The voice of banking
& financial services

18 June 2008

CEBS – Tower 42 (level 18)
25 Old Broad Street
London EC2N 1HQ

By email to AMLfundtransfer@c-ebs.org

Dear Sirs

Consultation on common understanding of the obligations imposed by European Regulation 1781/2006 on the information on the payer accompanying funds transfers to payment service providers of payees

The BBA is the leading association for the UK banking and financial services sector, speaking for 223 banking members from 60 countries on the full range of UK or international banking issues and engaging with 37 associated professional firms.

Collectively providing the full range of services, our member banks make up the world's largest international banking centre, operating some 150 million accounts and contributing £50 billion annually to the UK economy.

BBA members are grateful for the opportunity to comment on the common understanding document and are committed to the effective application of the Regulation, so that its objectives are properly realised. Several of our members were present at the meeting in London on 6 May 2008 and were grateful for the open nature of the discussion and the readiness of the regulatory representatives to hear the industry point of view.

We have the following comments on the CEBS/CESR/CEIOPS paper and we recognise that some of these points were covered at the meeting on 6 May 2008. We have attached at Annex A our comments on the specific questions raised.

General

We recognize and support the objectives of the Regulation to implement FATF Special Recommendation 7 intended to increase the transparency of electronic funds transfers, so that payer information is immediately available. At the same time it is important never to lose sight of the fact that the Regulation has to be applied in a high volume environment in which billions of dollars worth of electronic funds transfers are processed on a daily basis with a high level of automation. Also, the interests of innocent customers remain paramount: it is clearly unacceptable if customers were to be disadvantaged by payment delays or failures to complete transactions because of disagreements between PSPs over the requirements of the

Regulation. The issue must be kept in perspective: the vast majority of banks' customers and their transactions are entirely legitimate and the proper vigilance required to deter the abuse of the payments system should not be at the expense of degrading banks' service to those legitimate customers.

It is essential therefore when considering the impact of the inward monitoring obligations placed on Payee PSPs under the Regulation that:

- the monitoring obligations are practical, and recognize, for example, that when a PSP receives payments originating from another PSP it does not necessarily have a 'relationship' with that other PSP which can be simply terminated at will but such funds may be received through a payment system whose membership it does not control;
- their interpretation is clear and unambiguous, and that they are consistently applied across the Community ; in particular we are concerned to ensure that:
    - compliance with the Regulation is not conflated with the formatting conventions for specific payment or messaging systems, especially SWIFT, ie the fact that information required to comply with the Regulation is located in fields other than the 'by order of' fields does not constitute a breach of the Regulation and therefore does not justify the rejection or delay of the payment;
    - compliance with the Regulation is not conflated with compliance with financial sanctions, in respect of which PSPs may take varying commercial decisions on the extent to which they filter payments (as distinct from screening customers).

The document

Paras 6 -8

- we believe it is inconsistent to say in para 7 both that 'PSPs are *encouraged*…' and 'PSPs *must* apply…'. There is in any case a danger in the term 'obvious meaningless information' since the assessment of information to determine that fact is a subjective one and potentially liable to misunderstandings arising from language or the use of permitted identifiers other than address.

  In this regard we suggest that the term 'obvious meaningless information' is substituted by 'information clearly intended to circumvent the intention of Special Recommendation 7 and Regulation 1781/2006'. It may then be helpful to include as the chief example the various formulations around *a customer/one of our customers/un de nos clients/ein Kunde* etc.

  However, we note that 'meaningless' does not feature as such in the wording of the Regulation. Recital 6 refers to 'meaningful' information without defining it. It should therefore be clearly accepted and reflected in the common understanding that:

    - Neither PSPs nor regulators should apply an over-zealous interpretation to what is 'meaningful' or 'complete', particularly when it concerns addresses or permitted alternatives;
    - The ability of every PSP in the market place, large or small, to apply filters, as encouraged in paragraph 7, cannot be assumed, nor would the analytical capability of filters where they were applied be an exact science;

- we take the view that the distinction between the processes described in paras 7 and 8 is an artificial one: the means whereby a PSP identifies potentially non-compliant payments in the first place may well be the key element of its risk based approach, the output of which is then refined to determine the test sample for follow up. PSPs will of course vary in their preferred approaches; however, identifying and sampling are not necessarily two discrete processes, but may rather be two virtually simultaneous elements of one integrated process;

- 'regularly failing' is another subjective term, the interpretation of which has the scope for unnecessarily heavy handed application by some PSPs to the detriment of customers and fruitless devotion of resource by PSPs to a cumbersome and time wasting paper-chase;

- in particular, we consider that para 8 fails to acknowledge the potential distortion arising from situations where large PSPs act extensively as intermediaries and are simply passing on payments as they are required to do under Art 12. Consequently, they risk being branded as regularly failing when they are not directly at fault;

- we believe that there needs to be recognition that the incidence of formatting discrepancies and inconsistencies do not themselves represent a breach of the Regulation, as mentioned in our general introduction. We accept that it is highly desirable for the payments industry to work towards elimination of these complications, so that common standards are applied, but there are many technical and timing issues constraining the achievement of this objective in the short term.

Para 9 Following the logic of the risk based monitoring set out in paragraph 8 we suggest that it would be more appropriate in line 1 to say that the PSP 'may' become aware rather than 'will'.

Para 11 For the same reason as our preceding comment, we consider that paragraph 11 should commence: "***If*** the PSP becomes aware…" instead of "*When* the PSP…"

Para 13: It is not possible for BBA members to agree with the proposition set out in this paragraph. We consider that it is entirely reasonable and preferable – certainly from a customer perspective - to operate on the basis that all transfers will be systematically processed first and therefore to deal with cases of non compliance or ostensible non-compliance on a post event basis. Indeed, to operate otherwise may open a PSP to a customer claim for breach of contract or would infringe other legal obligations, as was noted at the meeting on 6 May 2008.

Such a position does not of course exclude the possibility that on rare occasions a transfer would be rejected or stopped, particularly to comply with criminal law requirements such as those in the UK's Proceeds of Crime Act (2002). Even apart from those considerations we were surprised and puzzled that this paragraph accepts as a normal or reasonable policy that a PSP would 'choose to systematically reject all transfers'. Such a policy would mean that the PSP would routinely subject its own customers, who in the vast majority of cases will be innocent parties, to the delay, distress and personal and commercial disruption and potential loss inherent in the automatic rejection of ostensibly non compliant payments. As we have suggested in our opening comments, it is essential that banks do not lose their customer focus as a result of what we believe would be a heavy handed approach to meeting the requirements

of this Regulation. Specifically, we would draw your attention to section1 of the underlying FATF Interpretative Note to Special Recommendation V11, which makes it clear that traceability is one of the prime objectives.

Para 21 and 26: we consider the various time deadlines suggested, particularly the 3 day follow-up proposed in Para 26, to be unrealistic, particularly when dealing with some developing countries or those in a state of civil unrest. We would prefer that specified deadlines are not included at all, please see our answer to Q1.

Paras 22-24: we suggest that incomplete information and delays in rectifying it are rarely likely of themselves to raise a suspicion of ML/TF. Moreover, firms generally apply their automated transaction monitoring resource for AML/CTF purposes to the whole of a customer's account activity and respond accordingly. Operationally, the inclusion of some form of suspicion assessment specifically within the post event sampling process for monitoring inward payment traffic to comply with Regulation 1781/2006 is not likely to be efficient, particularly within large firms processing high volumes of traffic. Whilst occasionally it may bring a case for concern to light, it will be the exception rather than the rule, and we recommend that the common position does not try to impose an obligation to assess suspicious character over and above that which already exists generally for AML under the requirements of the 3rd ML Directive and criminal law obligations.

Para 25: this is critical - the focus of the regulatory effort should be on ensuring that local regulators in non-EU countries are working to ensure that PSPs regulated by them are sending complete information with payments. Inward monitoring is only a second line of defence.

We look forward to contributing further to the work being carried out jointly by CEBS, CESR and CEIOPS in this area. We hope that our comments will be taken into account, and would be happy to provide clarification on any aspect of our response if this would be helpful.

Yours sincerely,

Catriona Shaw
Consultant Financial Crime

Question 1: Market participants are invited to express their preference between options A and B or to suggest another option

BBA Comment: We do not support Option A which we consider to be unrealistic and overly prescriptive. We believe that the JMLSG guidance to UK based PSPs (as reflected in part in the 'Bank N' case study in Annex 1) provides pointers to good practice. Hence, in order to accommodate the major differences in business mix and volumes between PSPs processing payments, we support Option B, but would be content to see the concept of time deadlines included within that option without attempting to specify them in detail, ie it would be for PSPs to address within their internal policies according to their own circumstances and defend to their own Regulator.

Section 3.1.4 Paras 31 - 37 and **Question 2**: **Market participants are invited to express their preference between options A and B or to suggest another option**

BBA Comment: Whilst BBA members would concur with para 30 that "when the PSP chooses to hold the funds, its first action should be to ask for the complete information", most would not see the option of holding the funds as one they would normally resort to other than in the case where they are seeking prior consent from the FIU (SOCA for the UK) to undertake a transaction as they are currently required to do in certain circumstances to comply with the Proceeds of Crime Act 2002. Incomplete information on a wire transfer would usually be a very tangential side-issue in such cases and would not of itself be the trigger for seeking consent. Consequently, BBA members view the choice between Options A and B as a hypothetical matter, such cases would be managed on their individual merits. By default Option B would be our preference.

Section 3.2 para 38: we do not see any need for this section, as the situation it seeks to address is already embraced under 3.1.3 *The PSP chooses to execute the transfer.*

Section 4:
4.1 *The regularity of failure:* We consider that it is first essential to have a common understanding of "failure" before attempting to define "regularity". As we have noted above, failure should not be confused with formatting differences or variations in approach towards complying with financial sanctions requirements. There are two elements present in "failure"

- not including anywhere within the funds transfer, irrespective of message type, solely the information specified in Articles 4 and 6 depending on which applies in the given case;
- not responding to a request from a Payee PSP to supply the missing information. The degree of failure is compounded if the request has to be repeated and is still not complied with.

Q.3 Market participants are invited to express their views on the criteria and advise of any other criteria that they currently use or suggest could be used

BBA Comment: In the light of these comments the BBA broadly supports the principles represented by criteria (a), (d) and (e) in para 41 but we cannot support those in (b) and (c)**.** However we continue to have reservations as to the practicality of measuring failures with precision because:

- high volume PSPs using a system of risk based post event sampling will not necessarily have the capacity to investigate every system-identified potential failure, ie. if investigated some may well not be actual failures, rather formatting differences, and therefore not need following up, and,
- as we have noted above, intermediaries may be blamed for deficiencies of originating PSPs when they are not themselves at fault;
- a single payer PSP may use multiple payee PSPs as well as altering the share of business given to each payee PSP from time to time so that no single payee PSP has the complete picture.

Para 44; we strongly support the point made in this paragraph that failure to supply information should not be confused with suspicious activity and that therefore reporting failing PSPs is a totally separate reporting concept to that which relates to the filing of SARs.

Para 46: we also strongly endorse the sentiment that disruption of commercial relationships is to be avoided if at all possible, and whilst PSPs do on occasions make their own commercial decision to terminate a relationship with a particular correspondent, they would rarely wish to do so purely for breaches of Regulation 1781/2006. Indeed, cases can arise where payments form only a small part of the overall relationship. But we also repeat a comment made earlier in this response that a PSP may not necessarily have a relationship as such with another PSP from whom it receives payments.

Q.4: Market participants are invited to express views on the merits of a coordination mechanism, and on the way it could be organised

BBA Comment: we agree that a mechanism is required for the coordination of actions against failing PSPs to ensure that any sanctions are proportionate and properly and fully considered before being put into effect. The blacklisting of any PSP would be potentially very damaging to that firm's market standing and should only be considered as a last resort. Any such blacklisting is properly the responsibility of the regulators, taking a view of a range of reports received, rather than individual PSPs. However, we agree that industry should be represented in the coordination process in whatever form it takes.

Q.5 Market participants are invited to share their current practice. In particular details of the experience of smaller retail banks and information about practices in relation to intermediaries would be welcome.

BBA Comment: in relation to intermediaries we have made comment in the course of our foregoing response. We would further like to add that there is no practical value in intermediaries acting as a post-box in respect of requests by Payee PSPs for missing payer information. The basic principle should be that a Payee PSP addresses a request for missing information direct to the Payer PSP. It should not be necessary to involve the intermediary PSP, other than on occasions where their help is needed to provide a payer PSP transaction reference number in order to trace the payment. We would welcome it if the common understanding could reflect this principle.