May 8, 2006

Financial Crimes Enforcement Network (FinCEN)
Office of Terrorism and Financial Intelligence
United States Department of the Treasury
RIN 1506-AA85
Via Website: www.regulations.gov

Dear FinCEN:

I am pleased to submit these comments on the advanced notice of proposed rulemaking issued by FinCEN on March 10, 2006 regarding the provision of banking services to money services businesses ("MSBs"). I currently serve as an employee of a banking organization, and specialize in compliance with the provisions of the Bank Secrecy Act ("BSA") and anti-money laundering and counter-terrorist financing regulations. It is with this perspective that I offer the below comments. However, these comments do not necessarily reflect the opinions of my employer.

My experience has been from the banking industry perspective vis-à-vis ensuring proper due diligence on bank customers who pose a higher risk of facilitating money laundering, terrorist financing, and other illicit crimes through bank (primarily deposit) accounts.

I fully support the concept behind regulating the money services business ("MSB") industry under the Bank Secrecy Act regime. Many publicly-available reports and anecdotal evidence confirm that certain of such businesses can and have been used to facilitate financial crime (including, at its worst, the financing of terrorists and terrorist acts), perhaps even more so than any other "financial institution" as defined statutorily in the BSA.

Notwithstanding this, the MSB industry has also been recognized as a financial institution critical to providing licit financial services to a large segment of the U.S population. Balancing these two opposing forces has, obviously, become a significant challenge for U.S. banks, FinCEN, and law enforcement. With this in mind, I provide my comments here from the banking perspective.

1. What requirements have banking institutions imposed on money services businesses to open or maintain account relationships since the issuance of the joint guidance by us and the Federal Banking Agencies in April 2005?

Requirements that banks have imposed on MSBs to open or maintain account relationships are generally consistent with the minimum due diligence expectations outlined in the Interagency Interpretive Guidance on Providing Banking Services to Money Services Businesses Operating in the United States ("Interagency Guidance") issued in April 2005. Additionally, other items, such as copies of anti-money laundering programs required to be maintained by MSBs pursuant to 31 CFR 103.125 and on-site visits are not uncommon *minimum* due diligence requirements. This is partially in

anticipation of potential bank examiner scrutiny for only operating within minimum requirements, but also to truly understand the normal and expected operating activity of a bank's MSB customer base. Further, banks likely have adopted due diligence questionnaires that ask, among other things, about principal and officer identification information, expected transaction activity, and other operational questions.

2. Describe any circumstances under which money services businesses have provided or have been willing to provide the information specified in the guidance issued by us to money services businesses in April 2005, concerning their obligations under the Bank Secrecy Act, and yet have had banking institutions decline to open or continue account relationships for the money services businesses.

Understandably, banks with proficient customer due diligence programs and limited human and financial resources will choose not to open or to continue relationships with MSB customers who, on the basis of the money services in which they engage, have been determined to pose an unacceptably high risk of potential money laundering or terrorist financing to the bank. This is because, even though an MSB may provide all required documentation, the costs associated with anticipatory suspicious activity monitoring (certainly not negated by the provision of mere paper documentation or other demonstrations of good intentions by the customer) of such accounts are sometimes too high for the bank to assume. I will provide reasons for this later.

3. Have Bank Secrecy Act-related grounds been cited for why banking institutions have decided not to open, or have decided not to continue to maintain, account relationships for money services businesses since the issuance of the guidance to money services businesses and to banking institutions in April 2005?

Though I cannot answer this from personal experience, I do believe that, based on a BSA/AML risk assessment, some banks will determine that the costs of (1) conducting enhanced due diligence and (2) suspicious activity monitoring on money services business customers is simply too burdensome and time-consuming and do not outweigh the benefits of holding such businesses as customers. Given that, it is not the legal (or even social) responsibility of banks to ensure that MSBs have access to banking services or to ensure that they are not "driven underground"; this is a political issue best addressed by other (perhaps regulatory) means.

4. Would additional guidance (including, if applicable, clarification of existing guidance) to the banking industry regarding the opening and maintenance of accounts for money services businesses within the Bank Secrecy Act regulatory framework be beneficial? If so, what specifically should such guidance address?

I do not believe so. Today, I believe banks have more than enough (possibly too much) guidance on regulator expectations for providing banking services to money services businesses. Any additional guidance will likely be viewed as more burden on an already-highly-regulated industry. Instead, I suggest possible regulatory remedies (below) that would be viewed as beneficial.

5. Would additional guidance (including, if applicable, clarification of existing guidance) to money services businesses regarding their responsibilities under the Bank Secrecy Act as it pertains to obtaining banking services be beneficial? If so, what specifically should such guidance address?

Partially. As "money services business" is defined today, and assuming that such definition does not change, more extensive outreach should be given by FinCEN to **those MSBs whose money services are only an ancillary part of their overall business**. In my experience, it is those businesses that are the most inexpert as to their responsibilities under the Bank Secrecy Act, whereas those who provide such services as a principal business function tend to, but not always, understand and accept their compliance obligations. In reality, it is banks that have to educate these ancillary MSBs about the BSA. (This is because [1] banks are expected to ascertain federal registration and state licensure of such businesses and [2] such businesses are not adequately examined for BSA compliance. I discuss this second point more below.)

Again, assuming that the regulatory definition of MSB does not change, "ancillary MSBs" tend to be such businesses as grocery stores, liquor stores, convenience stores, bars and taverns, and similar businesses. Outreach specifically targeted to these businesses' trade associations (who can thereby disseminate educational guidance), as well as to primary MSB trade associations, would likely result in much better understanding of BSA compliance.

6. Are there steps that could be taken with regard to regulation and oversight under the Bank Secrecy Act that could operate to reduce perceived risks presented by money services businesses?

Emphatically, yes. I see several options:

- Exclude ancillary MSBs (other than money transmitters or other appropriate money services [appropriateness should be derived from actual risk and empirical, historical illicit usage]) from the definition of MSB

I do not believe (though I cannot substantiate this with financial intelligence or criminal legal outcomes) that ancillary MSBs pose the same level of money laundering or terrorist financing risk as businesses whose main activity is check cashing, money order sales, currency exchange, etc. Such businesses are not likely to be able to handle the volume that would be required to facilitate money laundering acts that principal MSBs would, except for certain activities, such as money transmitting, or, more developing industries, such as stored value issuance and sales.

- Exclude "check casher" from the definition of MSB

First, I believe the most unnecessarily-regulated money services business is that which solely provides check cashing services. Though some publications would have us believe

otherwise (such as the U.S. Money Laundering Threat Assessment), I cannot believe that (and have not seen criminal convictions confirming) check cashing is an efficient way to launder illicit funds. Most check cashers, anyway, will only cash checks of customers for whom the source of funds is clearly understood (e.g. government checks, payroll checks). Again, the volume needed to make check cashing a good conduit for money laundering seems to make its regulation superfluous. I believe eliminating its regulation would have a profound, positive (though not thorough) effect on providing banking services to some businesses that once were, but would no longer be, money services businesses.

- Institute a regular, thorough, and comprehensive BSA examination regime for MSBs

This, to me, is the one certain action that would have pervasive impact and allow MSBs that might otherwise be excluded based solely on their money services activities to maintain and obtain banking services.

By their regulation under the BSA, and by the zeal with which banking regulators examine a bank's handling and monitoring of its MSB clientele, it cannot be doubted that anyone defined as a "money services business" is *necessarily and automatically* a "high-risk business" to a bank. A check casher will be scrutinized by banking examiners simply because it is such and is expected to be accorded a higher level of monitoring, than, for example, an antiques dealer who might very well pose a much higher risk of potential money laundering, but because of its non-regulation under the BSA, it will be understood to be to the bank's discretion whether to determine it is "high risk." Antiques dealers, as an industry, would not be categorically considered high risk by banking regulators, if only because they are not "financial institutions" as contemplated under the Bank Secrecy Act statute (or regulations). I presume that Congress legislated those general categories of businesses that are "financial institutions" as such because they, by their nature, are at high-risk for being used to facilitate money laundering, terrorist financing, and other financial crimes (though leaving FinCEN the discretion to specifically define the aforementioned categories, based on its judgment).

That said, banks do not routinely consider their domestic depository institution colleagues as high risk (*though they are inherently so*, again, by their nature, and as evidenced by their regulation under the BSA). This is because banks are held to what I would argue as an appropriate standard for preventing their abuse by instituting and executing anti-money laundering programs, **and are examined by federal functional regulators for their compliance on a regular and consistent basis, which mitigates deeply their otherwise inherent high-risk status**. Simply because this is so, banks can have confidence that dealing with domestic correspondent institutions will not be viewed as high-risk activity (except to the extent that a correspondent bank observes activity that is suspicious or *knows or has reason to believe* that a respondent institution does not have an effective anti-money laundering program).

Therefore, if "money services businesses," as defined today, altogether pose such an extreme risk of money laundering or terrorist financing, they should, as a matter of public

policy as well as a matter of law, be held to an examination standard just as rigorous as banks. This underscores that, Interagency Guidance to the contrary, FinCEN has regulated **all** check cashers, **all** currency dealers and exchangers, **all** money transmitters, **all** issuers, redeemers, or sellers of money orders, traveler's checks, and stored value to the same standards (with few exceptions, such as with definitional threshold amounts, or for required suspicious activity reporting), regardless of the types of checks cashed; money orders sold; type of stored value issued; locations offered, dollar limits set, or other restrictions on money transmitting, etc. It is simply not credible to say through the Interagency Guidance that MSBs are varying in their levels of risk, but hold them all to the same essential standards. As the MSB is defined today, there appears to be no real distinctions in law between their risk levels.

Regardless if the definition of MSB were to change or not, as delegated examiners of the money services business industry for BSA compliance, **the one certain way to mitigate their money laundering/terrorist financing risk is to ensure all businesses that are determined to be MSBs are examined by the Internal Revenue Service for BSA compliance on a routine, established basis that can be relied upon by banking institutions.** As it stands today, "financial institutions" currently regulated by the BSA that are **not** examined for compliance by a federal (or state, in the case of insurance companies) functional regulator cannot be assumed to be held to the same exacting standards as those that are. Here, credit should be given to the staffs of the Federal Reserve Board of Governors, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, Securities and Exchange Commission, and Commodities Futures Trading Commission for their efforts in demonstrating exemplary competence in examining under the Bank Secrecy Act, with few (mostly high-profile) exceptions. Unless and until such an examination regime is instituted for MSBs, I do not believe there will be the effect in provision of banking services that FinCEN would like to see.

7. Since the March, 2005, hearing and the issuance of guidance in April, 2005, to banks and to money services businesses, has there been an overall increase or decrease in the provision of banking services to money services businesses? Please offer any thoughts as to why this has occurred.

My belief is that there has most likely been an overall decrease in the provision in banking services to money services businesses since, and because of, the issuance of the Interagency Guidance.

Though the Interagency Guidance states, "However, FinCEN and the Federal Banking Agencies do not expect banking organizations to act as the *de facto* regulators of the money services business industry…", this is simply not the case, in fact. By requiring banking institutions to, **at a minimum**, confirm FinCEN registration, if required; confirm compliance with state or local licensing requirements, if applicable; and confirm agent status, if applicable (and in many cases, go beyond the foregoing), banks ***ARE acting as the de facto regulators*** (but certainly not *de jure* regulators) of the money services business industry, to the extent that banks must **proactively** conduct these checks, and to

the extent the Internal Revenue Service and state regulators cannot be relied upon to perform these exact functions. Were banks to be required to perform these functions *only if* there were reason to believe an MSB were operating contrary to law, the "*de facto* regulator" argument would no longer be in issue. Of course, this is not to discount the efforts in the banking industry to conduct appropriate due diligence on those customers, in its opinion, and based on its own subjective risk assessment of customer activity, to conduct the due diligence it feels is necessary on a customer-by-customer, and not prescriptive, basis.

I trust that these comments will be considered appropriately, as FinCEN appears to be concerned that MSBs continue to have access to the U.S. depository institution system. Please feel free to contact me with any questions at kcannon@wi.rr.com. Thank you for your consideration.

Sincerely,

Kenneth L. Cannon, CAMS