have a legal or beneficial interest in or entitlement to or control over the funds in the "account" (see 67 Fed. Reg. 37737 and § 103.175(b)). This concept, recognized by the agencies in the preamble and the proposed rule, makes clear that MSB transactions, as above-discussed, are not within the purview of the statutory focus.

- **The Proposed Rule Should be Amended to Clarify that Remittances Paid to Domestic MSBs From Foreign Sellers of Money Orders and Travelers Checks and Foreign Providers of Money Transmitter Services Are Not "Correspondent Accounts".**

In conclusion, no valid public policy would be served by imposing new "due diligence" requirements on MSBs which provide the products and services set forth above, merely because those products and services are offered through contractually bound, independent sales agents located abroad. There is no evidence of congressional intent to expand the scope of "correspondent account" to encompass such routine remittances of the domestic MSB's funds. The proposed definition of "covered financial institution" in § 103.175(d) could be limited by modifying the definition of "money services business" at § 103.175(d)(1)(xi) to exclude remittances in the ordinary course of business to issuers of travelers checks, money orders or a money transmitter provider (see enclosed revised definition).

- **The Proposed Definition of Correspondent Account Is Overbroad and Vague.**

The agencies also seek comment on whether the definition of "correspondent account is appropriate for the purposes of this proposal?" (67 Fed.

Reg. at 37741). In the context of the MSB transactions above-discussed, or otherwise, the term is vague. While it could be argued that an account "established on behalf of a foreign financial institution" is clear, the clause "or handle other financial transactions related to [a foreign financial] institution" (emphasis added) is meaningless and an overbroad catchall, even if it was crafted by Congress in section 311 of the Patriot Act. At the very least, this clause fails to capture the concept of the foreign financial institution's ownership, interest, authority, power to direct or control, etc. in the domestic account which is at the heart of the "correspondent" relationship. This latter clause, literally read, would create a "correspondent account" every time a foreign financial institution pays a domestic entity for goods and services since sellers often create customer "accounts" on their books and records. But, there is no legislative history to support such a broad scope. The problem in the wording of the catch-all clause can be remedied by substituting the words "on behalf of" in lieu of the words "related to." Thus, the clause could read, "or handle other financial transactions on behalf of such [foreign] institution." This change harmonizes the second clause with the first and is not contrary to legislative intent. In the case of MSBs, the foreign entity "handles" transactions on behalf of the domestic MSB, not the reverse.

- **The Group's Suggestions Will Not Compromise the Effectiveness of the Rule.**

The Group appreciates this opportunity to comment on the proposed section 312 regulations and believes that the suggested revisions will not in any manner undercut the purpose or functioning of the due diligence standard for correspondent accounts. The Group will, upon request, be pleased to provide the agencies additional information, as necessary, to further explain the operations of MSBs.

Sincerely,

Ezra C. Levine

SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS

§ 103.175 Definitions.

Except as otherwise provided, the following definitions apply for purposes of §§ 103.176 through 103.190:

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(d) Covered financial institution means:

(1) For purposes of §§ 103.176 and 103.178:

• • •

(xi) A money services business (as defined in § 103.11(uu)) except with respect to remittances paid to an issuer of traveler's checks, money orders, or stored value (as defined in § 103(uu)(4)) or a money transmitter (as defined in § 103(uu)(5)).