

March 6, 2006

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

Attention: Regulatory Information Number 1506-AA29  
[regcomments@fincen.treas.gov](mailto:regcomments@fincen.treas.gov)

**Re:** Notice of Proposed Rulemaking on Anti-Money Laundering Special Due  
Diligence Programs for Certain Foreign Accounts

Ladies and Gentlemen:

ABA Securities Association, the American Bankers Association, the Bankers' Association for Finance and Trade, The Financial Services Roundtable, the Futures Industry Association, the Institute of International Bankers, the Investment Company Institute, the Securities Industry Association, the Swiss Bankers Association, The Bond Market Association, and The Clearing House Association L.L.C. (the "Associations"),<sup>1</sup> which represent virtually every major covered financial institution, as well as a broad spectrum of other financial institutions, appreciate the opportunity to comment jointly on the Notice of Proposed Rulemaking (the "NPR") issued by the Department of the Treasury and the Financial Crimes Enforcement Network (collectively, the "Department") relating to a proposed regulation (the "Proposed Rule") to implement the provisions of Section 312 of the USA PATRIOT Act (the "Act")<sup>2</sup> that require enhanced due diligence for correspondent accounts established, maintained, administered or managed for certain types of foreign banks. 71 Fed. Reg. 516 (Jan. 4, 2006).

The Associations and their member institutions are deeply committed to assisting the Government in deterring and preventing money laundering and terrorist financing, and we appreciate this opportunity to offer our assistance in refining enhanced due diligence measures that will further contribute to achieving this objective. Our comments on the Proposed Rule address the following topics: (1) the general risk-based approach to enhanced due diligence embodied in the Proposed Rule; (2) the risk-based approach to applying the specified elements of enhanced due diligence, *e.g.*, the requirement to assess certain foreign banks' anti-money laundering programs; (3) the use of the term "nested banks"; and (4) the estimation of regulatory burden set forth in the NPR.

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<sup>1</sup> See Annex A for a description of each of the Associations.

<sup>2</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Pub. L. No. 107-56).

## 1. Risk-based Approach

In our July 1, 2002 comment letter on the May 30, 2002 notice of proposed rulemaking,<sup>3</sup> we endorsed a risk-based approach to implementing the due diligence requirements of Section 312. We continue to believe that a risk-based approach enables covered financial institutions to focus their attention and resources on those customers, accounts and transactions that are most vulnerable to money laundering and terrorist financing. As we stated previously, in our view, a fundamental and essential element of an effective due diligence program is a risk assessment by a covered financial institution of its business, its customers, the types of accounts it maintains, and the types of transactions in which it and its customers engage.

In this regard, we endorse the risk-based approach set forth in the Proposed Rule which recognizes that “not all correspondent accounts present the same type or level of risk,” and that the same enhanced due diligence need not be applied in every case. 71 Fed. Reg. at 517. This risk-based approach has two essential elements in our view. First, it applies the specified enhanced due diligence requirement only to the three categories of foreign correspondent banks identified in Section 312, *i.e.*, foreign banks operating under: (i) an offshore banking license; (ii) a banking license issued by a jurisdiction deemed non-cooperative with international money laundering principles (“NCCT banks”) by the Financial Action Task Force (“FATF”) or similar international body; or (iii) a banking license issued by a jurisdiction designated under Section 311 of the Act as warranting special measures due to money laundering concerns. Second, it states that covered financial institutions should determine the extent of the specified enhanced due diligence that is necessary and appropriate based on an assessment of the nature and extent of the risks posed by the foreign banks subject to the enhanced due diligence requirement. *Id.*

The preamble to the final rule under Section 312 (the “Final Rule”)<sup>4</sup> states that a covered financial institution’s risk assessment should be based on “a consideration of relevant factors, as appropriate to the particular jurisdiction, customer and account.” The Final Rule identifies certain relevant risk factors which may be considered in an institution’s risk assessment, as appropriate, including: (1) the nature of the foreign financial institution’s business and the markets it serves; (2) the nature of the correspondent account and the type of activity anticipated (*e.g.*, proprietary or customer activity); (3) the nature and duration of the covered financial institution’s relationship with the foreign financial institution; (4) the anti-money laundering regime of the jurisdiction that licensed or chartered the foreign financial institution and, if relevant, its parent; and (5) public information reasonably available to the covered financial institution, including determinations under Section 311 of the Act and determinations of comprehensive consolidated supervision made by the Federal Reserve. *Id.* at 502-503.

In determining the extent of enhanced due diligence that will be required for a foreign bank that falls within one of the three statutory categories subject to enhanced due diligence, we believe that a covered financial institution should apply these same factors, as appropriate. In particular, we believe that it is reasonable to give due consideration and substantial weight to a determination that such a foreign bank is part of a regulated group subject to consolidated supervision by a jurisdiction with a robust anti- money laundering regime. The preamble to the Final Rule states that a covered financial institution may consider in its risk assessment whether “a foreign financial institution is owned by an institution that is incorporated or chartered in a

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<sup>3</sup> 67 Fed. Reg. 37,736 (May 30, 2002).

<sup>4</sup> 71 Fed. Reg. 496 (Jan. 4, 2006).

jurisdiction that has a robust anti-money laundering and supervisory regime.” *Id.* at 503. This is particularly relevant in assessing, for example, the risk of an offshore booking center of a major international bank from a jurisdiction with a strong anti-money laundering regime. As noted in the preamble to the Proposed Rule, in assessing the risk of offshore banks, it is appropriate to consider “whether such banks are branches or affiliates of financial institutions that are subject to supervision in their home jurisdiction, which might reduce the risks or money laundering.” *Id.* at 518.

The Final Rule also recognizes that, because of the breadth of the definition of correspondent accounts, certain types of accounts will not present the same risk of money laundering as the traditional correspondent account (*i.e.*, an account used to make funds transfers on behalf of third parties). As discussed in more detail below, that distinction, in our view, applies equally strongly to a risk assessment of a foreign bank that falls into one of the three statutory categories of high risk institutions.

In sum, we believe the risk-based approach embodied in the Proposed Rule provides covered financial institutions the flexibility to design an enhanced due diligence program for foreign correspondent banks that is tailored to the specific risks posed by the correspondent accounts of those foreign banks. By limiting the defined categories of high risk foreign banks to those identified in the statute and by providing flexibility in the application of the required elements of enhanced due diligence to those foreign banks, the Proposed Rule avoids the danger of creating overly proscriptive rules that focus covered financial institutions on technical compliance rather than achievement of the underlying objectives. With regard to those foreign banks not falling within any of the three enumerated categories, the preamble to the Final Rule notes that covered financial institutions should apply “increased due diligence” to correspondent accounts of foreign banks identified as having a high risk of money laundering, which may or may not include, as appropriate, one or more of the elements of specified enhanced due diligence set forth in the Proposed Rule. *Id.* We believe this is an effective approach.

## **2. Elements of Specified Enhanced Due Diligence**

The risk-based approach to application of the specified enhanced due diligence requirements, as described in the NPR, allows the covered financial institution to vary its application of those requirements to a particular account based on its risk assessment. We endorse this approach and have the following comments on certain of the individual components of the enhanced due diligence requirements consistent with the overall objective of providing for rigorous risk assessment of certain foreign correspondent banks without imposing unduly burdensome or unproductive obligations on covered financial institutions.

### **a. Enhanced Scrutiny**

The Proposed Rule requires that the elements of enhanced due diligence include enhanced scrutiny of a foreign correspondent bank to guard against money laundering. Based on a covered financial institution’s risk assessment, it may, where appropriate, obtain and review documentation relating to the foreign correspondent bank’s anti-money laundering program, and consider and evaluate the extent to which the program appears to be reasonably designed to detect and prevent money laundering. The discussion of this requirement in the NPR is helpful in two respects: first, it makes clear that the covered financial institution is not required to conduct an audit of the implementation of the program, and, second, it recognizes that it will not always be necessary or appropriate to

obtain and analyze a written copy of the program, *e.g.*, in the case of a well-regulated foreign correspondent bank that is well-known to the covered financial institution. *Id.* at 518.

The Associations respectfully submit that, due to widely varying differences in language, terminology, procedures, policies and overall tone, a covered financial institution often would not be able to meaningfully analyze and evaluate a foreign bank's anti-money laundering program based on a review of its documentation. We recommend that the Proposed Rule explicitly recognize, as an alternative to obtaining and analyzing a copy of the program itself (*i.e.*, in those circumstances when heightened risk suggests that some documentation of the program should be obtained), that covered financial institutions be able to assess a foreign bank's anti-money laundering program based on the foreign bank's responses to a questionnaire designed to identify whether the program incorporates key aspects deemed to be essential to an effective program.<sup>5</sup>

The Associations believe that this approach represents an efficient and effective alternative to the enhanced due diligence requirement to review, when warranted by the covered financial institution's risk assessment, certain foreign banks' anti-money laundering programs. In addition, it will enable covered financial institutions to assess such programs using uniform guidelines and will contribute to the development of best practices in this area.

#### b. Foreign Bank Customers

The requirement in Section 312 that, where appropriate, a covered financial institution identify the foreign bank customers of its foreign correspondent banks (*i.e.*, those customers of the foreign correspondent banks that are themselves foreign banks), and perform due diligence on those foreign bank customers, continues to raise significant issues for covered financial institutions.<sup>6</sup> Recent enforcement actions involving correspondent banking activities of banks have indicated that bank regulators may hold their regulated financial institutions responsible for monitoring and reporting suspicious activity of their foreign correspondent banks' customers in certain circumstances. The requirement under some circumstances to identify "nested banks" and subject them to due diligence, further solidifies this regulatory approach.<sup>7</sup>

The Associations agree with the suggestion in the preamble to the Proposed Rule that a covered financial institution should be able to determine, based on its risk assessment, that it would not be necessary to obtain a list of the bank's foreign bank customers, unless they have strong reason to suspect that the foreign bank is providing services through its correspondent account to foreign bank customers that present unacceptable risk to the covered financial institution, *e.g.*, foreign bank customers identified by the

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<sup>5</sup> The Associations would be pleased to work with the Department as a group to develop an appropriate questionnaire that could be used in this context.

<sup>6</sup> The Associations are concerned by the standard in the requirement that the covered financial institution take "reasonable steps to obtain information relevant to assess and *minimize* money laundering risks associated with the foreign bank's correspondent accounts for other foreign banks" in Section 103.176(b)(2). We respectfully request that the Department consider changing that term to *mitigate*.

<sup>7</sup> As discussed in Section 3 below, we believe the use of the "nested bank" terminology generally is not appropriate when describing banks' roles as intermediary banks.

Department as institutions of primary money laundering concern. In the absence of such strong indicators of unacceptable risk, we continue to question the utility of obtaining lists of foreign bank customers. Indeed, foreign bank customers located in countries with strict privacy laws may not be permitted lawfully to provide wholesale lists of customers absent their customers' permission. In lieu of obtaining those lists, we believe covered financial institutions can attempt to identify activity of its correspondent banking customers in serving their own customers that may warrant additional investigation by monitoring wire transfer activity originating from the foreign correspondent bank.

Moreover, the Associations respectfully submit that the identification of "nested bank" activity is less relevant outside of traditional correspondent banking relationships, *e.g.*, in securities and futures accounts or corporate trust and custody relationships. The Department has acknowledged that "the term correspondent account does not have an established meaning outside of the banking industry". *Id.* at 498. As a result, implementation of the specified enhanced due diligence requirements of Section 312, in particular the requirement to identify foreign bank customers of a foreign correspondent bank in order to identify "nested bank" activity, is more complicated for those accounts and relationships.

The risk of "nested bank" activity is the risk that a correspondent account will be used by a high risk foreign bank customer of a foreign correspondent bank to effect funds transfers on behalf of third parties that present high risk of money laundering and terrorist financing. It is unclear how this risk could arise in accounts that are not used to conduct third-party funds transfers, such as custody and corporate trust accounts and securities and futures accounts. Accordingly, the Associations respectfully recommend that the Department specifically recognize in the final rule on enhanced due diligence that in certain circumstances, such as in the case of correspondent relationships that by their nature do not raise a meaningful possibility of nested bank activity (*e.g.*, as noted above, custody, corporate trust, securities and futures accounts), covered financial institutions should not be required to obtain lists of foreign bank customers of their foreign correspondent banks or other information about the foreign correspondent banks' customers.

### **3. Use of Term "Nested Bank"**

The Associations are concerned that the term "nested bank" reflects negatively on what is a common and accepted role in international banking. In the Proposed Rule, the term "nested bank" is used to refer to the foreign bank customers of a foreign correspondent bank on whose behalf the foreign correspondent bank processes transactions through its U.S. correspondent account. *Id.* The depiction of these foreign bank customers as "nested" implies that foreign banks seek to hide these relationships, which in turn can create the perception of suspicious activity. However, the fact that a foreign correspondent bank provides correspondent banking services to other foreign banks is not inherently suspicious, but is a common element of international banking. The great majority of foreign banks that provide correspondent banking services to other foreign banks are simply performing the role of intermediaries to facilitate cross-border payments.

We therefore urge the Department to change its terminology to refer to these foreign bank customers as the foreign correspondent bank's "foreign bank customers" or similar neutral term. This term is sufficiently descriptive and inclusive of the relationships at issue without casting a negative light.

#### 4. Regulatory Burden

The Associations believe that the estimates presented in the Proposed Rule vastly understate the burdens imposed by the Proposed Rule. The proposal estimates that the average annual recordkeeping burden on each covered financial institution will be one hour for (i) “[o]btaining and reviewing documentation relating to the foreign bank’s anti- money laundering program,” and (ii) “[o]btaining information from the foreign bank about the identity of any person with authority to direct transactions through . . . a payable-through account and, and the sources and beneficial owners of funds or other assets in the payable-through account.” This estimate of one hour to collect and review this information and documentation simply is not correct.

We believe that the burden of collecting, maintaining and analyzing the information and documentation required by the proposed rule, while varied depending on the size and business of a particular covered financial institution, will number into the hundreds of hours, at a minimum.<sup>8</sup> Even if the estimate is viewed as an average number of hours needed by all recordkeepers (including those that do not maintain correspondent accounts for foreign banks) the number is unrealistically low. We are concerned that this low estimate may reflect a misunderstanding of the significant resources required to meet these proposed obligations in view of our members’ commitment to compliance. Although it is clear that financial institutions will spend far more than one hour in complying with the terms of the Proposed Rule, projecting the total costs of complying is somewhat difficult at this point because the magnitude of the costs will depend somewhat on the final rule that is adopted.

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The Associations appreciate the opportunity to comment on the Proposed Rule, and would be pleased to discuss any of the points made in this letter in more detail. Should you have any questions, please contact H. Rodgin Cohen or Elizabeth T. Davy of Sullivan & Cromwell at (212) 558-4000.

Very truly yours,

ABA Securities Association  
Bankers’ Association for Finance and Trade  
Futures Industry Association  
Investment Company Institute  
Swiss Bankers Association  
The Clearing House Association L.L.C.

American Bankers Association  
The Financial Services Roundtable  
Institute of International Bankers  
Securities Industry Association  
The Bond Market Association

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<sup>8</sup> The Paperwork Reduction Act explicitly provides that burden estimates must include “acquiring, installing, and utilizing technology and systems [and] adjusting the existing ways to comply with any previously applicable instructions and requirement.” 44 U.S.C. § 3502(2)(B), (C).