

December 6, 2007

Department of the Treasury  
Office of Critical Infrastructure Protection and Compliance Policy  
Room 1327  
Main Treasury Building  
1500 Pennsylvania Avenue, N.W.  
Washington, D.C. 20220

**Re: Agency: Treas – DO**  
**Docket No. Treas-DO-2007-0015**

Dear Sirs:

These comments are submitted on behalf of The Money Services Round Table (“TMSRT”) in response to the above-referenced Notice of Proposed Rulemaking published in the Federal Register on Thursday, October 4, 2007 at 72 Fed. Reg. 56681, et seq. with regard to implementation of the Unlawful Internet Gambling Enforcement Act of 2006 (the “Act”). TMSRT is composed of the leading money transmitting businesses in the United States, including Western Union Company, MoneyGram International, Travelex Currency Services, Inc., Integrated Payment Systems, RIA Financial Services, and Sigue Corporation.

TMSRT is vitally interested in the proposed regulations to implement the Act because as money transmitting businesses, they would be included within the purview of the regulations as “designated payment system[s]” should the regulations be adopted as proposed (see, e.g., 72 Fed. Reg. at 56684).

In reviewing and analyzing the proposed regulations and determining the impact these regulation will have on “money transmitting businesses” it is important to recognize that the term “money transmitting” with regard to these businesses is something of a misnomer. “Money transmitting businesses” are non-

bank entities, which while engaged in the business of transmitting funds, are in reality only transmitting data, i.e., the name and address of the sender, the recipient, the amount of the transfer, and ancillary information. A “money transmitting business” has no ability in the United States financial system to move funds and/or monetary value cross-border. All such cross-border transactions and all domestic transactions are accomplished by depository institutions which have banking relationships with the “money transmitting business.”

As a practical matter, therefore, there is a sensitivity in the implementation of any new regulatory scheme which imposes new compliance obligations for “money transmitting businesses.” The sensitivity arises in the potential repercussions from the unintended consequences of new regulatory programs; *i.e.*, banks which have essential account relationships with “money transmitting businesses” to transmit funds on their behalf are confronted with the dilemma, real or imagined, that the bank has an affirmative obligation to ensure the adequacy of the “money transmitting business” compliance program.

**I. The Term “Money Transmitting Business” Includes Entities Not Intended to be Covered.**

The proposed regulation at section 2 contains a definition of the term “money transmitting business” as that term is defined in 31 U.S.C. § 5330(d) “determined without regard to any regulations prescribed by the Secretary of Treasury thereunder.” That term, however, in that statutory reference, not only includes entities which transmit funds but also includes check cashers, currency exchangers or entities which issue or redeem money orders, travelers checks, etc. The agencies, in the preamble to the proposed regulations, however, suggest that the “money transmitting businesses” contemplated for inclusion are limited to any business that “engages . . . in the transmission of funds” such as “Western Union and MoneyGram . . . PayPal, and other electronic systems that engage in the business of transmitting funds.” (72 Fed. Reg. at 56684) (Emphasis added). Such subcategory of funds transmitting businesses are expressly defined in 31 U.S.C. § 5330(d)(2) as “a money transmitting service.” Since it is the apparent intent to apply the proposed regulations only to such funds transmitters, and not the other non-bank categories, ambiguity can be avoided by amending the definitions in section 2(p) to make clear that only a “money transmitting service” is a “designated payment system.”

It should be noted that pursuant to the Act, the implementing agencies have discretion to “jointly determine” by rule or order, which “financial transaction providers” should be specified as “designated payment systems.” See 31 U.S.C. § 5362(3). Therefore, use of the statutorily defined term “money transmitting service” adds clarity and is consistent with the articulated intent of the drafters of the proposed regulation as set forth in the preamble to the proposal.

## **II. “Send” Agents of a “Money Transmitting Service” Should be Exempt Consistent with the Treatment of ACH and Wire Transfer Systems.**

For ACH and wire transfer systems, the proposal exempts the originating entity (e.g., the ODFI in the case of ACH systems or the “originator’s bank” in the case of wire transfer systems, see 72 Fed. Reg. 56686-87) on the basis that “while it may be possible, at least in some cases, for an originating bank to obtain . . . a submission from the originator, any associated benefits would likely be outweighed by the associated costs for reasons similar to those described . . . regarding exemption for ODFIs in ACH credit transactions.” 72 Fed. Reg. at 56687. These reasons were described with reference to ODFIs in the context of ACH transactions, as the fact that a customer “may knowingly mischaracterize the actual nature of the transaction . . . or because the customer may not actually know whether [a] . . . transaction is a restricted transaction under the Act.” 72 Fed. Reg. at 56686. Moreover, the agencies believed that “the burden on ODFIs in developing the necessary systems to obtain the [originator] information and determine whether to input or block a transaction would likely be substantial.” *Id.*

But these same considerations also apply to “send” agents of money transmitting services which should be exempt.<sup>1/</sup> In the typical traditional money

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<sup>1/</sup> The proposed regulation is confusing because a send agent appears to be both a “money transmitting service,” “money transmitting business” and arguably a “participant in a designated payment system.” See Section 2(q). The preamble contains a reference that such send agents are “participants” rather than “money transmitting businesses” or “money transmitting services.” See 72 Fed. Reg. at 56689, n.17. Yet, whatever the conclusion in this regard, “all non-exempt participants . . . shall establish and implement written policies and procedures . . . to identify and block . . . restricted transactions,” (See Section 5(a)) unless it relies on the payment system’s procedures. See section 5(b)(1). But if the send agent is

transmission model, over 150,000 independently owned send agents exist in the United States. These agents interact with the retail customer and receive the funds and payment instructions from the customer. In turn, these payment instructions are forwarded by the send agent to the transmission company via computer or telephone. In addition, the send agent does not have a commercial relationship with the recipient of the funds transmission.

As in the case of ACH originators or wire transfer system originating banks, the send agents are not in a position to determine the purpose of the funds transmission. In addition, as noted in the ACH and wire transfer context, the customer/originator may misstate the purpose or fail to comprehend the prohibited nature of the purpose of the transaction and, of course, the send agent will be “unable to determine whether the originator’s characterization of the transaction is accurate.” (See 72 Fed. Reg. at 56686).

Moreover, the send agent will not have a “pre-existing relationship with the customer receiving the proceeds . . . and could [not] with reasonable due diligence, take steps to ascertain the nature of the [recipient’s] business . . .” (72 Fed. Reg. at 56686.) In short, whether the “designated payment system” category is “money transmitting business” or “money transmitting service,” the definitional regulations should (at section 2(p)) exempt “the send agent for or on behalf of a money transmitting business or a money transmitting service.” Nothing in the Act precludes the agencies from adopting this reasonable approach which is consistent with the similar treatment for ACH and wire transfer systems based on the identical rationale. Such an approach is also consistent with the proposed regulatory approach of focusing on recipients of funds transfer systems which have a “commercial subscriber relationship” with the system (See section 6(e)).

In this regard, the agency’s request for comment on the impact of the proposal under the Regulatory Flexibility Act (5 U.S.C. § 601 et seq.) is especially pertinent since send agents are predominantly small businesses. In the absence of an exemption, they would be forced to somehow “determine” if the transmitter’s procedures “comply with the requirements of the regulation as applied to the participant [i.e., the sales agent]” (72 Fed. Reg. at 56689 n. 17) Yet, neither the

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a “money transmitting service” or “business” it is by definition a “designated payment system, and so the “participant” reference is ambiguous in this context.

proposed regulation nor the preamble provides any guidance on how the send agent outlet -- mainly mom and pop retail stores -- make such a “determination” or what degree of inquiry will satisfy this requirement, which is not spelled out in the regulations. (See section 5(b)<sup>2/</sup>). This burden is severe for small businesses such as send agents which may now be faced with the prospect of performing due diligence on the adequacy of a funds transmitter’s policies and procedures -- an unworkable and impractical, if not impossible, task for such small businesses. In sum, such a burden on small business is unwarranted, particularly since the public policy justifying an exemption for originators in the ACH and wire transfer contexts is equally applicable to send agents.

Finally, as the proposing agencies are aware, money transmitting businesses and their sales outlet agents have been suffering from repeated waves of bank account closures over the past few years largely resulting from misperceptions by banks of their duties to police compliance by MSBs with pertinent Bank Secrecy Act compliance obligations. If the proposed regulations appear to be imposing a new due diligence requirement on money transmission send agents, the remaining banks which serve these sales outlets may be even less motivated to continue providing depository services. This is not an illusory fear, based on recent history.

### **III. A Money Transmitting Business Should Not be Required to Ask the Sender the Purpose of the Transaction.**

For the reasons set forth above, the preamble should make explicit what appears to be clear in the regulations, *i.e.*, that the policies and procedures prescribed in section 6 of the regulations focus not on customer identity or transaction purpose, but rather on “due diligence in establishing or maintaining commercial subscriber relationships” so that such entities “will not receive restricted transactions through the money transmitting business . . . .” (See Section

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<sup>2/</sup> Section 5(b) appears to deem as compliant a participant which “relies on or complies with the written policies and procedures of the designated payment system . . . .” As to a send agent, however, the regulation does not appear to require send agents to make a “determination” of whether the payment systems policies and procedures are in compliance, contrary to the text of footnote 17 at 56689. Therefore, the regulations should reflect this position. Also, it is not clear if a send agent is a “participant” or a “money transmitting business.” See note 1.

6(e)(1).) (Emphasis added). Thus, the narrow focus of the proposed regulations on “commercial subscriber” recipients appears to be underscored by the requirement that money transmitting businesses (i.e., the systems themselves) must monitor payment patterns to such “commercial subscribers.” (See Section 6(e)(2)(i)). In short, the regulatory approach set forth in Section 6(e) of the proposal is reasonable with regard to money transmitting businesses and the preamble should clarify this critical distinction. As set forth above, it is axiomatic that send agents, whether they are deemed “participants” or “money transmitting businesses” or “money transmitting services” are ill-equipped to determine the nature of whether a recipient has a “commercial subscriber relationship” with the transmitting system.

**IV. ACH Due Diligence Requirements Should Not Have the Unintended Consequence of Encouraging Bank Closure of MSBs such as Money Transmitting Businesses.**

The typical activities of money transmitting businesses are set forth in the preamble (72 Fed. Reg. at 56684-85). Also, in some circumstances, money transmitting businesses engage in bill payment activities and in that role, the money transmitting business may initiate ACH transactions on behalf of consumers. While the ACH proposed regulations appear to focus on the origination of ACH debits (ODFI’s in ACH credit transactions appear to be exempt), there is concern that section 6(b)(ii) of the proposed regulation will be interpreted by banks as requiring them, in cases of ACH credit transfers initiated by money transmitting businesses, to perform due diligence of the money transmitting business and/or the send agent. In such cases, a money transmitting business performing bill payment services might be construed as a “commercial customer” which would trigger the “screening” obligation of the customer as well as the system as specified in section 6(b)(i)(A).

In addition, a money transmitting business will have a “customer relationship” with both a bank and/or an ACH system and both, according to the preamble text are required “before establishing a relationship with [such] a third party sender [to] conduct appropriate due diligence with respect to the third party sender.” (72 Fed. Reg. at 56688). But, banks have shown some much publicized reluctance in recent years to be the gatekeepers of the adequacy of money transmitting companies’ compliance.

In order to avoid the unintended consequence of banks closing money transmitting business accounts because of nervousness over the extent of the

“screening” requirement, it is recommended that the regulations incorporate a self-certification obligation to be provided by the money transmitting business (i.e., the system) to the ACH originating depository financial institution that it is in compliance with the regulations promulgated under the Act. This self-certification could be a statement by the money transmitting business, executed under penalty of perjury prosecution, that the money transmitting business is compliant with the regulations promulgated pursuant to the Act. An ACH system or a wire transfer system should be able to rely on this certification without performing additional due diligence on the adequacy of the money transmitting business’ compliance.

**V. As to Cross-Border Transactions -- The Agencies Should Promulgate and Routinely Update a List of Proscribed Financial Institutions and Avoid any Suggestion that Banks Have a Due Diligence Obligation with Regard to “Money Transmitting Businesses”.**

While the agencies have rejected the establishment and publication by the government of a list of “businesses known to be engaged in the business of unlawful internet gambling” (72 Fed. Reg. at 56690), perhaps consideration should be given to the maintenance of a list of non-cooperative foreign financial institutions. Such a list would avoid the complexities identified in the preamble with regard to devising a list of internet gaming facilities (See 72 Fed. Reg. at 56690).

As stated in the preamble, (See p. 72 Fed. Reg. 56690, fn 19), the originator’s bank “that directly sends a cross-border wire transfer to a foreign bank is not exempt from the [compliance] requirement.” Id The same is true for the ACH operator in an outgoing cross-border transaction to a foreign gateway operator. The concern for money transmitting businesses, in the cross-border arena, relates to transactions directed to foreign banks on behalf of consumers, businesses and for settlements with foreign pay out agents. These would seem to be ACH credit transactions under section 6(b)(3), and there is concern that a money transmitter business’ depository banks will second guess the nature of the money transmitting business’ transaction which involves instructions to send or credit a transaction to a foreign bank.

Likewise, with regard to a wire transfer system, the “originator’s bank,” i.e., the bank utilized by the money transmitting business to effect its cross border transactions, must have procedures assigned to identify and block restricted transactions. (section 6(f)). The issue is whether and to what extent the

originating bank, in the case of a money transmitting business' cross-border transfers, must perform due diligence of the foreign bank and/or the money transmitting business, its policies and procedures and/or the specific underlying transaction.

As indicated above, the recent history of bank closures of money transmitting business accounts suggests that banks may be reluctant to take on new "due diligence" obligations relating to compliance by money transmitting businesses with legal requirements. The fear is not unfounded, particularly since the proposed wire transfer system regulations (section 6(f)) require that a bank with regard to a "commercial customer" (a money transmitting company could be so deemed) "will not receive restricted transactions . . . ." (section 6(f)(i)). The regulation is vague, however, as to whether, in cross border situations, funds transfers on behalf of a money transmitting business which are received by a foreign bank for or on behalf of a participant in the money transmitting business' system, (e.g., a pay-out agent), must be scrutinized by the "beneficiaries bank."

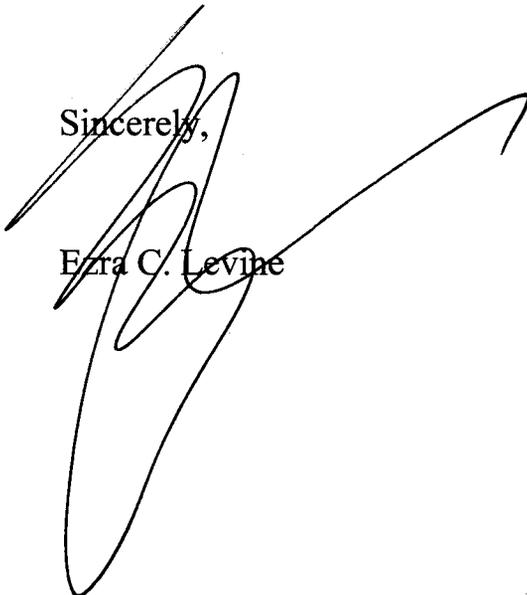
In short, increased clarity is required to make clear that money transmitting businesses, because of the unique fact that they cannot "move" money without either a bank wire transfer or ACH relationship, do not because of that fact, require additional due diligence duties by either ACH systems or banks in the context of wire transfers. Since money transmitting business must use banks to move money cross-border for the customers of the money transmitting business, banks may be reluctant to conduct these transactions for non-bank entities if the regulations appear to place new burdens on the banks to "police" money transmitting businesses. To avoid this reluctance, the government could publish a list of non-compliant foreign banks (i.e., those that are "found to have received restricted transactions) that should not be utilized as recipients for cross-border transactions and/or banks could rely on a self-certification by the money transmitting business that it is in compliance with the regulations promulgated under the Act.

In summary, TMSRT believes that the proposed regulations with regard to money transmitters, which are narrowly focused only on funds transfer recipients who have commercial subscriber relationships with the transmitter (See, section 6(e)) are appropriate. TMSRT agrees that this regulatory approach is consistent with the purposes of the Act, poses the least administrative burden and will serve the public interest. However, as suggested above, the preamble and the regulations should explicitly take into account the piggy-back nature of money transmitting

businesses in the financial services world. A possible solution could be the exemption of send agents and the self certification by system operators set forth above.

In short, many of the comments of TMSRT relate to the fear that absent explicit guidance in either the final regulation and/or the preamble to the regulation, some language in the proposal may be construed by banks and their federal bank examiners to require a new affirmative obligation by banks to monitor, evaluate, and police the adequacy of the money transmitters business' compliance with the regulatory mandate. TMSRT's comments, therefore, seek clarifications and simplifications and to avoid unintended consequences of the regulatory framework.

Sincerely,



Ezra C. Levine