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By electronic mail: comments@dfs.ny.gov

Mr. Gene C. Brooks
Assistant Counsel
New York State Department of Financial Services
One State Street
New York, New York 10004

Re: Regulating Transaction Monitoring and Filtering Systems Maintained by Banks, Check Cashers and Money Transmitters, I.D. No.: DFS-50-15-00004-P

Dear Mr. Brooks:

The Electronic Transactions Association ("ETA") hereby submits its comments in response to the Department of Financial Services' ("Department") proposal to adopt regulations designed to clarify the required attributes of the Transaction Monitoring and Filtering Program and Watch List Filtering Program maintained by regulated entities and to require a Senior Officer to certify on an annual basis that the entity's programs comply with the new regulations.[1] ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA's members include financial institutions, licensed money transmitters and others that may be impacted by any rules or regulations the Department may adopt. ETA respectfully disagrees with the Department's suggestion[2] that the proposed rules are needed to foster compliance by regulated entities with federal anti-money laundering and sanctions requirements. They will, however, have the unfortunate consequence of limiting the flexibility regulated entities are currently afforded under federal law to design and tailor their own programs to fit their size, needs and risk profiles and may restrict the ability of regulated entities to make changes to their programs based on changes in their risk profiles.

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[1] Proposed Section 504.3 of Title 3 NYCRR, NY Reg., Dec. 16, 2015 at 10.

[2] NY Reg., Dec. 16, 2015 at 11.

ETA commends the Department for its diligence in working to uncover and eliminate money laundering, terrorist and criminal financing and the transaction of business with sanctioned countries, entities and individuals. As a result of shortcomings it has discovered during investigations into compliance by ***certain*** regulated entities with federal Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") statutes and regulations and Office of Foreign Assets Control ("OFAC") requirements that implement economic and trade sanctions ("federal requirements"), the Department believes that ***all other*** financial institutions may also have "shortcomings" in their compliance programs.[3]

To address these possible presumed shortcomings, the Department has proposed rules that would require the Transaction Monitoring and Filtering Programs and Watch List Filtering Programs maintained by regulated entities to incorporate, at a minimum, specific attributes enumerated in proposed Section 504.3.[4] In addition, the proposed rules would require a regulated entity's chief compliance officer or functional equivalent[5] to file an annual certification with the Department representing that he/she has reviewed the entity's Transaction Monitoring and Filtering Program and Watch List Filtering Program and that the Programs comply with all of the requirements of the new rules.[6] Failure to maintain compliant Programs or to file the annual certification would subject a regulated entity to "all applicable penalties provided for by the [New York] Banking Law and the Financial Services Law."[7] A chief compliance officer who files "an incorrect or false" annual certification may also be subject to criminal penalties.[8]

The federal BSA/AML requirements appropriately recognize that no single compliance program is suitable for every regulated entity.[9] Under the federal rules, a regulated entity is

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[3] Proposed Section 504.1 of Title 3 NYCRR, NY Reg., Dec. 16, 2015 at 9.

[4] Proposed Sections 504.3(a)-504.3(c) of Title 3 NYCRR, NY Reg., Dec. 16, 2015 at 10.

[5] The Department should elaborate on what it means by the "functional equivalent" of a chief compliance officer in proposed Section 504.2(c). Would a Chief AML/BSA Officer be the functional equivalent of a chief compliance officer for purposes of the certification even if his/her authority is more limited than that of the institution's chief compliance officer?

[6] Proposed Section 504.4 of Title 3 NYCRR and Attachment A thereto, NY Reg., Dec. 16, 2015 at 10.

[7] Proposed Section 504.5 of Title 3 NYCRR, NY Reg. Dec. 16, 2015 at 10.

[8] *Id.*

[9] See e.g., 31 C.F.R. §1022.210, which requires each money services business to develop, implement and maintain an effective money laundering program and which defines an effective

required to design its BSA/AML program in a manner that is commensurate with the money laundering risks that may be associated with its unique combination of products, services, customers, geographic locations and operations. In contrast, the proposed rules require all regulated entities, regardless of size, location or the nature and volume of the financial services they offer, to incorporate the same prescriptive requirements into their Transaction Monitoring and Watch List programs. There is no doubt that the existing compliance programs of regulated entities have many of the attributes the proposed rules mandate (*e.g.,* they are based on the AML and OFAC risk assessment of the institution, they reflect current BSA/AML laws and regulations and they utilize watch lists that reflect current legal or regulatory requirements). A number of the mandated attributes, however, are replete with undefined terms, such as the "threshold settings" required in the Watch List Filtering program,[10] the "end-to-end pre- and post-implementation testing" required for both the Transaction Monitoring and Watch List Filtering programs[11] and the requirement that the Transaction Monitoring program reflect "any relevant information available from the institution's related programs and initiatives, such as 'know your customer due diligence,' 'enhanced customer due diligence' or other relevant areas. . . ."[12] With no explanation as to what the Department means by these undefined terms, compliance with the proposed rules (and certification of compliance) will be difficult, if not impossible.

The federal regulators responsible for enforcement of the BSA/AML laws and OFAC sanctions provide extensive guidance on what regulated entities must do to comply with their AML and OFAC obligations.[13] Rather than introduce considerable uncertainty into the compliance process, the Department should allow regulated entities to maintain the flexibility to design their BSA/AML and OFAC programs that they are given under federal law.

The Proposed Rules Are Not Necessary To Ensure Compliance with Federal Law

ETA submits that the federal BSA/AML statutes and rules and the OFAC statutes and rules adequately address the topics identified in proposed rule 504.3 and are more than sufficient

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program as "one that is reasonably designed to prevent the money services business from being used to facilitate money laundering and the financing of terrorist activities."

[10] See Proposed Rule 504.3(b)(3) and (5).

[11] See Proposed Rule 504.3(a)(5) and (b)(3).

[12] See Proposed Rule 504.3(a)(2).

[13] See *e.g.,* FFIEC Bank Secrecy Act/Anti-Money Laundering Examination Manual (2014); OFAC Information For Industry Groups, available at https://www.treasury.gov/resource-center/sanctions/Pages/regulations.aspx.

to ensure that regulated entities that comply with the federal requirements are well positioned to combat the facilitation of money laundering and terrorist and criminal financing and to avoid sanctions violations.[14] In addition, Sections 115, 116, 416 and 417 of the Superintendent's Regulations mandate that all banks and all money transmitters chartered or licensed in New York demonstrate, establish and maintain anti-money laundering programs that comply with all federal BSA/AML and OFAC requirements.[15] The proposed rules will not strengthen the federal requirements, but they will add another level of overlapping regulatory complexity that will burden regulated entities[16] with no corresponding law enforcement benefit. For this reason, we urge the Department to decline to adopt the proposed rules.

While the Department has acknowledged that the proposed rules do not change the existing compliance requirements under federal law, it states that "the certification requirement will cause compliance officers to proactively ensure compliance by their institutions with existing federal Requirements."[17] The federal requirements already impose on regulated entities an affirmative duty to have procedures and mechanisms in place to guard against the use of their products for money laundering and terrorist or other criminal financing purposes as well as an affirmative duty to avoid doing business with sanctioned countries, companies and

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14 The Department acknowledges that all covered institutions "should already have in place processes and systems, whether manual or automated, to ensure compliance with the [federal] Requirements." See ¶ 5 of the Regulatory Flexibility Analysis; see also ¶ 7 of the Regulatory Flexibility Analysis ("The proposed regulation is intended merely to foster compliance with existing requirements.") and ¶ 3 of the Regulatory Impact Statement ("The proposed rule does not change existing compliance requirements imposed on Covered Institutions."), NY Reg., Dec. 16, 2015 at 11. ETA agrees that all covered institutions should already have in place processes and systems to ensure compliance with the federal requirements as mandated by both New York state and federal law. For this reason, the proposed rules are not needed to ensure compliance.

15 3 NYCRR §§ 115.1, 116.1, 416.1, 417.1. Applicants for a money transmitter license must also provide for the Department's review and approval a risk assessment and written BSA/AML compliance program that incorporates transaction screening and filtering compliant with applicable federal law. See DFS Money Transmitter Application, Instructions at Section K, Anti-Money Laundering, available at http://www.dfs.ny.gov/banking/ialfmti.htm.

16 Unlike the federal BSA/AML requirements, the proposed rules make no distinction between banks and non-bank regulated entities. For example, under the federal rules, money transmitters are not required to collect as much information about their customers as are banks. Compare 31 C.F.R. § 1022.210 with 31 C.F. R. § 1020.220. The difference in the customer identification requirements reflects the fact that banks are account-oriented while money transmitters are transaction-oriented.

17 See ¶¶ 3, 4 of the Regulatory Impact Statement and ¶¶ 2, 4 of the Regulatory Flexibility Analysis, NY Reg., Dec. 16, 2015 at 11.

individuals. The certification requirement itself will not ensure compliance with federal law. Rather as currently proposed, it will compel compliance officers to attest unequivocally to a legal conclusion (*i.e.,* that their companies' Transaction Monitoring and Watch List Filtering Programs "compl[y] with all the requirements of [proposed] Section 504.3") and subject them to potential criminal prosecution if the Department subsequently determines that the institution's programs are not fully compliant. Holding compliance officers accountable for knowing or willful violations of the federal requirements is one thing, but mandating that compliance officers certify absolute compliance with the vague and subjective requirements of the new state regulation is neither necessary nor appropriate to achieve compliance with the federal requirements. The Department should eliminate the certification requirement.

Holding Compliance Officers Strictly Liable Is Not Good Public Policy

As the Department is aware, compliance with the BSA/AML and OFAC requirements is a shared corporate responsibility. Compliance personnel operate in a highly regulated environment requiring persistent vigilance and are responsible, among other things, for overseeing their companies' transaction monitoring, internal controls, reporting and training. Compliance officers often must rely on their staffs and/or other third parties to provide the information necessary to monitor and interdict potentially suspect transactions and to file suspicious activity reports. Requiring compliance officers to certify that their companies' Transaction Monitoring and Watch List Filtering Programs actually comply with the requirements of the proposed rule and imposing criminal liability for a certification made in good faith but that the Department determines to be incorrect is likely to have the unintended consequence of discouraging qualified and talented individuals from serving in compliance positions, lest they be held personally accountable for conduct that is the responsibility of the regulated entity. In light of the need for competent, experienced professionals to establish, maintain and enforce effective compliance programs, it would be counterproductive for the Department to adopt regulations that would inhibit such professionals from agreeing to assume compliance responsibilities. Because proposed Section 504.3(c)(7) requires that the Transaction Monitoring and Watch List Filtering Programs have qualified personnel responsible for the design, planning, implementation, operation, testing, validation and on-going analysis of the Programs, the Department should not adopt a rule that would have the effect of shrinking the universe of qualified personnel willing to serve in compliance positions.

If the Department nonetheless decides to retain the certification requirement of the proposed rule, it should revise the language. Rather than requiring a compliance officer to certify that the Transaction Monitoring and Watch List Filtering Programs actually comply with proposed Section 504.3, the Department should at the very least amend the certification to read that the Transaction Monitoring and Watch List Filtering Programs are reasonably designed to achieve compliance with all of the requirements of Section 504.3.[18] Such a revision would

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[18] This certification language is modeled on the attestation language the federal banking regulators adopted to implement the Volcker rule under Section 610 of the Dodd-Frank Act. See 12 C.F.R. §248, Appendix B.

appropriately allow for an evaluation of the reasonableness of the compliance officer's judgment that the Programs comply before any determination is made that a certification is incorrect or false. Such a revision would also be more consistent with the federal requirements which recognize that regulated entities are not "infallible."[19] In no event should a compliance officer be held strictly liable for any infraction.

The ambiguity of certain provisions of proposed Section 504.3[20] would also render a strict criminal liability standard particularly unfair. For example, section 504.3(a)(6) and (b)(6) require that the Programs include "easily understandable documentation." Easily understandable by whom? Requiring a compliance officer to certify that documentation is easily understandable under threat of criminal prosecution without specifying by whom the documentation must be easily understandable creates an impossible standard to meet. Similarly, Section 504.3(c)(1) requires that the Transaction Monitoring and Filtering Programs identify "all data sources that contain relevant data." Given the breadth and volume of data sources that may contain data relevant to money laundering and watch lists, requiring a compliance officer to certify that *all* such sources have been identified under threat of criminal prosecution would be unwarranted. Even the most diligent and conscientious compliance officers can do no more than exercise reasonable judgment in identifying and relying upon sources that contain relevant data. To the extent the Department subsequently determines that an additional source may contain relevant data, it would be unfair to penalize a compliance officer who acted in good faith in identifying relevant data sources at the time the certification was made.

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[19] Opening Remarks of Under Secretary for Terrorism and Financial Intelligence David S. Cohen at the Treasury Roundtable on Financial Access for Money Services Businesses (January 13, 2015), ("We recognize that it is not possible or practical for a financial institution to prevent every single potentially illicit transaction that flows through it. The Bank Secrecy Act requires that financial institutions establish and implement AML/CFT programs reasonably designed to detect, prevent and report suspicious activity."), available at https://www.treasury.gov/press-center/press-releases/Pages/jl9736.aspx.

[20] See also, the discussion of undefined terms at p.3, *supra,*

Conclusion

For the foregoing reasons, ETA respectfully requests that the Department find that the proposed rules are not necessary to achieve compliance with federal BSA/AML and OFAC requirements. To the extent that the Department disagrees, it should at the very least eliminate the certification requirement or amend the certification language consistent with ETA's recommendation.

Respectfully submitted,

/s/

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