

**SURPRISE! YOU ARE A MONEY SERVICES BUSINESS:
Classification and Requirements of a Money Services Business
Under the Bank Secrecy Act**

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Foreign bank account reporting under the Bank Secrecy Act (“BSA”) has recently made headlines in the tax realm due to increased enforcement efforts by the Internal Revenue Service (“IRS” or “Service”). But this is just the tip of the iceberg. Businesses must be aware of conduct that could bring them within the scope of the BSA and subject them to a BSA examination.

Although the BSA was enacted by Congress in 1970 to fight money laundering and other financial crimes, many law-abiding individuals and small businesses are surprised to find that they are subject to certain BSA requirements. Some of these requirements stem from the regulatory definition of a Money Services Business (“MSB”). Despite their relative obscurity, noncompliance with the MSB requirements under the BSA can result in hefty civil and criminal penalties as well as imprisonment for up to 5 years.¹

An MSB is any individual or organization that does business in one of the following capacities:

- (1) Currency dealer or exchanger
- (2) Check casher
- (3) Issuer of traveler’s checks, money orders, or stored value
- (4) Seller or redeemer of traveler’s checks, money orders, or stored value
- (5) Money transmitter

An activity threshold applies to the first four categories. A business that engages in these activities will not be considered an MSB unless it deals in an amount greater than \$1,000 per person, per day, in one or more transactions. 31 C.F.R. § 103.11(uu). However, *no* activity threshold applies to the definition of a money transmitter, defined as, “[a]ny person . . . engaged as a business in the transfer of funds.” 31 C.F.R. § 103.11(uu)(5)(i)(B). Thus, any person who engages, as a business, in the transfer of funds *is* a money transmitter and, therefore, an MSB – regardless of the amount of money actually transmitted.

Whether a person “engages as a business in the transfer of funds” is based on the facts and circumstances surrounding the transaction. The “acceptance and transmission of funds as an integral part of the execution of and settlement of a transaction other than the funds transmission itself . . . will not cause a person to be a money transmitter.” 31 C.F.R. § 103.11(uu)(5)(ii). For example, a title company transmitting the proceeds of a sale of real estate to the seller via electronic transfer will not automatically subject the title company to the BSA. Nonetheless, small businesses engaged in these activities should be aware of the requirements and consequences associated with being classified as an MSB.

¹ A responsible individual who fails to satisfy MSB registration requirements is subject to a civil penalty up to \$5,000 per day regardless of whether the failure was willful. Violations may also expose individuals to criminal fines and/or imprisonment for up to 5 years per violation.

I. MSB Requirements – the 3 R’s

A business classified as an MSB must comply with the general requirements of the BSA applicable to all financial institutions as well as the specific requirements applicable solely to MSBs. These general and specific requirements can all be grouped into three categories: (1) registration; (2) recordkeeping; and (3) reporting.

(i) *Registration*

Except for specific exceptions, a business that meets the definition of an MSB must register with the Financial Crimes Enforcement Network (“FinCEN”) of the U.S. Department of the Treasury by filing a FinCEN Form 107.² 31 C.F.R. § 103.41(a)(1). The initial Form 107 must be completed, signed and filed within 180 days of the date the MSB was created. 31 C.F.R. § 103.41(b)(3). An MSB must renew its registration by filing a new, original Form 107 every two years, on or before December 31 of the second year of the applicable registration period. 31 C.F.R. § 103.41(b)(2). One Form 107 is required regardless of the number of branches or branch offices operated by the MSB.

Any person who “owns or controls a money services business is responsible for registering the business; however, only one registration form is required to be filed for each registration period.” 31 U.S.C. § 5330(a); *see also* 31 C.F.R. § 103.41(c). For instance, if an MSB is a sole proprietor, the owner is responsible for the registration. If the MSB is a corporation, the shareholders are individually and collectively responsible for registration. While multiple owners may designate one owner or other individual to register the MSB, this does not relieve the owners’ liability for failure to register. *Id.*

(ii) *Recordkeeping*

Pursuant to 31 C.F.R. § 103.41, a copy of the filed registration form, an estimate of business volume, information regarding ownership or control of the business, and a *list of agents* for the business must be retained at a location in the United States for a period of 5 years and must be updated annually. Moreover, an MSB must meet the following recordkeeping requirements during the course of business:

(a) *Currency Exchanges of More Than \$1,000*

Under 31 C.F.R. § 103.37, if an MSB provides currency exchanges totaling more than \$1,000, in either foreign or domestic currency, to the same customer in a day, it must keep a record of the transaction in the following manner:

- Record and verify the customer’s name, address, and passport number or Taxpayer Identification Number (TIN);

² The only exceptions are for: (i) a business that is an MSB solely because it serves as an agent of another MSB; (ii) a business that is an MSB solely as an issuer, seller, or redeemer of stored value (such as stored value cards); and (iii) government agencies. 31 C.F.R. § 103.41(a).

- Record the date and amount of the transaction, the currency name, country, and total amount of each foreign currency; and
- Keep the record for 5 years from the date of the transaction.

(b) Money Transfers of \$3,000 or More

Pursuant to 31 C.F.R. § 103.33, if an MSB provides money transfers of \$3,000 or more, to the same customer in a day, regardless of the method of payment, it must keep a record for 5 years from the date of the transaction.

(c) Money Orders or Traveler's Checks for Cash of \$3,000 - \$10,000

Pursuant to 31 C.F.R. § 103.29, if an MSB provides money orders or traveler's checks for cash of \$3,000 up to and including \$10,000, to the same customer in a day, it must keep a record for 5 years from the date of the transaction.

(iii) Reporting

(a) FinCEN Form 104 Currency Transaction Reports (CTR)

Pursuant to 31 U.S.C. § 5313 and 31 C.F.R. § 103.22, MSBs must file a FinCEN Form 104, Currency Transaction Report (CTR), within 15 days whenever a transaction or series of transactions in currency:

1. Involves more than \$10,000 in either cash-in or cash-out;
2. Is conducted by, or on behalf of, the same person; and
3. Is conducted on the same business day

(b) FinCEN Form 105 Report of International Transportation of Currency or Monetary Instruments (CMIR)

Pursuant to 31 U.S.C. § 5316, each person (including a bank) who “transports, is about to transport, or has transported,” mails or ships, (or causes to be transported, mailed, shipped or received), currency, traveler's checks, and other monetary instruments in an aggregate amount exceeding \$10,000 into, through, or out of the United States “*at one time*”³ must file a Currency or Monetary Instruments Report (“CMIR”). In addition, a person receiving such funds from abroad must file the CMIR when the report has not already been filed pursuant to 31 C.F.R. § 103.23(a), “whether or not required to be filed thereunder.” 31 C.F.R. § 103.23(b).

(c) FinCEN Form 109 Suspicious Activity Report (SAR)

³ See 31 C.F.R. § 103.11(b) (defining “at one time” as occurring in one calendar day, or more than one calendar day if done for the purposes of evading the requirement).

Pursuant to 31 C.F.R. § 103.20, an MSB must file a FinCEN Form 109 Suspicious Activity Report (SAR) if a transaction involves or aggregates funds or other assets of \$2,000 or more, and if the MSB knows, suspects, or has reason to suspect that any transaction:

1. Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity as part of a plan to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law or regulation;
2. Is designed, whether through structuring or other means, to evade any requirements of [the BSA or any regulations promulgated thereunder];
3. Serves no business or apparent lawful purpose, and the reporting [MSB] knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or
4. Involves use of the [MSB] to facilitate criminal activity.

31 C.F.R. § 103.20(a)(2)(i)-(iv); *see also* 31 U.S.C. § 5318(g). An MSB must file the SAR within 30 calendar days after becoming aware of the suspicious transaction. A copy of the completed SAR and any supporting documentation must be retained for 5 years from the date the SAR is filed.

II. Consequences of Noncompliance

As discussed above, failure to satisfy the MSB requirements could give rise to substantial civil and criminal penalties. It is extremely important that businesses examine whether they qualify as an MSB and, if so, make efforts immediately to become compliant with the applicable BSA requirements.

If you receive a notice from the Internal Revenue Service regarding a Bank Secrecy Act examination, wish to discuss the Bank Secrecy Act or any related issues, or simply wish to have your current practices reviewed for potential exposure, please contact an attorney in our tax controversy and litigation group at (410) 727-6600 or by e-mail at:

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