

Unanswered questions in FinCEN's guidance on reviewing money service businesses



In September 2006 the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance on independent reviews of Money Service Businesses (MSBs). FinCEN addressed four key questions:

1. What should be done during the review?
2. Who should conduct the review?
3. How often should the review be performed?
4. Should the review be documented and reported to management?

But what FinCEN's guidance does not satisfactorily address are questions related to an overriding policy concern: Can an MSB truly perform an independent review of itself? Related to that is the matter of credibility: Will state regulators accept an independent review performed by an MSB employee with little or no anti-money laundering (AML) expertise? And can financial institutions that provide banking services to MSBs rely on such internal reviews in their own Know Your Customer (KYC) and AML policies?

Who conducts independent reviews?

One of the most important issues FinCEN addresses is who should conduct the inde-

pendent review. The guidance states that anyone can conduct the review as long as the reviewer is not the company's compliance officer and does not report directly to the compliance officer.

But FinCEN's permissiveness alone is unlikely to ensure that the reviewer is both independent and knowledgeable.

First and foremost, what is the level of the reviewer's AML know-how? Does he or she have the requisite expertise to understand the requirements of an effective AML compliance program?

And even if the answer is yes, is it reasonable to expect the employee of a small MSB who conducts the review to be truly honest and candid in noting all deficiencies and weaknesses in the AML program, or will the employee's own concerns with job security encourage a review that sugar-coats real problems?

MSBs range from the Mom & Pop firm that serves as agent of a money remitter to multinational corporations with foreign agents and hundreds of employees. Despite those differences, there needs to be a common denominator, which is the ability to rely on the independence and competence of the reviewer.

In-house vs. outsiders

A small MSB might have someone on its payroll with the requisite audit knowledge and AML expertise, but more often than not it won't. The MSB may then seek help from its Certified Public Accountant or attorney, but they too may lack the AML knowledge to conduct the review properly. When retained to conduct an audit on financial statements, the American Institute of Certified Public Accountants requires CPAs to have knowledge of the client and the client's industry. A similar standard should be accepted practice in qualifying independent reviewers of AML programs.

In many cases the MSB may be a family-owned concern with only one or two employees, including the compliance officer, and might benefit greatly from the efforts of an outside reviewer. The outside reviewer's report could touch on issues that the MSB is unaware of, and do exactly what it is supposed to do: avert AML problems.

Too, the financial institution that banks the MSB may be relying on the MSB's review to satisfy the requirements of its own KYC program. For the bank, that competent outside review offers credibility and confidence.

Worth the price?

Still, small MSB's may be hesitant to retain an outsider to conduct the review because of cost. The MSB must ask itself if the price of the competent, qualified outside review is less than the risks it faces (reputational, operational and economic) from having a deficient internal independent review that overlooks potentially ruinous lapses in its AML compliance program.

For larger MSB's the price of having an independent review performed by an outside third party may be lower than the cost of an internal independent review. A further problem with internal reviews is that the employees assigned the review might well be audit staff with little AML expertise, who would focus on quantitative analysis rather than a tough, qualitative assessment.

The audit staff might test transactions, but might not understand Suspicious Activity Report alerts, reportable transactions, Know Your Agent policies and Currency Transaction Report filings. The reviews would tend to focus on the flow of transactions, with limited analysis of employee training programs, risk assessment, Customer Identification Programs and Office of Financial Asset Control (OFAC) analysis of transaction performed.

Regulators may want more

It is important for MSBs to understand that state regulators, as well as the Internal Revenue Service, will ask for the review report during their own examinations. The regulators will ask about the reviewer's AML expertise, and may well ask to review the work papers behind the review report as well as the transaction testing performed by the reviewer.

These factors must be considered before the MSB decides to rely on FinCEN's guidance in arranging for its independent review.

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