The National Money Transmitters Association, Inc.

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July 10, 2006

Mr. Robert W. Werner, Director
Financial Crimes Enforcement Network
PO Box 39
Vienna, VA 22183

Via Email to: *regcomments@fincen.treas.gov*

Re: RIN 1506-AA85
Advance Notice of Proposed Rulemaking (ANPR)
Provision of Banking Services to Money Services Businesses

Dear Director Werner:

The National Money Transmitters Association (the NMTA) appreciates the opportunity to offer analysis and recommendations concerning the pervasive denial of banking services to licensed Money Services Businesses (MSBs.)

The NMTA was founded to voice the concerns of the state-licensed remittance companies (or LRCs) of the United States. Currently, our members number 43 licensed companies, that collectively handle over $17 billion a year in migrant worker remittances.

It is impossible to overestimate the negative impact these account closings are having on our customers and their families, on the many countries that depend on remittances for their survival, and on the effectiveness of our nation's anti-money laundering (or AML) strategy. All licensed MSBs are suffering from this problem, to one extent or another, and the economic and market conditions of our industry have been altered for the worse.

No one knows the exact amount, but we estimate that outbound remittances from the US total at least $60 billion annually. The roughly 600 US-based LRCs that handle these remittances have never faced more peril than we do today. Banks are crucial to the operation of our business, and they are no longer willing to work with us, citing regulatory concerns.

These regulatory concerns are well-founded, but not because of any real money laundering risk. Banks get into trouble for having us as customers because federal banking regulators have incorrectly classified all MSBs as 'high-risk' and make no distinction within that stereotype between licensed and unlicensed remittance companies. In today's atmosphere of high BSA fines, a bank looking at a customer classified as high-risk is seeing an insurmountable red flag.

Now, these attempts to 'protect' the banking system from the 'risk' LRCs pose have backfired badly by threatening to destroy the best ally law enforcement has in the fight against money laundering. No sector of the financial industry has better compliance programs, a cleaner record, or is more central to our nation's AML efforts than LRCs. The average remittance we send is approximately $243, hardly a size conducive to money laundering.

Although regulators say they do not hold banks responsible for our supervision, that is exactly what is happening. Under such conditions, it does not seem to make sense to most banks to keep us as customers, no matter how profitable our accounts are for them. In this case, forewarned is not forearmed, but warned-off.

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In her May 8th comment on this ANPR, New York Banking Superintendent Diana Taylor reports that, according to her Department's own survey, 42% of New York LRC banking relationships hang by a thread, and are concentrated at only two banks. If this situation is not remedied, and soon, then the ranks of LRCs all across the country will be decimated. Unscrupulous, unlicensed operators will no doubt fill the void left by our departure.

Regulators have steadfastly refused to grant any sort of assurance that would allow banks to rely on our state licenses. Under the 'electricity' theory of money laundering we seem to be working under these days, banks and regulators rightly feel they will be held liable if 'something' goes wrong with an LRC. Banks also feel they will be held liable if they are too lax in their requirements, or fail to follow their own procedures, which have become unnecessarily complex. Regulation is the job of government, and cannot and should not be delegated to banks, yet that is precisely what has happened.

Below, summarizing our position, are our answers to the specific questions posed by the ANPR. (Also see our March 24, 2006 letter to Congressman Rangel, which covers essentially the same ground, but offers a more complete exploration of the problem and possible solutions.[1])

NMTA Responses to Specific ANPR Questions

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?

> There are many banks that want to keep servicing MSBs. Those banks already had good compliance procedures in place before the guidance, but the April Guidance undoubtedly made them 'sharpen their pencils.' So now, a 10-page questionnaire might have been expanded to 20 pages, the reviews more frequent, the questions more critical, demanding and probing. As a result of the mountain of due diligence required, the most important effect of the Guidance has been to make more banks close their doors to all MSBs as a class.

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.

> Most cases of account refusal or discontinuance have been generic; no chance was given to make a compliance presentation in these cases. We have nevertheless also heard of many cases where the MSB account was refused *after* a compliance package was submitted. Most of those customers never got a chance to hear the perceived deficiencies or risks that led to the refusal. One can only try to imagine what motivated those judgments. But the mystery deepens when a *licensed* MSB is rejected – was the bank's compliance judgment perhaps sounder, more conservative or more subtle, than that of the licensing authority? Most rare were cases where the bank communicated its concerns and gave the MSB a chance to explain or cure the exception. Sometimes, those follow-up questions bespoke a worried banker more than any real deficiency.

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?

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The NMTA has a collection of closing letters. Most of the more recent letters have been very clear and explicit that regulatory concerns were driving the decision to close. This represents a shift: earlier, banks would usually write only that they were exercising their contractual right to close the account, with no explanation given.

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?

No. Additional guidance would only serve to make the situation worse, as bankers only perceive such additional guidance as signaling additional responsibility and danger. As long as banks perceive no time-efficient and certain way to fulfill their obligations, guidance will not help. As long as banks are required to review their customers' compliance programs, the only certain result is escalating uncertainty, especially when no maximum requirements are spelled out.

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?

Additional training and outreach is always to the good, but would not secure our bank accounts. The tragedy of the current situation is that even MSBs that know and fulfill their BSA obligations very well are not given a chance.

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?

In order to solve this problem, we recommend the following three-pronged approach:

1. ***Remove the onus of supervising us from the banks' shoulders, by law or regulation, as soon as possible, by:***

    a. Officially recognizing some or all state licenses. At a minimum, any state that does on-site examinations should be officially recognized under the general powers of the Secretary of the Treasury as per 31USC5318(a)(5). Banking regulators must categorically state that the license (or the federal certification) totally counteracts all of the above AML risk factors, bringing our net (or residual risk) down to zero. A clear statement from *all* authorities is needed, that affirms reliance on the states, FinCEN and the IRS to regulate MSBs, not banks. If current regulation of MSBs is not enough, see NMTA Recommendation #2, below.
    b. Defining *all* measures a bank is expected to take when opening our accounts, and making those measures practicable. Banks would still have to verify our licenses and remain alert for red flags, as usual.
    c. The LRC may be required to sign a self-certification form similar to the one used in foreign correspondent banking relationships.
    d. Remove from the Guidance any implication that a bank should have to pass judgment on any part of their licensed MSB customers' compliance programs.
    e. On any or all of the above grounds, or based on a (future) federal MSB certification, carve out a safe harbor from prosecution or regulatory criticism, for banks that show good faith and diligence. And make sure that the level of

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diligence required, is economic and objectively measurable. This may not require legislation, as it is probably already within the general powers of the Secretary to accomplish. But, as long as there is a chance that a class of customer may expose a bank to criminal charges merely by association, that class of customer will find their welcome very brief indeed.

f. Ease is crucial, and we must be realistic: In 1992, in Annunzio-Wylie, Congress asked Treasury to prescribe regulations requiring each depository institution to identify any and all non-bank financial institution customers. In 1996, that provision, 31USC 5327, was repealed as unnecessarily burdensome on the banks. If just to identify NBFIs was considered too burdensome, how much worse must things now be seeming to banks, post-Guidance? Most banks have only recently compiled their roster of MSB customers.

g. Even without any safe harbor, it might help if account-opening and monitoring procedures for licensed MSBs were more formally codified (the more finite the better.) The law's requirements, with regard to other types of 'high-risk' accounts such as private and (foreign) correspondent banking have already been explicitly spelled out. But a bank's minimum responsibility with regard to serving non-bank financial institutions has never been spelled out in a statute or a regulation. Handling this at the 'guidance' level, and in day-to-day practice, has worked out, unfortunately, to our detriment. But, for some reason, even 'minimum' requirements, when written into law or regulation, take on a look of standard procedure, and so might make our business seem more routine to bank practitioners.

2. ***Start regulating LRCs at the federal level with a voluntary, non-preemptive AML-centric MSB certification:***

This is the next logical step in the evolution of FinCEN's role and the BSA itself. If the MSB sector is such a 'high-risk,' government can do no less. Many states are meeting the challenge already; I refuse to believe the individual states can accomplish something the federal government with all its might, cannot. Even on a voluntary basis, this would be true regulation: it would involve initial application and vetting, published rules and standards that must be followed to maintain certification, and regular examinations and reports.

Such a regime would qualify us as having a *functional* federal regulator, as the term is used in the BSA. This might better be done by legislation, but again, could probably be done under the general powers of the Secretary of the Treasury as per 31USC5318(a).

<u>Federal,</u> because state regulation has been deemed too uneven, by consensus.

<u>Voluntary,</u> so as not to criminalize vast numbers of people unnecessarily, and thus debase the seriousness of enforcement efforts. Over time, certification will become the norm and therefore, self-enforcing.

<u>'Certification,' not 'Licensing,'</u> because 'licensing' would imply sanctions for non-compliance. At the federal level, it should be more about the carrot, than the stick, at least in the beginning. (The 'carrot' here, of course, is access to bank accounts, image value, etc.)

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Non-preemptive, because states' rights should be respected and, frankly, the federal government is not up to the regulatory challenge quite yet. The federal government should assert minimum requirements, especially in a field of such national, interstate concern as anti-money laundering, but let states go beyond those minimums, if they see the need.

AML-centric-only, because, again, the federal government is not quite tooled up for the challenge yet, and safety and soundness has always been in the states' domain.

The current regulation of MSBs we have at the federal level is not enough. We recommend that an MSB supervision division be created at FinCEN and somehow the unfortunate division of AML responsibilities that currently exists between FinCEN and the IRS come to an end. Despite the Secretary's Section 357 report to Congress denying any problem with this bifurcation, Audit Report OIG-05-050 issued by Treasury's own Inspector General, to most readers, would indicate that this was not the most effective configuration. More and more interpretive responsibility, it seems, is being handed over by FinCEN to the IRS -- more than just computing services and field exams. Hands-on supervision would surely not be all that inconsistent with FinCEN's mission and general setup.

Let the MSB registration program gradually be replaced by something more meaningful that would give those firms that so desire, a pathway to the credentials that it takes to get bank accounts. Regulate the agent population through us licensees, rather than trying to herd over 200,000 retail locations, most of which are mom and pop shops.

The standardization and stature of a federal credential alone may be comforting enough by itself, without compulsion, to convince enough banks to feel comfortable reopening our accounts. But just in case it is not, let there be a provision of the law that explicitly says that a bank may rely on the certification for AML due diligence, absent any obvious red flags.

3. ***Our industry needs to take the first steps toward self-regulation:***

This would involve industry-driven training, standards-setting, certification and disciplinary procedures. While this is something that we ourselves need to do, government can help by encouraging LRCs to join together. An industry effort without close government cooperation would not achieve the desired result and, judging by results achieved so far, might not happen at all without some leadership from government. An involved industry establishment, partnering with government, could be the key to amplifying FinCEN's current outreach and enforcement efforts, even reaching beyond the formal, licensed sector.

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.

Decrease. This has occurred because the regulatory atmosphere has made closing MSB accounts not just the path of least resistance, but seemingly the only sound business decision for most banks to make, all facts to the contrary. This problem is the natural result of informal rulemaking without regard to practical consequences. Ultimately, it does not

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matter whether this is a problem of perception or misunderstanding; the issue is stark, the consequences are real and with us, and will not yield to further clarification.

In order to understand how this happened, one has only to look at the Table of Contents of the June 30, 2005 Bank Secrecy Act Anti-Money Laundering Examination Manual. LRCs could be said to fall into, or somehow touch upon, the many of the 'high-risk' categories of 'Persons and Entities' and 'Products and Services' enumerated in the Manual:

Correspondent Banking (Domestic and Foreign)
Correspondent Accounts (Domestic)
Correspondent Accounts (Foreign)
Parallel Banking (common ownership, here and abroad)
Electronic Payment Services
Funds Transfers
Electronic Cash
Third-Party Payment Processors
Purchase and Sale of Monetary Instruments
Concentration Accounts
Nonresident Aliens and Foreign Individuals
Non-Bank Financial Institutions
Corporate Entities (Domestic and Foreign)
Cash-Intensive Businesses

We usually do business in HIFCAs (High-Intensity Financial Crime Areas) and frequently 'facilitate' money transmissions to countries of high money-laundering concern. We deal through agents, do not have customer accounts, per se. We are perceived as 'less-regulated.' Indeed, because regulation was late in coming to our sector, we may have some bad apples that need to go. We do not believe these items are true risk factors, but merely a description of the business we are in. In fact, we believe that the vast majority of our colleagues run excellent compliance programs.

So the Manual is basically a roadmap to "No," rather than a "Yes." To counteract all the above 'risk factors,' the risk *mitigators* offered in the manual consist only of further investigation and monitoring the bank must perform. These are not really 'mitigators' in the true sense of the word, but rather, just more work and potential exposure for the bank.

We thank FinCEN once again for the opportunity to have our opinions heard. The NMTA is vitally interested in the outcome of this critical deliberation. If we do not get immediate short-term relief, this crisis will destroy many worthy LRCs. Our need, as an industry, is urgent, but the stakes for our country, for all of us, are equally high.

Please let us know if there is anything we can do to help the process along.

Sincerely,

David Landsman

David Landsman
Executive Director

Footnote [1]: March 24, 2006 letter to Congressman Rangel.
http://www.nmta.us/main/Docs%20Posted/RangelSnowEtAl-MSBLetters-3-30-2006.pdf