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The Market Funded Lending Industry

June 28, 2002

James F. Sloan
Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, Virginia 22183

Re: *Proposed Bank Secrecy Act Regulations Implementing Section 312 of the USA PATRIOT Act, 67 Fed. Reg. 37736 (May 30, 2002)*

Dear Mr. Sloan:

The American Financial Services Association ("AFSA") appreciates the opportunity to provide the Department of the Treasury and the Financial Crimes Enforcement Network ("FinCEN") with comments on the proposed regulation implementing Section 312 of the USA PATRIOT Act (the "Act"). AFSA was established in 1916 and is based in Washington, D.C. AFSA is the national trade association for market funded providers of financial services to consumers and small businesses. These providers (over 500 of which are members of AFSA) offer an array of financial services, including unsecured personal loans, automobile loans, home equity loans and credit cards through specialized bank institutions.

AFSA is committed to assisting our members in preventing and detecting money laundering, terrorism and terrorist financing through the products and services offered by our members. We stand ready to be of assistance to Treasury as it implements the new BSA requirements. We are of the view that carefully drafted requirements, appropriate to the particular type of business and the specific money laundering risks, are key to effective, result-driven BSA compliance and enforcement.

We appreciate Treasury's efforts to understand the business of our members. At the same time, we are concerned by the broad breadth of the definition of correspondent account and the potential application of the Section 352 proposal to loan and finance companies, including leasing companies. Specifically, we are concerned that the term correspondent account potentially could include loan accounts and accounts receivables for foreign financial institutions. Consistent with Section 311 of the Act, we urge Treasury to exercise discretion in defining correspondent account to exclude accounts and accounts receivables maintained by U.S. financial institutions solely for the purpose of receiving payments on loans and leases. Moreover, the other upcoming BSA regulatory requirements under Sections 326 and 352 of the Act will apply to the accounts or accounts receivable of loan, finance and leasing companies and will more appropriately address the money laundering risks faced by these businesses with respect to all their customer relationships, not just their financial institution customers. Consequently, we do not believe that application of Section 312 to these businesses will be necessary or appropriate.

1. The Definition of Correspondent Account Should Exclude Loan and Lease Payments and Accounts Receivable

Under the proposal, a covered U.S. financial institution would be required to implement a due diligence program that is reasonably designed to prevent and detect money laundering through the correspondent accounts of covered foreign financial institutions, *i.e.*, financial institutions that would be required to have anti-money laundering programs if operating in the United States. Covered U.S. financial institutions would include those financial institutions that currently are required to maintain anti-money laundering programs under the BSA regulations. Also, as additional categories of financial institutions are required to maintain anti-money laundering programs by regulation, Treasury has indicated that the Section 312 regulatory requirements would apply to them to the extent that they maintain correspondent accounts.[1] Thus, the requirement could apply to loan and leasing companies in the future.

For purposes of Section 312, the definition of correspondent account in the proposal tracks the applicable statutory definition of correspondent account set forth in Section 311(e)(1)(B) of the Act:

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[1] Treasury has announced that, in accordance with the authority of Section 352 of the Act, between now and October 24, 2002, it will issue a series of regulations requiring anti-money laundering programs for all the categories of financial institutions listed in the BSA statute, 31 U.S.C. § 5312(a)(2), including loan and finance companies. While Treasury is currently refining the regulatory definition of loan and finance companies, it is our understanding, based upon discussions with Treasury staff, that the definition will include leasing companies.

> [A]n account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution.

Section 311(e)(2) of the Act further requires that, with respect to any financial institution other than a bank, the Secretary of the Treasury ("the Secretary"), in consultation with the "appropriate Federal functional regulator," must define account by regulation to the extent, *if any*, the Secretary deems appropriate to include "arrangements similar to" bank correspondent accounts.

A fair reading of Section 311(e)(2) is that the Secretary has discretion to determine that only certain accounts, as opposed to all accounts, maintained by non-bank financial institutions for foreign financial institutions should be treated as correspondent accounts, and that accounts that are not similar to correspondent accounts for banks should be excluded from the definition of correspondent account.[2] As defined, however, correspondent account could be read to apply potentially to loan accounts and accounts receivable maintained by U.S. loan, finance, and leasing companies for banks, securities broker-dealers and foreign finance and leasing companies and other businesses that would be considered financial institutions if operating in the United States. If the term correspondent account were read in this way, the regulatory requirement would apply, for example, if a U.S. company leased an airplane to a foreign company that also leased airplanes.

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[2] Arguably, based upon the language in Section 311(e)(2), Congress only intended that Treasury would apply due diligence requirements for correspondent accounts to financial institutions under the BSA statute that have Federal functional regulators, like banks and securities broker-dealers, and not to non-bank loan, finance and leasing companies.

We do not believe that this was the Congressional intent of Section 312. Congress did not intend that *all* accounts with foreign financial institutions would be considered correspondent accounts. Again, the salient factor in defining correspondent accounts for BSA financial institutions is whether an account is "similar to" a correspondent bank account.

The feature of a correspondent bank account that distinguishes it from other types of foreign financial institution accounts and that makes a correspondent bank account vulnerable to money laundering is the foreign bank's ability to effect dollar-denominated transactions for its customers, *e.g.*, payments and investments, through its U.S. correspondent bank account.[3] The types of loan accounts and accounts receivable maintained for foreign financial institutions in no way function in a similar way to a correspondent bank account. In these situations, the foreign financial institutions are acting on their own behalf.[4] These "accounts" have a single, simple

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[3] The background for Section 312 was the work of the Permanent Subcommittee on Investigations, the Senate Investigating Senate Government Operations Committee, on the problem of money laundering through correspondent banking. In its report, the Minority Staff emphasized why correspondent banking figures in money laundering schemes:

> Correspondent accounts in U.S. banks give the owners and clients of poorly regulated, poorly managed, sometimes corrupt, foreign banks with weak or no anti-money laundering controls direct access to the U.S. financial system and the freedom to move money within the United States and around the world.

Minority Staff of the Permanent Subcommittee on Investigations Report on Correspondent Banking: A Gateway for Money Laundering, February 5, 2001, p.1.

[4] As the New York Clearing House and others have commented to Treasury, the definition of correspondent account for USA PATRIOT Act compliance purposes should not include accounts where a foreign financial institution is acting as principal and where there is no

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function, *i.e.*, to collect funds owed by the foreign financial institution under a loan, financing or leasing agreement. Consequently, consistent with Congressional intent and common sense, these accounts should be excluded from the definition of correspondent account.

Therefore, AFSA recommends that the following language be added at the end of the proposed definition of correspondent account:

> This term does not include an account maintained solely for the purpose of receiving payments owed by a foreign financial institution to a U.S. financial institution, such as loan or lease payments.

3. The Application of Section 312 Requirements to Loan, Finance and Leasing Companies Is Unnecessary and Inappropriate

Not only is it not logical to apply correspondent account requirements to loan, finance or leasing companies, but it also is not necessary because there soon will be appropriate BSA rulemakings which will address specifically the appropriate due diligence requirements for these types of businesses. Upcoming regulations applying the anti-money laundering programs requirements of Section 352 and customer identification requirements of Section 326 to loan, finance and certain leasing companies will require that these businesses take a risk-based approach to know all their customers, not just those that technically would be financial

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potential to conduct transactions for their customers or third parties. Letter from Jeffrey P. Neubert, President and Chief Executive Officer of the New York Clearing House, to the Department of the Treasury, commenting on the proposed regulations implementing Sections 313 and 319 of the Act, February 11, 2002.

institutions if operating in the United States. As part of those rulemakings, Treasury will emphasize that an important factor in assessing money laundering and terrorist financing risk is the geographic location of customers and that special attention must be paid to relationships with businesses in high risk jurisdictions, such as countries on the Financial Action Task Force on Money Laundering's List of Non-Cooperative Countries and Territories.

The Section 352 and 326 regulations, unlike the Section 312 regulations, will be tailored to the particular type of financial institution, *e.g.*, loan, finance or leasing companies, and the money laundering risks associated with the financial institution's products, services and transactions. Requirements drafted for the particular business risk and compliance capabilities of loan and leasing companies should result in efficient use of their compliance resources. On the other hand, applying the measures proposed in the Section 312, which were designed for true bank-like correspondent relationships, would be counterproductive and divert valuable compliance resources.

3. There Should Be an Exception to the Due Diligence Requirements for Accounts of Foreign Bank and Other Foreign Financial Institution Affiliates

Despite the low money laundering risk and the lack of utility of the proposed mandatory due diligence procedures for the foreign financial institution affiliates of U.S. covered financial institutions, there appears to be no exception from the due diligence requirements for affiliates of U.S. financial institutions, even for publicly-traded U.S. financial institutions. As written, arguably, the definition of correspondent account could even reach accounts that U.S. parent

financial institutions maintain for the receipt of dividends from foreign subsidiaries. We believe this may have been an unintended result. Without regard to how Treasury defines the term correspondent account, Treasury should include an exception to the definition of foreign financial institution for the various types of relationships and internal "accounts" that U.S. financial institutions of all types maintain for their foreign financial institution affiliates.

We hope that Treasury will carefully consider these comments and make the necessary revision to the definition of correspondent account to assure that there is a sensible and appropriate application of the Section 312 due diligence requirements consistent with Congressional intent and sound BSA enforcement principles.

Sincerely,

Robert E. McKew
Senior Vice President and General Counsel

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