



May 9, 2006

Financial Crimes Enforcement Network  
P.O. Box 39  
Vienna, VA 22183

Re: Provision of Banking Services to Money Services Businesses  
RIN 1506-AA85  
71 FR 12308 (March 10, 2006)

Dear Sir or Madam:

America's Community Bankers (ACB)<sup>1</sup> is pleased to comment on the Financial Crimes Enforcement Network's (FinCEN's) advance notice of proposed rulemaking (ANPR) that seeks updated facts and recommendations regarding the provision of banking services to money service businesses (MSBs) by insured depository institutions.<sup>2</sup> The ANPR is part of FinCEN's effort to address concerns raised by both MSBs and the banking industry regarding the impact of Bank Secrecy Act (BSA) regulations on the ability of MSBs to open and maintain bank accounts.

### **ACB Position**

Institutions that provide banking services to MSBs need meaningful regulatory relief. Despite statements to the contrary, FinCEN and the banking agencies have made banks the *de facto* regulator of MSBs. Due to high regulatory demands, many depository institutions have closed the accounts of existing MSB customers or are declining requests to provide banking services to new MSB customers. The costs and burdens of monitoring MSB accounts often necessitates such action, even though it is not in the best interest of the banks, their customers, or the communities they serve.

ACB is concerned that depository institutions are being used as a substitute regulator for MSBs due to staffing and budget shortfalls at state and federal agencies. Depository institutions do not have the authority to serve a regulatory function. In addition, requiring depository institutions to file repeated Suspicious Activity Reports on MSBs that do not register with FinCEN or cut off from banking services those MSBs that have an inadequate anti-money laundering program is not a satisfactory means to ensure MSB compliance with the BSA.

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<sup>1</sup> America's Community Bankers is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. To learn more about ACB, visit [www.AmericasCommunityBankers.com](http://www.AmericasCommunityBankers.com).

<sup>2</sup> 71 Fed. Reg. 12308 (March 10, 2006).

Therefore, ACB requests that FinCEN work with the federal banking agencies to delete the due diligence items listed in Part II of the April 26, 2005 interagency interpretive guidance on providing banking services to MSBs. We also request that FinCEN re-craft the guidance and the BSA/AML exam manual to explicitly state that depository institutions are not required to evaluate a MSB's anti-money laundering program because these businesses are already regulated by the states that license them, FinCEN, and the Internal Revenue Service (IRS).

We believe these actions are necessary to ensure that community banks that currently provide banking services to MSBs do not exit this line of business. However, ACB cautions that even substantial change to the guidance and the exam manual will not persuade depository institutions to quickly re-enter banking relationships with MSB customers. Community banks do not frequently review decisions to exit a business line. Therefore, institutions that have terminated MSB account relationships will have to be persuaded that the monitoring, due diligence, and other regulatory demands have significantly changed and that the costs of banking MSBs do not outweigh any associated benefits to depository institutions.

### **Background**

Community banks have made varying determinations regarding whether to continue to provide banking services to MSBs. Generally, ACB members have addressed the MSB question by: 1) Terminating accounts of MSB customers that posed a high risk of money laundering but continuing to provide services to lower risk MSBs; 2) Keeping current MSB customers, but not providing accounts for MSBs seeking to open a new account; or 3) Terminating all MSB accounts and are not opening new ones.

Some community banks have closed accounts with all MSBs because the institutions do not have the internal resources to conduct the requisite monitoring and due diligence required for these types of accounts. Other institutions were pressured by examiners to sever ties with their MSB customers due to the heightened money laundering risk posed by these businesses. In many cases, such "suggestions" by examiners and subsequent termination of account relationships occurred before or shortly after FinCEN and the federal banking agencies issued the *Interagency Interpretive Guidance on Providing Banking Services to Money Services Businesses Operating in the United States* on April 26, 2005. However, even after the guidance was issued, some institutions continued to terminate accounts with all MSBs or are not accepting new MSB customers due to the enhanced due diligence requirements for higher risk MSBs.

Other community banks wish to continue long-term relationships with existing customers whose MSB activity is an ancillary part of their business (e.g., convenience stores, liquor stores, etc.). These institutions have accepted the increased due diligence and monitoring costs linked to MSB customers, but are carefully evaluating the amount of time that bank personnel devote to these accounts.

## **Factors Influencing Decision to Bank MSBs**

Numerous regulatory issues have negatively affected community bank decisions to close the accounts of their MSB customers. Many of these same concerns are cited by institutions that are still banking MSBs, but are re-evaluating the decision to continue this line of business.

Regulatory expectations. Community banks report that the current regulatory demands placed on banks with MSB customers are too high. Furthermore, community banks find the interagency guidance on MSBs to be contradictory. On one hand, the guidance states, "banking organizations *will not be held responsible* for their customers' compliance with the Bank Secrecy Act and other applicable federal and state laws and regulations." In addition, when referring to the due diligence that institutions should conduct on higher risk MSB customers, the guidance states that these requirements are "*no different from requirements applicable to any other business customer* and do not mean that a banking organization cannot maintain the account" (emphasis added). On the other hand, Part II of the interagency guidance suggests several types of due diligence that depository institutions may perform on higher risk MSBs. Suggested steps include:

- Reviewing the MSB's AML program;
- Reviewing the results of the MSB's independent testing of its AML program;
- Conducting on-site visits;
- Reviewing a list of agents, including locations, within or outside the U.S., that will be receiving services directly or indirectly through the MSB account;
- Reviewing written procedures for the operation of the MSB;
- Reviewing written agent management and termination practices for the MSB; or
- Reviewing written employee screening practices for the MSB.

Insured depositories do not conduct this type of due diligence for other types of commercial customers, not even loan customers. As a practical matter, an institution that performs the due diligence elements enumerated in Part II of the guidance is evaluating the various components of the MSB's AML program and is performing a regulatory function.

MSB education. Many small businesses that provide check-cashing services as an ancillary business trigger the anti-money laundering requirements applicable to MSBs. Convenience stores, small grocery stores, and liquor stores are common types of businesses that cash checks as a side business. In contrast to the large cash advance stores or wire remitters, these small businesses do not belong to MSB trade associations and are not aware of their anti-money laundering responsibilities. In many cases, these entities do not know what it means to be an MSB and are unaware of state and federal regulatory

requirements applicable to MSBs. It is often difficult for them to understand that by engaging in such activities, they are required to obtain a license from the state, register with FinCEN, develop and maintain an AML program, designate a BSA officer, conduct AML training for appropriate staff, and ensure that an independent auditor tests the AML program.

As a result, community banks must spend a great deal of time educating these customers about their regulatory responsibilities under the Bank Secrecy Act. This process is very time consuming for bank personnel. Because community banks invest a great deal of staff time working to educate their current MSB customers, many institutions do not have the personnel to conduct the requisite due diligence necessary to open accounts for new MSB customers.

Unidentified MSBs. Many community banks are still working to ascertain whether they have customers that are unidentified MSBs. This is a difficult and time-consuming process. One ACB member with approximately \$135 million in assets reported that between five and six of the bank's employees are participating in the effort to detect unidentified MSBs within the bank's customer base. Some institutions are not willing to take additional MSB customers until they have identified how many unidentified MSBs are in the existing customer base. Most institutions that find an unidentified MSB will send the MSB a questionnaire or otherwise contact the entity to ensure that it is licensed and registered with FinCEN. If the business is unlicensed or unregistered, the institution must file a Suspicious Activity Report and begin the process of educating the customer about its regulatory responsibilities.

### **ACB Recommendations**

#### 1. Delete Checklist That Recommends Evaluation of MSB AML Program

ACB does not believe that additional guidance from FinCEN and the banking agencies will persuade banks and savings associations to open accounts for money service businesses. Rather, we strongly believe it would be more effective for FinCEN to delete portions of the April 26, 2005 interagency guidance that recommended depository institutions evaluate an MSB's AML program, its training and independent audit, and the MSB's operational procedures. These kinds of measures greatly exceed the due diligence that banks conduct for other types of cash intensive commercial depositors.

ACB believes that depository institutions should be required to conduct basic due diligence at account opening (e.g., determine projected business volumes, cash needs, wire transfer activity, etc.), assess the MSB's AML risk, and monitor an MSB's banking activity in a manner that is commensurate with the account volume and the AML risk posed by that business. This approach would treat MSBs like other commercial accounts.

ACB understands that depository institutions are not technically required to review a MSB's AML program, but some bank managers and examiners have the impression that compliance with the guidance is mandatory. In addition, our members have told us their examiners sometimes feel compelled to follow guidance, citing violations of the guidance

in examination reports. Bank examiners, pursuant to their safety and soundness authority, have tremendous discretion, which may vary from examiner to examiner and region to region in the interpretation and application of guidance. This use of guidance, coupled with the extensive list of suggested due diligence items for higher-risk MSBs, illustrates the need to expressly relieve depository institutions of any responsibility for helping to oversee the AML compliance of MSBs.

## 2. Expressly Recognize the Responsibility of MSB Regulators

ACB also requests that FinCEN and the agencies amend the interagency MSB guidance and the BSA/AML Examination Manual to expressly state that the licensing states, FinCEN, and the IRS are fully responsible for ensuring MSB compliance with the BSA. We also request that FinCEN include this statement in any directives to examiners and other relevant communications with the agencies' regional offices.

### **Conclusion**

ACB believes the interagency guidance on MSBs and the general view by Treasury and law enforcement that depository institutions have a role in overseeing the AML compliance of MSBs has compounded the already heavy AML compliance burden borne by the nation's community banks. We request FinCEN to work with the federal banking agencies to 1) delete the due diligence items enumerated in Part II of the April 26, 2005 interagency interpretive guidance on providing banking services to MSBs and 2) re-craft the guidance and the BSA/AML exam manual to explicitly state that depository institutions are not required to evaluate a MSB's anti-money laundering program because these businesses are regulated by the states that license them, FinCEN, and the IRS.

We recommend these actions for two reasons. First, FinCEN needs to reduce the regulatory burden on depository institutions that currently serve as MSB customers. It is important to ensure that the demands on bank personnel are not such that additional institutions feel compelled to stop providing banking services to MSBs. Second, meaningful changes will be needed to persuade other institutions to open accounts for new MSB customers again.

Thank you for the opportunity to comment on this important matter. Should you have any questions, please contact the undersigned at 202-857-3187 or [kshonk@acbankers.org](mailto:kshonk@acbankers.org) or Patricia Milon at 202-857-3121 or [pmilon@acbankers.org](mailto:pmilon@acbankers.org).

Sincerely,



Krista J. Shonk  
Regulatory Counsel