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**DEPARTMENT OF THE TREASURY**

**31 CFR Part 103**

**RIN 1506-AB01**

**Financial Crimes Enforcement Network; Notice of Proposed Rulemaking; Cross-Border Electronic Transmittals of Funds**

**AGENCY**: Financial Crimes Enforcement Network (FinCEN), Treasury.

**ACTION**: Notice of proposed rulemaking.

**SUMMARY**: FinCEN, a bureau of the Department of the Treasury (Treasury), to further its efforts against money laundering and terrorist financing, and as required by 31 U.S.C. § 5318(n), is proposing to issue regulations that would require certain banks and money transmitters to report to FinCEN transmittal orders associated with certain cross-border electronic transmittals of funds (CBETFs). FinCEN is also proposing to require an annual filing with FinCEN by all banks of a list of taxpayer identification numbers of accountholders who transmitted or received a CBETF.

**DATES**: Written comments are welcome and must be received on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] [*See* the Compliance Date heading of the Supplementary Information for further dates.]

**ADDRESSES**: Those submitting comments are encouraged to do so *via* the Internet. Comments submitted *via* the Internet may be submitted at http://www.regulations.gov/search/index.jsp with the caption in the body of the text, "Attention: Cross-Border Electronic Transmittals of Funds." Comments may also be submitted by written mail to: Financial Crimes Enforcement Network, Department of the

Treasury, P.O. Box 39, Vienna, VA 22183, Attention: Cross-Border Electronic Transmittals of Funds. Please submit your comments by one method only. All comments submitted in response to this notice of proposed rulemaking will become a matter of public record, therefore, you should submit only information that will be available publicly.

Instructions: Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must obtain in advance an appointment with the Disclosure Officer by telephoning (703) 905-5034 (not a toll free call). In general, FinCEN will make all comments publicly available by posting them on http://www.regulations.gov/search/index.jsp.

**FOR FURTHER INFORMATION CONTACT**: The FinCEN regulatory helpline at (800) 949-2732 and select Option 3.

**SUPPLEMENTARY INFORMATION**:

## I. Statutory Provisions

The Bank Secrecy Act (BSA) (Pub. L. 91-508, codified at 12 U.S.C. §§ 1829b and 1951-1959, and 31 U.S.C. §§ 5311-5314 and §§ 5316-5332) authorizes the Secretary of the Treasury (Secretary) to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in intelligence or counterintelligence matters to protect against international terrorism. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN. The BSA was amended by the Annunzio-Wylie Anti-Money Laundering Act of 1992 (Pub. L. 102-550) (Annunzio-

Wylie). Annunzio-Wylie authorizes the Secretary and the Board of Governors of the Federal Reserve System (the Board) to jointly issue regulations requiring insured banks to maintain records of domestic funds transfers.[1] In addition, Annunzio-Wylie authorizes the Secretary and the Board to jointly issue regulations requiring insured banks and certain nonbank financial institutions to maintain records of international funds transfers and transmittals of funds.[2] Annunzio-Wylie requires the Secretary and the Board, in issuing regulations for international funds transfers and transmittals of funds, to consider the usefulness of the records in criminal, tax, or regulatory investigations or proceedings, and the effect of the regulations on the cost and efficiency of the payments system.[3]

The Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108-458) amended the BSA to require the Secretary to prescribe regulations "requiring such financial institutions as the Secretary determines to be appropriate to report to the Financial Crimes Enforcement Network certain cross-border electronic transmittals of funds, if the Secretary determines that reporting of such transmittals is reasonably necessary to conduct the efforts of the Secretary against money laundering and terrorist financing."

## II. Background Information

### *A. Current Regulations Regarding Funds Transfers*

On January 3, 1995, FinCEN and the Board jointly issued a rule that requires banks and nonbank financial institutions to collect and retain information on certain funds

[1] 12 U.S.C. 1829b(b)(2) (2006). Treasury has independent authority to issue regulations requiring nonbank financial institutions to maintain records of domestic transmittals of funds.
[2] 12 U.S.C. 1829b(b)(3) (2006).
[3] *Id.*

transfers and transmittals of funds (Funds Transfer Rule).[4] At the same time, FinCEN issued the "travel rule," which requires banks and nonbank financial institutions to include certain information on funds transfers and transmittals of funds to other banks or nonbank financial institutions.[5]

The recordkeeping and travel rules provide uniform recordkeeping and transmittal requirements for financial institutions and are intended to help law enforcement and regulatory authorities detect, investigate, and prosecute money laundering and other financial crimes by preserving an information trail about persons sending and receiving funds through the funds transfer system.

Under the "travel rule," a financial institution acting as the transmittor's financial institution must obtain and include in the transmittal order the following information on transmittals of funds of $3,000 or more: (a) name and, if the payment is ordered from an account, the account number of the transmittor; (b) the address of the transmittor; (c) the amount of the transmittal order; (d) the execution date of the transmittal order; (e) the identity of the recipient's financial institution; (f) as many of the following items as are received with the transmittal order: the name and address of the recipient, the account number of the recipient, and any other specific identifier of the recipient; and (g) either the name and address or the numerical identifier of the transmittor's financial institution. A financial institution acting as an intermediary financial institution must include in its respective transmittal order the same data points listed above, if received from the sender.[6]

[4] 31 CFR 103.33(e) (2009) (Recordkeeping requirements for banks); 31 CFR 103.33(f) (2009) (Recordkeeping requirements for nonbank financial institutions).
[5] 31 CFR 103.33(g) (2009).

[6] 31 CFR 103.33(g)(1)-(2) (2009).

Furthermore, under the recordkeeping rule, of the information listed above, a financial institution must retain the following data points for transmittals of funds of $3,000 or more:

- If acting as a transmittor's financial institution, either the original, microfilmed, copied, or electronic record of the information received, or the following data points: (a) the name and address of the transmittor; (b) the amount of the transmittal order; (c) the execution date of the transmittal order; (d) any payment instructions received from the transmittor with the transmittal order; (e) the identity of the recipient's financial institution; (f) as many of the following items as are received with the transmittal order: the name and address of the recipient, the account number of the recipient, and any other specific identifier of the recipient; and (g) if the transmittor's financial institution is a nonbank financial institution, any form relating to the transmittal of funds that is completed or signed by the person placing the transmittal order.[7]
- If acting as an intermediary financial institution, or a recipient financial institution, either the original, microfilmed, copied, or electronic record of the received transmittal order.[8]

The recordkeeping rule requires that the data be retrievable and available upon request to FinCEN, to law enforcement, and to regulators to whom FinCEN has delegated BSA compliance examination authority. A broad range of government agencies regularly compel under their respective authorities (*e.g.*, subpoena or warrant) financial institutions

[7] 31 CFR 103.33(e)(1)(i), (f)(1)(i) (2009).
[8] 31 CFR 103.33(e)(1)(ii)-(iii), (f)(1)(ii)-(iii) (2009).

to provide information maintained pursuant to the recordkeeping rule, albeit in ad hoc and sometimes inconsistent and overlapping ways, depending upon the agency or investigator.

*B. FATF Special Recommendation VII*

Shortly after the attacks of September 11, 2001, the Financial Action Task Force (the FATF)[9] adopted several special recommendations designed to stem the financing of terrorism. Special Recommendation VII (SR VII) was developed with the objective of preventing terrorists and other criminals from having unfettered access to wire transfers for moving their funds and detecting such misuse when it occurs.[10]

The FATF in adopting SR VII found that, "due to the potential terrorist financing threat posed by small wire transfers, countries should aim for the ability to trace all wire transfers and should minimize thresholds taking into account the risk of driving transactions underground." The interpretive note to Special Recommendation VII goes on to say that countries may adopt a *de minimis* standard of $1,000, below which countries could exempt institutions from reporting or maintaining records.

*C. 9/11 Commission and Section 6302*

On November 27, 2002, President Bush signed legislation creating the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) (Pub. L. 107–306), which was directed to investigate the "facts and circumstances relating to the terrorist attacks of September 11, 2001," including those involving intelligence agencies,

[9] The FATF is a 36-member inter-governmental policy-making body with the purpose of establishing international standards, and developing and promoting policies, both at national and international levels, to combat money laundering and terrorist financing. *See generally* http://www.fatf-gafi.org. The United States is a member of the FATF.

[10] *Revised Interpretative Note to Special Recommendation VII: Wire Transfers*, FATF (Feb. 29, 2008), http://www.fatf-gafi.org/dataoecd/16/34/40268416.pdf.

law enforcement agencies, diplomacy, immigration issues and border control, the flow of assets to terrorist organizations, and the role of congressional oversight and resource allocation.[11] To fulfill its mandate, the 9/11 Commission reviewed over 2.5 million pages of documents, conducted interviews of some 1,200 individuals in ten countries, and held 19 days of public hearings featuring testimony from 160 witnesses.

In conducting its review, the 9/11 Commission focused a significant amount of inquiry into the financial transactions undertaken by the 19 hijackers and their associates. The Commission estimated that $400,000 - $500,000 was used to support the execution of the attacks of September 11, 2001.[12] The Commission noted that the transactions were not inherently suspicious and the low volumes of the transactions would not have raised alarm at the financial institutions processing the transactions. The Commission also noted that no suspicious activity reports (SARs) were filed on these transactions prior to the attacks of September 11, 2001.[13] The Commission determined that the current reporting and recordkeeping requirements contained in the BSA were insufficient to detect terrorist financing because of the inability of financial institutions to use typical money laundering typologies to detect terrorist financing transactions.[14]

The 9/11 Commission, through its final report and the August 23, 2004 testimony of its Vice-Chairman,[15] noted that vigorous efforts to track terrorist financing must remain front and center in U.S. counterterrorism efforts. The Commission also found that

[11] *The Final Report of the National Commission on Terrorist Attacks Upon the United States* (9/11 Commission Report) (July 22, 2004 ), http://www.9-11commission.gov/report/911Report.pdf.
[12] *Id.* at 169.
[13] *Id.* at 528 n. 116.
[14] *See* National Commission on Terrorist Attacks Upon the United States, *Terrorist Financing Staff Monograph*, 54-58 (2004).
[15] *9/11 Commission* at 382 (Testimony provided by Mr. Lee Hamilton, Vice-Chairman).

''terrorists have shown considerable creativity in their methods for moving money."[16] Expanding upon this point in his August 23, 2004 testimony, 9/11 Commission Vice-Chairman Hamilton stated: "While we have spent significant resources examining the ways al Qaeda raised and moved money, we are under no illusions that the next attack will use similar methods. As the government has moved to close financial vulnerabilities and loopholes, al Qaeda adapts. We must continually examine our system for loopholes that al Qaeda can exploit, and close them as they are uncovered. This will require constant efforts on the part of this Committee, working with the financial industry, their regulators and the law enforcement and intelligence community."

In response to the findings of the 9/11 Commission, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),[17] which was signed into law on December 17, 2004, by President Bush. IRTPA encourages the sharing of information across intelligence agencies, protects the civil liberties and privacy of individuals, and provides processes through which intelligence agencies can obtain additional intelligence necessary to protect the United States and its citizens. Specifically, section 6302, codified under 31 U.S.C. § 5318(n), requires that the Secretary study the feasibility of "requiring such financial institutions as the Secretary determines to be appropriate to report to [FinCEN] certain cross-border electronic transmittals of funds, if the Secretary determines that reporting of such transmittals is reasonably necessary to conduct the efforts of the Secretary against money laundering and terrorist

[16] *Id.* at 383.
[17] Pub. L. 108-458, 118 Stat. 3638 (2004).

financing." The law further requires that the regulations be prescribed in final form "before the end of the 3-year period beginning on the date of enactment of the [Act]."[18]

Although no particular provision of IRTPA on its own would have prevented the attacks of September 11, 2001, together these provisions are designed to close the loop-holes that would allow future attacks of a similar design. For example, of the $400,000 to $500,000 used to fund the September 11, 2001 attacks, an estimated $130,000 was received by CBETFs sent from supporters overseas. Several of those transactions were above the $3000 reporting threshold and involved a transmittor or recipient who was either an active target of an investigation at the time the transfer was made, or could have been recognized as a person of interest under the new IRTPA intelligence sharing provisions.

### *D. Feasibility of a Cross-Border Electronic Funds Transfer Reporting System under the Bank Secrecy Act*

Section 6302 of IRTPA requires that, prior to prescribing the contemplated regulations, the Secretary submit a report to Congress that: (a) identified the information in CBETFs that might be found in particular cases to be reasonably necessary to conduct the efforts of the Secretary to identify money laundering and terrorist financing, and outlined the criteria to be used by the Secretary to select the situations in which reporting under this subsection may be required; (b) outlined the appropriate form, manner, content, and frequency of filing of the reports that might be required under such regulations; (c) identified the technology necessary for FinCEN to receive, keep, exploit, protect the security of, and disseminate information from reports of CBETFs to law enforcement and other entities engaged in efforts against money laundering and terrorist

[18] 31 U.S.C. 5318(n) (2006).

financing; and (d) discussed the information security protections required by the exercise of the Secretary's authority under such subsection. In January 2007, the Secretary submitted the feasibility report required under Section 6302 (the "Feasibility Report") to the Congress.[19]

FinCEN's development of the Feasibility Report included multiple approaches. An internal working group of employees drawn from all operational divisions of FinCEN coordinated efforts within the organization, managed contact with external stakeholders, hosted small workshops with law enforcement representatives, visited relevant U.S. and foreign government and private sector organizations, surveyed industry and governmental organizations, solicited input from private sector technology experts,[20] and researched extensively. In addition, FinCEN formed a subcommittee of the Bank Secrecy Act Advisory Group (BSAAG)[21] including representatives from across the spectrum of U.S. financial services industry members, and governmental agencies. The subcommittee did not author or review this report, but provided expert assistance in the identification and analysis of relevant issues, recommendations about the focus of the report, and important contacts within the U.S. financial services industry. FinCEN also drew upon the experience of the Australian Transaction Reports and Analysis Centre (AUSTRAC) and

[19] Feasibility of a Cross-Border Electronic Funds Transfer Reporting System under the Bank Secrecy Act, FinCEN Report to Congress dated January 17, 2007, available at http://www.fincen.gov/news_room/rp/files/cross_border.html.

[20] *See Feasibility Report* App. G. FinCEN Industry Survey (Notice and Request for Comment, 71 Fed. Reg. 14289) and industry responses can be found in Appendix G of the Feasibility Report.

[21] The Annunzio-Wylie Anti-Money Laundering Act of 1992 required the Secretary of the Treasury to establish a Bank Secrecy Act Advisory Group (BSAAG) consisting of representatives from federal regulatory and law enforcement agencies, financial institutions, and trade groups with members subject to the requirements of the Bank Secrecy Act, 31 CFR 103 *et seq.* or Section 6050I of the Internal Revenue Code of 1986. The BSAAG is the means by which the Secretary receives advice on the operations of the Bank Secrecy Act. As chair of the BSAAG, the Director of FinCEN is responsible for ensuring that relevant issues are placed before the BSAAG for review, analysis, and discussion. Ultimately, the BSAAG will make policy recommendations to the Secretary on issues considered. BSAAG membership is open to financial institutions and trade groups.

the Financial Transactions Reports and Analysis Centre (FINTRAC), FinCEN's counterpart financial intelligence units in Australia and Canada, both of which already collect cross border funds transfer information.[22]

The Feasibility Report produced a general, high-level assessment of:

- What information in a funds transfer is reasonably necessary to collect to conduct efforts to identify money laundering and terrorist financing, and the situations in which reporting may be required;[23]
- The value of such information in fulfilling FinCEN's counter-terrorist financing and anti-money laundering missions;[24]
- The form that any such reporting would take and the potential costs any such reporting requirement would impose on financial institutions;[25]
- The feasibility of FinCEN receiving the reports and warehousing the data, and the resources (technical and human) that would be needed to implement the reporting requirement;[26] and,
- The concerns relating to information security and privacy issues surrounding the reports collected.[27]

The Feasibility Report also identified a number of issues that policy makers were required to consider at any stage of the implementation of the reporting requirement, such as whether the potential value of requiring financial institutions to report information about CBETFs outweighs the potential costs of building the technology, the costs to

[22] *See Feasibility Report*, at Section 3.0 – Overview.
[23] *See Id.* at Section 4.0.
[24] *See Id.* at Section 3.0.
[25] *See Id.* at Section 5.0.
[26] *See Id.* at Section 6.0.
[27] *See Id.* at Section 7.0.

financial institutions of implementing compliance processes, and the social costs related to privacy and security of the information.

A significant concern for the centralization of information on CBETFs is the cost, both to U.S. financial institutions and to the government, of implementing the reporting requirement and building the technological systems to manage and support the reporting. Related to these concerns are questions about the government's ability to use such data effectively. Another concern is the potential effect that any reporting requirement could have on dollar-based payment systems such as: (1) a shift away from the U.S. dollar toward other currencies (i.e., the Euro) as the basis for international financial transactions; (2) the creation of mechanisms and facilities for clearing dollar-based transactions outside the United States; and (3) interference with the operation of the central payments systems. The United States has economic and national security interests in the continued viability and vitality of dollar-based payments and these possible outcomes must inform and guide the rulemaking process.

These issues were also pointed out by commenters in response to FinCEN's March 2006 survey[28] regarding the reporting of CBETFs. In its response to FinCEN's March 2006 survey, the American Bankers Association "proposes for discussion whether piloting a single channel specific reporting requirement and then evaluating what has been achieved from a law enforcement perspective for what cost from an economic and privacy basis, isn't a preferred alternative to attempting to implement a comprehensive definition-and-exception driven cross-border, cross-system regime."[29] The Feasibility Report concluded that there was some value to a phased implementation of a CBETF

[28] 71 FR 14289 (March 21, 2006).
[29] *Feasibility Report,* App. G at 119.

reporting system. Building on the ABA's suggestion, the Feasibility Report proposed an incremental development and implementation process. The pre-acquisition phase of the process involved three parallel efforts: user requirement analysis; institutional cost analysis; and value analysis. All three of these efforts provided vital information required to develop detailed requirements for the proposed regulation and technological system. If the concerns noted above or any as-yet unidentified issues would impede the project or cause it to be infeasible, such incremental approach provides the opportunity to alter or halt the effort before FinCEN or the U.S. financial services industry incurs significant costs.

Based on extensive fieldwork and analysis of information and data, the Feasibility Report concluded that:

- The information that FinCEN is seeking to be reported is reasonably necessary to support the Secretary's efforts to combat money laundering and terrorist financing. Specifically, the inability to conduct proactive analysis on the information currently recorded by banks hinders law enforcement's ability to identify significant relationships to active targets.
- The basic information already obtained and maintained by U.S. financial institutions pursuant to the Funds Transfer Rule, including the $3,000 recordkeeping threshold, provides sufficient basis for meaningful data analysis.[30]

[30] As discussed below, through understanding the processing of transactions by potential third-party reporters, FinCEN removed the reporting threshold for banks and adjusted the reporting threshold for money transmitters to $1,000.

- Any threshold should apply only to discrete transactions and not to the aggregated total value of multiple transactions conducted very closely to one another in time.
- Any reporting requirement should apply only to those U.S. institutions that exchange payment instructions directly with foreign institutions. FinCEN determined that a focused approach on those institutions that act as intermediaries would restrict the reporting requirement to those institutions with the systems able to process these reports and limit the implementation costs on the industry as a whole.
- Any reporting requirement should permit institutions to report either through a format prescribed by FinCEN, through the submission of certain pre-existing payment messages that contain the required data, or through an interactive online form for institutions that submit a low volume of such reports. The filing system should accommodate automated daily filing, periodic filing via manual upload, and discrete single report filing on an as-needed basis.[31]
- The implementation of the reporting requirement described in section 6302 would be a staged process, requiring FinCEN to review and update the requirements as necessary.

As to the determination of what type of cross-border movements of funds to include in the first step of the staged process advocated by the Feasibility Report, the definition of "cross-border electronic transmittal of funds" lies at the heart of a successful

[31] *See Feasibility Report*, at Section 1.0 – Executive Summary.

implementation of the reporting requirement. The nature of the electronic funds transfer process as it has evolved in the United States poses specific difficulties in creating a definition that at once captures all of the nuances of the payment systems and avoids needless complexity. Section 6302 contemplates a reporting requirement that is coextensive with the scope of the BSA funds transfer rule (31 CFR § 103.33). Accordingly, for the purposes of the first step of a phased approach to the cross-border electronic transmittal of funds reporting rulemaking process (the CBETF First Stage), the Feasibility Report focused on electronic "transmittals of funds" as defined in 31 CFR § 103.11(jj), and did not address any debit card type of transmittals, point-of-sale (POS) systems, transaction conducted through an Automated Clearing House (ACH) process, or Automated Teller Machine (ATM).[32] Furthermore, within the current regulatory definition of "transmittals of funds," the Feasibility Report advised concentrating for the CBETF First Stage on those transactions involving depository institutions that exchange transmittal orders through non-proprietary messaging systems, and all money transmitters, and where the U.S. institution sends or receives a transmittal order directing the transfer of funds to or from an account domiciled outside the U.S.. Refining an appropriate regulatory definition of what transactions fall within the new reporting requirement will implicate a number of concerns that were identified by the Feasibility Report and should be further addressed during future studies.

As further preparation for a study of the implications and benefits of implementing the first step of CBETF reporting, the Feasibility Report recommended the following:

[32] *See Feasibility Report*, at Section 8.0 – Conclusions and Recommendations.

- Engaging with partners in the law enforcement, regulatory and intelligence communities to develop detailed user requirements to meet the most central needs of those who access BSA data.
- Engaging in a detailed discussion with representatives of the U.S. financial services industry, along with representatives of the major payment systems and members of the Canadian and Australian financial services industries. These discussions would focus on quantifying the cost the proposed requirement would impose on reporting institutions and the potential impact on the day-to-day operation of the payment systems.
- Engaging outside support to obtain and analyze a sizable sample of cross-border funds transfer data and exploring means of extracting value from the data, and identifying means to effectively and intelligently use the data to advance efforts to combat money laundering and illicit finance.

## III. Implications and Benefits of Cross-Border Funds Transmittal Reporting

Based on the high-level assessment and recommendations of the Feasibility Report, FinCEN conducted an in-depth Implications and Benefits Study of Cross-Border Funds Transmittal Reporting (the Implications and Benefits Study, or simply the Study)[33] addressing the proposed first step of implementation of CBETF reporting. Significant input into the survey of banks and MSBs that supported the Study[34] was provided by BSAAG. The Study was also supported by interviews with law enforcement and

[33] *See generally Implications and Benefits of Cross-Border Funds Transmittal Reporting*, FinCEN Analytical Report, FinCEN (Sept. 27, 2010), http://www.fincen.gov/news_room/rp/rulings/pdf/ImplicationsAndBenefitsOfCBFTR.pdf [hereinafter *Implications and Benefits Study*].
[34] *See Implications and Benefits Study*, at App. C.

regulatory agencies, information from foreign financial intelligence units,[35] and interviews and surveys of financial institutions.[36] The Study analyzed in detail the implications of CBETF reporting on the financial sector and the benefits to law enforcement of having access to CBETF data to determine the known or potential uses of CBETF data, the implications of reporting on the financial industry, and the technical requirements for accepting reports.

*A. The Known and Potential Uses of CBETF Data*

As illicit actors adapt to an increasingly transparent system, they must make additional and more complicated efforts to conceal their behavior and resort to slower, riskier, more expensive, and more cumbersome methods of raising and moving money. Every additional step or layer of complexity illicit actors must add to their schemes provides new opportunities for detection, and an increased risk to those who would abuse the financial system. The value of transparency is twofold – it deters those who would use the financial system for illicit activity and promotes the detection of those who do so. As governments throughout the world strive to promote transparency in the financial system, the shortage of tools for detecting schemes that rely on these modern technological payment systems creates a potential blind spot in our efforts to protect the homeland and to combat financial crime.

Traditionally, experts describe three stages of money laundering:

- Placement – introducing cash into the financial system or into legitimate commerce;

[35] FinCEN continued drawing upon the experience of AUSTRAC and FINTRAC, FinCEN's counterpart financial intelligence units in Australia and Canada, both of which already collect cross border funds transfer information. The extensive and detailed information contributed to this effort by AUSTRAC and FINTRAC is contained in Appendix B (Financial Intelligence Unit Letters of Support) to the Study.

[36] See Implications and Benefits Study, at Section 1.0 – Executive Summary.

- Layering – separating the money from its criminal origins by passing it through several financial transactions;
- Integration – aggregating the funds with legitimately obtained money or providing a plausible explanation for its ownership.

The BSA reporting regime deals well with the placement stage. Some financial institutions file Currency Transaction Reports (CTRs) when a person conducts certain types of large currency transactions, others file Forms 8300 for large amounts of cash or monetary instruments received in a trade or business, and travelers entering the U.S. with more than $10,000 in currency must complete Currency and Monetary Instrument Reports (CMIRs). However, while these three reports address placement, due to their focus on currency-based transactions, they do not provide insights into the rapidly developing electronic aspects of financial transactions. These reports identify the physical movement of currency into and within the U.S. financial system. Electronic funds transfers, by contrast, represent an entirely different mode for the movement of money.

The SAR provides some insight into the layering and integration stages by casting a light on transactions of any amount and type that financial institutions suspect are related to illicit activity or that are suspicious in that they do not appear to fit a known pattern of legitimate business activity. FinCEN has found that electronic funds transfers feature prominently in the layering stage of money laundering activity, which is not addressed in any of the reports currently filed if the transactions do not raise suspicions within the financial institution. Complex electronic funds transfer schemes can

deliberately obscure the audit trail and disguise the source and the destination of funds involved in money laundering and illicit finance.[37]

In addition to addressing money laundering, the BSA requires reporting that has a high degree of usefulness in tax proceedings, and provides the Secretary with additional tools to prevent tax evasion. Although some models of tax evasion do follow the placement, layering, and integration models of money laundering, many do not because the proceeds are not illicit until after the money has been transferred overseas. The information proposed to be reported in this rulemaking will assist the government in preventing tax evasion and reducing the tax gap.

A reporting requirement would create a centralized database of this very basic CBETF information in a single format and link it with other highly relevant financial intelligence. Furthermore, this very basic information about such transfers provides both a source of information that can provide new leads standing alone and can potentially enhance the use and utility of current BSA data collected by FinCEN when combined with those other data sources. Currently, the government has no ability on a national scale to systematically and proactively target money laundering, terrorist financing, tax evasion, and other financial crimes that are being conducted through wire transfers. By creating a reporting structure, the government will be able to query the data by geography and transaction value, uncovering linkages such as many people sending money to one person outside the United States or vice versa. These types of linkages play a critical role in the ability of the government to bring cases that it is not able to in today's reporting environment. Among the ways in which FinCEN and its partners can exploit this data are individual searches for known subjects, data matching with other sources of lead

[37] *See Feasibility Report*, at Section 3.0 – Overview.

information, and link analysis with other financial, law enforcement, and intelligence reporting.[38]

The study team worked with law enforcement and regulatory agencies to identify how CBETF data would be usable for those identified purposes to demonstrate the "reasonable necessity" of collecting CBETF data. The results of that analysis are summarized in the Implications and Benefits Study as follows:

- Section 4.2, Business Use Case Process, describes the study team's approach to developing the business use cases which illustrate potential uses of the data.
- Section 4.3, Categories of Analysis, explains how the use cases were categorized (e.g., reactive, proactive).
- Section 4.4, Domestic Business Use Case Summary, summarizes the use cases that the study team developed.
- Section 4.5, Use of CBETF Data by International Financial Intelligence Units (FIUs), summarizes the use of CBETF data by FinCEN's counterpart FIUs in foreign countries.
- Section 4.6, Data Usability, Quality, and Prototyping, presents the results of the study team's analysis to validate the usability of the data with CBETF data samples provided by the financial industry.[39]

From its interviews with law enforcement and regulatory agencies, the study team developed primary impact areas, also known as "business use cases," and identified 24

[38] *See Feasibility Report*, at Section 4.0 - Data Reasonably Necessary to Identify Illicit Finance, and also Appendix F (Potential Analytical Value of Cross-Border Funds Transfer Report).
[39] *See Implications and Benefits Study*, at Section 4.0 – Benefits to Law Enforcement and Regulatory Agencies.

scenarios in which thirteen different federal and state law enforcement and regulatory agencies, in addition to FinCEN, would benefit from access to CBETF data based upon their investigative mission, current use of BSA data, or existing utilization of CBETF data obtained from financial institutions in the primary impact areas of terrorist financing, money laundering, tax evasion, human and drug smuggling, and regulatory oversight.[40] The results of this work demonstrate how access to CBETF data would greatly improve both the efficiency of these agencies' current investigations and their ability to identify new investigative targets as well as be highly valuable in the U.S. Government's efforts to counter these associated crimes. The following examples are illustrative of the representative business use cases that were developed:

- To support the FBI's efforts in tracking and freezing terrorist assets, the FBI's Terrorism Financing Operations Section (TFOS) analysts conduct sophisticated analysis, cross-referencing multiple disparate data sources, to identify financial transactions indicative of terrorist financing. The availability of CBETF data would significantly improve the efficiency of FBI analysts investigating targets suspected of engaging in terrorist financing by tracing the flow of proceeds to entities associated with terrorist organizations. Such analysis would play a critical role in the ability of the FBI to detect, disrupt, and dismantle terrorist financial support networks.
- The Internal Revenue Service's Abusive Tax Scheme Program, Offshore Compliance Initiatives Group, conducts sophisticated analysis to

[40] *See Implications and Benefits Study*, at Section 1.0 – Executive Summary.

proactively identify taxpayers using offshore accounts and entities to evade U.S. income tax. The availability of CBETF data would significantly enhance the group's ability to identify potential evasion by identified taxpayers through the analysis of funds transmittals from the United States to offshore accounts.

- United States Immigration and Customs Enforcement (ICE) is establishing Trade Transparency Units (TTUs) with critical partner jurisdictions worldwide, in its effort to identify and eliminate customs fraud and trade-based money laundering. These TTUs have enhanced international cooperative investigative efforts to combat activities designed to exploit vulnerabilities in the U.S. financial and trade systems. As formal international financial systems become more highly regulated and transparent, criminal entities have resorted to alternative means of laundering illicit proceeds. Fraudulent practices in international commerce allow criminals to launder illicit funds while avoiding taxes, tariffs, and customs duties. To enhance combating this threat, ICE TTUs would conduct proactive analysis of CBETF data in conjunction with existing U. S. and foreign trade data to detect money laundering cases involving the international movement of over- or under-valued goods.

Using FinCEN's authority under the recordkeeping rule, FinCEN received a limited sample of CBETF data from several large financial institutions.[41] Based on the business use cases, the study group performed an analysis of the sample data. This analysis yielded several findings:

[41] *See* 31 CFR 103.33(e) (2009) (Office of Management and Budget (OMB) Control Number 1505-0063).

- CBETF data fields, under current recordkeeping requirements, are sufficient to conduct the type of analyses illustrated in the business use cases, although additional fields could add value.
- Upon implementation, CBETF data would immediately be available to conduct the type of analyses illustrated in the business use cases.
- Having CBETF data for transactions under $3,000 would significantly benefit the type of analysis illustrated in the business use cases.
- The quality of the data in the sample was found to be acceptable to conduct the type of analyses illustrated in the business use cases.

A comparison of a three month limited sample of CBETF data to FinCEN cases revealed a substantial number of instances where CBETF transactions were matched with existing cases and/or pointed to additional investigative leads.[42] Based on the findings from the Study, FinCEN has determined that the collection of CBETF data would be "reasonably necessary" as set forth in Section 6302. This determination is based on the value FinCEN believes this information will have in our efforts to stem money laundering, tax evasion, and terrorist financing. FinCEN believes that a reporting requirement provides a significant advantage to the government's efforts in these areas over the current recordkeeping requirement at a reasonable cost. These advantages are based on the central premise that proactive targeting is more effective with access to a larger dataset.

FinCEN's determination that a reporting requirement is reasonably necessary also rests on the tenet that the government has greater access to information than any

[42] *See Implications and Benefits Study*, at Section 1.0 – Executive Summary.

individual institution. For example, if a bank or money transmitter has a customer who routinely transfers funds to a foreign country in amounts that, considered alone, would not appear significant, this activity may never be reviewed. By instituting a reporting requirement, the government will be able to observe whether this customer is conducting similar transactions at many other institutions and, if so, can see that the person may be avoiding detection by spreading their transactions across many market participants. Additionally, the government has access to more information than banks and money transmitters. While the government cannot provide the private sector access to trade and tax databases, for example, matching information in these databases with cross-border wire records will further prosecutions in these areas, potentially leading to recouping revenue that may otherwise go uncollected. Lastly, the government will always have access to classified information that cannot be shared with the private sector, and the ability to run queries based on this information could have a significant impact on mapping a criminal or terrorist support network.

*B. Implications of CBETF Reporting to the Financial Industry*

To solicit input from the financial industry on the effects of a potential CBETF reporting requirement, FinCEN contracted with an experienced survey contractor to gather qualitative information and quantitative data from sectors of the industry that could be affected by the reporting requirement.[43] On behalf of FinCEN, the contractor distributed the CBETF survey to 247 depository institutions and 32 money transmitters that conduct CBETF transactions on behalf of their own customers or that act as a correspondent bank for other financial institutions. Acting on the recommendations of the Feasibility Report:

[43] *See Implications and Benefits Study*, App. C. at 28 (OMB Control Number 1505-0191).

- "Depository institutions" were defined as depository institution members of the Society of Worldwide Interbank Financial Telecommunications (SWIFT) user group located or doing business in the United States, including offices or agents of non-U.S. chartered depository institutions.
- "Money transmitters" were defined as non-bank financial institutions that were registered with FinCEN as a money transmitter on November 10, 2007 and reported at least 20 branch locations in the United States.[44]

Out of the group of financial institutions surveyed, 81 provided responses to FinCEN on the implications and benefits of a potential CBETF reporting requirement based upon the transactions currently subject to FinCEN's recordkeeping requirement, both at the $3,000 and zero threshold. Key findings from the survey of financial industry entities include the following:

- Respondents expected an increase in the cost of complying with the new reporting requirement as compared to costs under the current process of complying with subpoenas or other legal demands under current recordkeeping requirements.
- Respondents suggested many alternative reporting methods and implementation approaches to reduce the potential costs of a reporting requirement, such as reporting CBETF data weekly or monthly, having FinCEN obtain CBETF information directly from a financial industry entity that currently services the majority of depository institutions' international funds transmittals such as SWIFT or some other centralized

[44] *See Implications and Benefits Study*, at Section 5.0 – Implications to the Financial Industry.

repository, either expanding or further limiting which CBETF transactions would need to be reported, or accepting the data in the existing format used by financial institutions.

- Respondents consider customer privacy a significant concern.
- Respondents noted that the security and uses of CBETF data are also a significant concern for financial institutions, especially the perceived ease of accessibility of the data to law enforcement.
- Respondents felt that outreach and guidance both before and after the implementation of a reporting requirement would be critical to its effective implementation; this would include providing clear and specific regulations, detailed technical requirements, published guidance and frequently asked questions, sufficient implementation time, and coordinated testing opportunities.[45]

Survey respondents were given an opportunity to provide additional input on several topics related to a potential CBETF reporting requirement. The study team identified several areas of importance to financial institutions. One of the most significant suggestions received from respondents was to have FinCEN obtain CBETF information directly from SWIFT or some other centralized repository.[46]

Based on financial industry survey responses and interviews with financial institutions and law enforcement agencies, the study team developed the following two potential operating models, documented the uses and usability of the data, developed a rough order of magnitude (ROM) cost for each model, and documented how to apply

[45] *See Implications and Benefits Study*, at Section 1.0 – Executive Summary.
[46] *See Implications and Benefits Study*, at Section 5.0 – Implications to the Financial Industry.

FinCEN's Information Technology (IT) Modernization Program security and privacy capabilities to CBETF data:

- Standard Reporting Model: Each individual financial industry entity implements its own reporting system and reports CBETF information to FinCEN.
- Hybrid Reporting Model: SWIFT reports CBETF information to FinCEN at the direction of its financial institution members. Large Money Services Businesses (MSBs) will report to FinCEN on their own behalf and small/medium MSBs will use FinCEN-provided e-Filing data entry capabilities rather than implementing their own solutions.[47]

In both of the potential operating models, the study team sought to reduce the effort of financial institutions and increase investigative efficiency of law enforcement by:

- Reducing the number and scope of investigative subpoenas and requests for clarifying information sent from law enforcement agencies to financial institutions.
- Reducing financial institution and law enforcement agency human resources required to execute business processes.
- Increasing the use of technology to automate and standardize the transfer of data between financial institutions, FinCEN, and law enforcement agencies.

[47] *See Implications and Benefits Study*, at Section 1.0 – Executive Summary.

- Employing consistent security and privacy controls between the financial institutions, FinCEN, and law enforcement agencies.
- Reducing the number of overlapping requests and increasing the use of data obtained from financial institutions.

Based on the results of their ROM cost analysis, the study team developed the following conclusions:

- The Hybrid Reporting Model significantly reduces the cost of a potential reporting requirement for depository institutions because the depository institutions would only incur annual reporting charges from SWIFT.
- The Hybrid Reporting Model significantly reduces the cost of a potential reporting requirement to MSBs, in aggregate, because the one-time and recurring annual costs of small/medium size MSBs using FinCEN's e-Filing data entry capabilities would be significantly less than the one-time and recurring annual costs of implementing/operating individual solutions. The costs to large MSBs would be the same under both models.
- The Hybrid Reporting Model slightly increases the costs of supporting a potential reporting requirement for FinCEN because of the higher implementation and maintenance/operation costs for the interface to SWIFT and the e-Filing CBETF data entry capabilities for small/medium size MSBs.
- Under both the Standard and Hybrid Reporting Models the cost to law enforcement agencies is the same.[48]

[48] *See Implications and Benefits Study*, at Section 1.0 – Executive Summary.

Additionally, FinCEN estimates that fewer than 300 banks and fewer than 800 money transmitters will qualify as reporting financial institutions under the proposal to report individual CBETFs. For a full discussion of the anticipated financial implications associated with this proposal, see sections V through VII below.

## IV. Proposed CBETF Reporting Requirements

Based on extensive fieldwork and analysis of information and data provided by the Feasibility Report and the Implications and Benefits Study, FinCEN determined that:

- The basic information already obtained and maintained by U.S. financial institutions pursuant to the Funds Transfer Rule is sufficient to support the Secretary's efforts against money laundering and terrorist financing. Any thresholds should apply only to discrete transactions and not to the aggregated total value of multiple transactions conducted very closely to one another in time.[49]
- Any reporting requirement should apply only to those U.S. institutions that exchange payment instructions directly with foreign institutions. FinCEN determined that a focused approach on those institutions that act as intermediaries as well as originating banks and beneficiary banks would restrict the reporting requirement to those institutions with the systems able to process these reports and limit the implementation costs on the industry as a whole.
- Any reporting requirement should permit institutions to report either through a format prescribed by FinCEN, through the submission of certain

[49] As discussed below, through understanding the processing of transactions by potential third-party reporters, FinCEN removed the reporting threshold for banks and adjusted the reporting threshold for money transmitters to $1,000.

pre-existing payment messages that contain the required data, or through an interactive online form for institutions that submit a low volume of such reports. The filing system should accommodate automated daily filing, periodic filing via manual upload, and discrete single report filing on an as-needed basis.[50]

- The implementation of the reporting requirement described in section 6302 would be a staged process, requiring FinCEN to review and update the requirements as necessary.
- The information that FinCEN is seeking to be reported is reasonably necessary to support the Secretary's efforts to combat money laundering and terrorist financing. Specifically, the inability to conduct proactive analysis on the information currently recorded by banks hinders law enforcement's ability to identify significant relationships to active targets.

*A. General Scope of Proposed Cross-Border Electronic Transmittal of Funds Report*

Based on the result of these efforts, and paying close attention to the above referenced concerns, FinCEN has developed the proposed rule as the initial implementation of the IRTPA. From information gathered during this stage, FinCEN will determine the need for future reporting requirements, and will formulate an improved development plan that incorporates future milestones and permits pilot testing of different aspects of the evolving reporting system. This incremental development approach will enable FinCEN to build the system in manageable stages and to test the system's functionality at each stage before moving on to the next.

[50] *See Feasibility Report*, at Section 1.0 – Executive Summary.

For the CBETF First Stage, FinCEN proposes:

- To limit the scope of the subject transactions to those defined as "transmittals of funds" under the current regulation (31 CFR § 103.11(jj)).
- To further reduce the scope of the reporting requirement to those transactions involving (a) depository institutions that exchange transmittal orders through non-proprietary messaging systems, and (b) all money transmitters; and where the U.S. institution sends or receives a transmittal order directing the transfer of funds to or from an account domiciled outside the United States, FinCEN is proposing only to require reporting by those two types of financial institutions, because they carry out the great majority of CBETFs. FinCEN is proposing to require banks and money transmitters to report these transfers on a first in/last out basis. Hence, an institution will be required to report transfers to FinCEN only if it is the last U.S. institution to process a transaction prior to the transaction crossing the border or if it is the first U.S. institution to process the transaction received from a foreign financial institution.
- Finally, to adopt the Hybrid Reporting Model, which would provide for (i) some third-party "centralized repository" (such as SWIFT)[51] to report CBFT information to FinCEN at the direction of its financial institution members; (ii) large MSBs to report to FinCEN on their own behalf; and (iii) small/medium MSBs to employ FinCEN-provided e-Filing data entry capabilities, rather than implementing their own solutions.[52]

[51] *See Implications and Benefits Study*, at Section 5.0 – Implications to the Financial Industry.
[52] *See Implications and Benefits Study*, at Section 1.0 – Executive Summary.

In proposing a reporting requirement, FinCEN is striving to create the most efficient reporting regime that still achieves the overarching goal of providing the information that is necessary to law enforcement. In addition, FinCEN is trying to avoid requiring large changes to the business systems of the funds transmittal industry in order to implement this reporting regime. As such, FinCEN is proposing that banks report on all CBETFs and that money transmitters report on all CBETFs at or above $1,000. During FinCEN's studies of the proposed reporting entities, FinCEN determined that banks, by and large, keep records for funds transfers regardless of dollar value. FinCEN was aware that, with respect to recordkeeping, many banks would prefer to not have to segregate transactions at certain thresholds due to increased costs.[53] Hence, if required to report on funds transfers, many institutions will find reporting on all transactions less costly than reporting only those transactions that exceed a certain dollar threshold. The segregation or sorting of funds transfers by value, including for transfers denominated in non-U.S. dollar currencies, could require significant changes to the information technology systems of some banks and third-party carriers, at considerable additional costs.

Additionally, transmittal orders carried by third parties are generally encrypted to protect the information therein. FinCEN was advised by industry members and financial regulators that some third-party carriers might be unable to identify the amounts of the encrypted transmittal orders sent through their system without the active intervention of both the sending and receiving financial institution, thereby increasing the cost of the

[53] *See* Ltr. from Krista J. Shonk, Reg. Counsel, America's Community Bankers, to FinCEN, *Re: Threshold for the Requirement to Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds* 3 (Aug. 21, 2006). http://www.fincen.gov/statutes_regs/frn/comment_letters/71fr35564_35567_rin1506_aa86/americas_community_bank.pdf [ hereinafter America's Community Banker's Ltr.].

third-party reporting option. Having no transaction threshold would allow third parties to report without adjusting encryption methods to provide them with access to transmittal amounts. Beyond operational difficulties, requiring only those transactions that are above a certain threshold would open financial institutions up to liability under the Right to Financial Privacy Act. If an institution or its designated third-party sent a transaction that was under the threshold, such filing would not be protected from the exclusion in the Right to Financial Privacy Act regarding information required to be reported by the federal government, subjecting the institution to liability. By requiring the reporting of all transactions, FinCEN is protecting institutions from this potential liability.[54]

For money transmitters the threshold issue must be treated differently because money transmitters have different business models than banks. Money transmitters do not typically establish long-term account relationships with their customers and therefore they do not have a business need to keep detailed records of all transactions, especially small electronic transfers. Money transmitters do, however, currently keep records of transfers to comply with the various recordkeeping requirements of FinCEN and other applicable authorities in the jurisdictions where they operate. Money transmitters that operate in more than one jurisdiction must comply with the recordkeeping requirements of all such jurisdictions. Because of this, many money transmitters have adopted global recordkeeping requirements and keep records at the lowest regulatory threshold required regardless of jurisdiction, thus assuring them of compliance in all applicable jurisdictions.

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[54] *See* 12 U.S.C. § 1829b(b)(3)(C) (2009) (Any information reported to Treasury or the Board in accordance with section 1829b(b)(3)(C) falls within an exception to the Right to Financial Privacy Act, 12 U.S.C. § 3401et seq (2009)). *See* 12 U.S.C. § 3413(d) (excepting disclosures pursuant to Federal law or rule). Moreover, the Right to Financial Privacy Act does not apply to money transmitters. *See* 12 U.S.C. § 3401(1) (2009) (defining a "financial institution" for purposes of the Act's coverage to include banks and other depository institutions).

Because many jurisdictions have adopted the $1,000 threshold suggested in SRVII, a large portion of the money transmitter industry, by volume of transactions, is already keeping records at the $1,000 level but is not keeping detailed records of transactions falling below that amount.

### *B. What to Include in the Cross-Border Electronic Transmittal of Funds Report*

As a by-product of globally accepted standards, there already is a large degree of standardization in the formats of transmittal orders currently being used by banks. This standardization has been driven by global commercial incentives to allow straight-through processing for funds transfers, i.e., electronic processing without the need for re-keying or manual intervention. FinCEN intends to take advantage of this standardization, to the greatest degree possible, and to accept direct filings of copies of these transmittal orders in the form they are already being processed by institutions.

The Implications and Benefits Study found that there is significant benefit in providing flexibility to the financial industry in how they would be able to comply with any proposed reporting requirement. For example, a large volume of the transmittal orders exchanged between foreign and U.S. banks as part of incoming or outgoing transmittals of funds are sent through a third party, that provides a secure, standardized electronic format for financial messaging between financial institutions, such as SWIFT. For this proposed rule, FinCEN is focusing on messaging systems, rather than financial settlement systems; therefore, the instructions exchanged between financial institutions through these third parties must be settled between the parties by other means (for example, using correspondent accounts or sending payments through a primary industry funds transfer system in the currency of denomination of the transmission of funds). By

definition, FinCEN is not collecting information regarding funds transfers governed by the Electronic Fund Transfer Act of 1978 (Title XX, Pub. L. 95-630, 92 Stat. 3728, 15 U.S.C. § 1693, *et seq.*), or any other funds transfers that are made through an automated clearinghouse, an automated teller machine, or a point-of-sale system.

FinCEN proposes to require certain banks to submit copies of certain standard format transmittal orders directly to FinCEN. Banks covered by this option will be required to submit to FinCEN a copy of each full transmittal order. Because a significant portion of the transmittal orders are currently being carried by third parties, this proposed rule would clarify that while the reporting obligation and accountability for compliance rest with the bank, third-party reporting of these transmittal orders at the express direction of a bank would be acceptable to FinCEN. Some financial institutions suggested this option to FinCEN in the course of the interviews and survey conducted as part of FinCEN's Feasibility Report and Implications and Benefits Study.[55] For example, a substantial number of transmittals required to be reported by the proposed rule are processed by SWIFT through standardized formats. FinCEN anticipates that many first-in/last-out institutions will comply with their filing obligations through third-party carriers, like SWIFT, with significant cost savings compared to in-house reporting.

If a bank is not able to submit (or cause to be submitted) copies of these standard format transmittal orders, FinCEN will accept submissions of just the required information in alternative formats to be prescribed by FinCEN. FinCEN proposes to

[55] *See Feasibility Report* – Section 5, n. 21. *See also Implications and Benefits Study* – Section 3.

require institutions utilizing this alternative reporting format to submit only the following information, if available,[56] about all CBETFs:

i) Unique transaction identifier number;

ii) either the name and address or the unique identifier of the transmittor's financial institution;

iii) name and address of the transmittor;

iv) the account number of the transmittor (if applicable);

v) the amount and currency of the funds transfer;

vi) the execution date of the funds transfer;

vii) the identity of the recipient's financial institution;

viii) the name and address of the recipient;

ix) the account number of the recipient; and

x) any other specific identifiers of the recipient or transaction.[57]

Certain money transmitters will be required to report on all transmittals of funds that are at or above the previously mentioned threshold of $1,000. Additionally, for reportable transactions of $3,000 or more, FinCEN is proposing that money transmitters include the U.S. taxpayer identification number of the transmittor or recipient (as applicable), or if none, the alien identification number or passport number and country of

[56]As discussed in Section II.A above (Background Information - Current Regulations Regarding Funds Transfers), the regulatory obligation of financial institutions in general to obtain and retransmit certain data points of transmittals of funds depends on the role they play in the transmittal chain, and on the amount of the transaction. Therefore, FinCEN acknowledges that some of the reportable fields of CBETFs collected through either method (submitting copies of the actual standard format transmittal orders or utilizing an alternative reporting format) might be empty or contain incomplete data.

[57] FinCEN has consulted with the staff of the Board and has determined that the reporting requirements under this section will exceed the requirements under section 21 of the Federal Deposit Insurance Act and the regulations promulgated thereunder. Further, FinCEN has determined that the reporting of this information is reasonably necessary to conduct our efforts to identify cross-border money laundering and terrorist financing.

issuance in their reports. As discussed below, FinCEN has determined that this information is reasonably necessary to assist in the investigation and prosecution of financial crimes including tax evasion. FinCEN will accept submissions from these money transmitters of the required information in formats that are prescribed by FinCEN. FinCEN proposes to require the following information, if available,[58] in these submissions:

i) Unique transaction identifier number;

ii) either the name and address or the unique identifier of the transmittor's financial institution;

iii) name and address of the transmittor;

iv) the account number of the transmittor (if applicable);

v) the amount and currency of the transmittal of funds;

vi) the execution date of the transmittal of funds;

vii) the identity of the recipient's financial institution;

viii) for transactions over $3,000, the U.S. taxpayer identification number of the transmittor or recipient (as applicable), or if none, the alien identification number or passport number and country of issuance;

ix) the name and address of the recipient;

x) the account number of the recipient; and

xi) any other specific identifiers of the recipient or transaction.

[58] As discussed in Section II.A above (Background Information - Current Regulations Regarding Funds Transfers), the regulatory obligation of financial institutions in general to obtain and retransmit certain data points of transmittals of funds depends on the role they play in the transmittal chain, and on the amount of the transaction. Therefore, FinCEN acknowledges that some of the reportable fields of CBETFs collected through either method (submitting copies of the actual standard format transmittal orders or utilizing an alternative reporting format) might be empty or contain incomplete data.

### *C. Filing methodology and frequency of Cross-Border Electronic Transmittal of Funds Reports*

FinCEN proposes to require reporting financial institutions to submit the copies of certain standard format transmittal orders or the required data elements through an electronic filing system to be developed and implemented by FinCEN, which shall allow submissions filed either discretely on a transaction-by-transaction basis, or by batching transactions in a format approved by FinCEN. FinCEN believes that electronic filing is the most efficient and effective manner for both the government and the institutions and will result in not only cost savings on both sides of the submission but will also significantly reduce the chances for data corruption during data entry. In special cases, where hardship can be demonstrated, FinCEN is proposing to allow the Director of FinCEN to authorize a reporting financial institution to report in a different manner if the financial institution demonstrates that (a) the form of the required report is unnecessarily burdensome on the institution as prescribed; (b) a report in a different form will provide all the information FinCEN deems necessary; and (c) submission of the information in a different manner will not unduly hinder FinCEN's effective administration of the BSA. Third-party reporters (entities engaged by reporting financial institutions to provide reporting services) will be required to report electronically in a format approved by FinCEN.

FinCEN is considering whether to develop an internet-based form that could be filed electronically through a secure internet connection by institutions that have a limited quantity of reportable transactions and do not wish to invest in information technology changes required to file in a more automated fashion, such as batching. By doing this, FinCEN believes that it can provide an effective method for smaller institutions to

continue to process a limited number of funds transmittals for their customers while not being required to invest significantly in additional technology.

FinCEN intends to accept transmittal orders currently being carried by SWIFT. FinCEN intends to accept message traffic from other similarly situated entities as well. Given the types of transactions FinCEN is currently proposing to collect, and the current limited number of messaging systems in the marketplace, FinCEN anticipates banks will be able to comply with these regulations through submissions of copies of the transmittal orders currently being carried on SWIFT's messaging format for person-to-person transmittals of funds (MT-103s at the time of the Implications and Benefits Study, but now additionally including 202-COVs).

The Feasibility Report and the Implications and Benefits Study analyzed CBETFs from the point of view of serial payments, where all the information sent to the beneficiary banks goes through the various intermediaries. While these reports were being produced, the financial industry started concentrating on the vulnerabilities of other cross-border transmittal mechanisms, namely, cover payments.[59] Cover payments are generally used by a foreign bank to facilitate funds transfers on behalf of a customer to a recipient in another country and typically involve both (a) a transaction in a currency other than that of the country where the transmittor's or recipient's bank is domiciled, and (b) the transmittor's and recipient's banks not having a relationship with each other that allows them to settle with each other directly. In this circumstance, the originator's bank may directly instruct the beneficiary's bank to effect the payment and advise that transmission of funds to "cover" the interbank obligation created by the payment order

[59] *See i.e.*, The Wolfsberg Group, Clearing House Statement on Payment Message Standards: www.wolfsberg-principles.com/pdf/WGNYCH_Statement_on_Payment_Message_Standards_April-19-2007.pdf.

has been arranged through a separate channel (the "cover intermediary bank").[60] This cover payment mechanism, where the cover intermediary banks do not necessarily see all the information sent to the beneficiary bank, is distinct from the direct sequential chain of payments envisaged in the FATF Special Recommendation VII on wire transfers.[61]

As a result of an industry initiative, SWIFT developed a change in its message standards, allowing the covering payment (which used to be sent through a MT 202 message which generally provided no information about originator and beneficiary) to include full information about the other parties to the transaction. The new message standard (MT 202-COV) was implemented as of November 2009. On December 17, 2009, the U.S. federal banking supervisors, in consultation with the Office of Foreign Assets Control (OFAC) and FinCEN, issued interagency guidance to clarify the supervisory perspective on certain key issues involving cover payments.[62] The guidance covers the obligations of U.S. originators of cover payments, the responsibilities of U.S. cover intermediary banks for screening messages for blank key fields and sanctioned entities, and for suspicious activity monitoring, and the supervisory approach to the foreign correspondent banking monitoring obligations of U.S. banks. SWIFT MT 202-COV messages are specifically covered by this proposed rulemaking.

In determining reporting frequency, FinCEN is striving to reach the appropriate balance between providing timely information to law enforcement and limiting the cost of compliance to the institutions. Other nations' financial intelligence units have been

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[60] *See* Basel Committee on Banking Supervision, "Due diligence and transparency regarding cover payment messages related to cross-border wire transfers," May 2009.

[61] *Revised Interpretative Note to Special Recommendation VII: Wire Transfers*, FATF (Feb. 29, 2008), http://www.fatf-gafi.org/dataoecd/16/34/40268416.pdf.

[62] Interagency Joint Notice – "Transparency and Compliance for U.S. Banking Organizations Conducting Cross-Border Funds Transfers," available at www.occ.treas.gov/ftp/bulletin/2009-36a.pdf.

able to intercept ongoing criminal activity, such as illegal drug dealings, through the use of daily submissions of CBETF information. At the same time, FinCEN recognizes that requiring institutions to report daily could, in some cases, increase costs as compared to a less frequent reporting period. For this reason, FinCEN is proposing that institutions be required to report on covered transmittals of funds within five business days following the day when the reporting financial institution issued or received the respective transmittal order. This five-business-day interval was discussed with financial institutions and law enforcement during the review of the Implications and Benefits Study. Institutions will be permitted to report more frequently if desired.

*D. Annual Reports Proposed*

In addition to the CBETF reporting proposal, FinCEN is proposing, as a separate but related requirement, an annual report by banks of the account number and accountholder's U.S. tax identification number (TIN) of all accounts used to originate or receive CBETFs subject to reporting under Section 6302 of the IRTPA. The purpose of this proposal is to enhance the usefulness of the funds transfer data to better detect, investigate, and prosecute money laundering and terrorist financing to the extent such crimes also may involve tax evasion. The extent to which offshore bank accounts are used to evade U.S. income tax is considerable and well-documented.[63] The Administration, as part of a comprehensive effort to reduce the use of offshore accounts

[63] *See generally* Staff of Sen. Subcomm. on Investigations of the Comm. on Homeland Sec. and Govtl. Affairs, 110th Cong., *Tax Haven Banks and U.S. Tax Compliance*, (Sen. Subcomm. Print 2008); *See generally* Staff of Sen. Subcomm. on Investigations of the Comm. on Homeland Sec. and Govtl. Affairs, 109th Cong., *Tax Haven Abuses: The Enablers, the Tools and Secrecy*, (Sen. Subcomm. Print 2006).

and entities to evade U.S. tax, has also proposed the collection of certain information regarding certain international transfers of funds.[64]

FinCEN is considering a methodology for this second reporting requirement that would require banks to submit an annual filing with FinCEN (the TIN annual report) that provides the account number and accountholder's U.S. TIN of all accounts used to originate or receive one or more CBETFs in the previous calendar year. This annual reporting requirement would apply to all banks that maintained any customer account that was debited or credited to originate or receive a CBETF subject to reporting under this section, for any amount, during the previous calendar year. FinCEN would then endeavor to have that information matched with CBETF data received throughout the year and made available for the investigation and prosecution of tax evasion and other purposes consistent with the BSA.

*E. Exemptions*

Although myriad systems are available to U.S. financial institutions to process electronic funds transfers, cross-border funds transfers tend to flow through a small number of channels as they enter and leave the United States (i.e., Fedwire, CHIPS and SWIFT). As institutions pass payment orders along through correspondents en route to their destination, those institutions' systems convert the orders from the many available formats to one of only a few. At some point in the cross-border payment chain a single U.S. financial institution must communicate directly with a foreign financial institution.

[64] *"General Explanations of the Administrations Fiscal Year 2011 Revenue Proposals*, Miscellaneous Tax Policy Document, at 63 (Treasury, Feb. 2010) http://www.ustreas.gov/offices/tax-policy/library/greenbk10.pdf.

On the other hand, financial institutions may use standardized or proprietary or internal systems to handle all or part of an electronic funds transfer (i.e., between branches of the same institution). Proprietary systems pose a special challenge to designing a reporting system because of the wide range of potential message formats, communications protocols, and data structures involved. The primary challenge that arises in this context is that a reporting requirement would require that the U.S.-based institution implement processes for identifying and extracting cross-border funds transfer information from its proprietary communications systems. The implementing regulation must take into account this kind of permutation in order to ensure that FinCEN collects CBETFs that follow this pattern.

For banks, FinCEN is proposing to require reporting of all funds transfers that are effected through transmittal orders that are standardized across the banking industry. For this proposed reporting requirement, FinCEN intends to exempt from both reporting requirements funds transfers that are conducted entirely through, and messaged entirely through, systems that are proprietary to banks.[65]

This exemption would not apply to money transmitters because their business model for transmitting funds relies almost solely upon proprietary systems. Additionally, there is no industry-wide adoption of a standardized transmittal order format as exists in the banking industry. The largest MSBs generally maintain centralized communications systems and database records of customer transactions that provide an obvious source for

[65] These proprietary systems include those developed by banks, or those off-the-shelf systems acquired and adopted or adapted by banks, or by the corporate structure the bank belongs to, to receive payment instructions from their customers (including those financial institutions that maintain correspondent accounts at such banks).

the CBETF information collection.[66] FinCEN is also proposing to exempt from both reporting requirements CBETFs where both the transmittor and the recipient are a bank, i.e., there is no third-party customer to the transaction. There is a lower risk of money laundering and terrorist financing associated with these transactions.

*F. Recordkeeping Rule Issues*

Changes to the regulations implementing Section 21 of the Federal Deposit Insurance Act for banks (31 CFR § 103.33 (e) and (f) (the Funds Transfer Rule) and 31 CFR § 103.33 (g) (the Travel Rule)), would require a joint determination of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury as to the necessity of such a change. Section 6302 provides that information required to be reported under that section shall not exceed the information already required to be retained by financial institutions pursuant to the Funds Transfer Rule and the Travel Rule unless:

i) The Board and the Secretary jointly determine that particular items of information are not currently required to be retained under those law and regulations; and ii) The Secretary determines, after consultation with the Board, that the reporting of such additional information is reasonably necessary to conduct the efforts of the Secretary to identify money laundering and terrorist financing.

At this time, FinCEN and the Board are not proposing any amendments to the recordkeeping rule affecting banks. Also, FinCEN is not proposing any amendments to the recordkeeping rules affecting nonbank financial institutions. FinCEN understands that institutions collect and maintain a wide range of business records and customer and

[66] *See Feasibility Report*, at Section 5.0 - Form, Manner, and Content of Reporting, and at App. D. *See Id*. App. G, at 134-135.

transaction-related information for business reasons unrelated to regulatory compliance. Additionally, FinCEN acknowledges that this proposed regulation would result in a requirement for institutions to report certain transactions where they are not currently required to keep records or verify customer identification.[67]

*G. Compliance Date*

Section 6302 of the IRTPA requires the Secretary to certify that the information technology systems are in place to accept reports from the regulated industry prior to prescribing regulations requiring institutions to report on transmittals of funds. Because of the statutory language, FinCEN is unable to issue a final rule with a delayed effective date prior to having adequate technological systems in place. FinCEN does not anticipate these systems being in place before 2011. Hence, FinCEN does not anticipate issuing a final rule until after January 1, 2012. FinCEN anticipates delaying the compliance date of the final rule to provide institutions with ample time to adjust necessary systems for compliance.

*H. Technical Requirements*

The development of information technology systems capable of receiving, storing, analyzing, and disseminating an estimated 750 million records a year is a daunting task. FinCEN will implement federated data warehouse architecture to receive, keep, exploit, protect the security of, and disseminate information submitted under the proposed reporting requirement. FinCEN will implement a separate path for the

[67] As discussed in Section II.A above (Background Information - Current Regulations Regarding Funds Transfers), the regulatory obligation of financial institutions in general to obtain and retransmit certain data points of transmittals of funds depends on the role they play in the transmittal chain, and on the amount of the transaction. Therefore, FinCEN acknowledges that some of the reportable fields of CBETFs collected through either method (submitting copies of the actual standard format transmittal orders or utilizing an alternative reporting format) might be empty or contain incomplete data.

processing, enhancement, and storage of report information and would provide a single point of entry for users to submit queries to all BSA data systems, including CBETF information, in a way that is invisible to the user. A full description of the proposed architecture, procedural paths, and points of entry is contained in Appendices H (Technical Alternatives Analysis), J (Preliminary Work Breakdown Schedule), and L (Project Management and Information Technology Processes) to the Feasibility Report.

*I. Protection of Private Personal Financial Information*

While the benefits of centralizing BSA data have been substantial, these developments pose significant risks to the critical operations of the government and the security of the data contained in these systems. BSA data is highly sensitive data containing details about the financial activity of private persons. Without proper safeguards, this data could be at risk of inadvertent or deliberate disclosure or misuse and FinCEN's mission could be undermined. These risks generally fall into two closely related categories, the privacy of the personal information contained in government systems, and the risk of system compromise or misuse.

FinCEN will apply existing policies and procedures that comply with all applicable legal requirements, industry and government best practices, and the Department of the Treasury's Information Technology Security Program Directive to every phase of the design and implementation of any system built to accommodate reporting of CBETF data. FinCEN also will impose strict limits on the use and re-dissemination of the data it provides to its law enforcement, regulatory, and foreign counterparts and strictly monitor those persons and organizations to which it grants access to the data. CBETF data will be technologically protected and secure and would

only be available to FinCEN and the law enforcement and regulatory agencies authorized by law to access it. Compliance with these three requirement types will be subject to certification, and Section 6302 will not permit FinCEN to finalize this proposed rulemaking until such certification is issued and found acceptable.[68]

A number of Federal laws directly control the collection and use of data by government agencies with the aim of protecting the privacy of individual persons – namely, the Right to Financial Privacy Act,[69] the Privacy Act,[70] the Federal Information Security Management Act,[71] and the Bank Secrecy Act itself.[72] Lastly, the E-Government Act of 2002[73] provides a further protection for personal information in government data systems, by requiring that agencies conduct "privacy impact assessments" prior to procuring or developing such systems.[74]

FinCEN has developed policies and procedures for compliance with these requirements in accordance with the Department of the Treasury's Information Technology Security Program Directive. Compliance with these government-wide and department-wide standards ensures that FinCEN designs and operates its information systems in accordance with government best practices for the maintenance and dissemination of sensitive data. In developing a system for the collection, storage, analysis, and sharing of CBETF reports, FinCEN will incorporate compliance with these standards into every phase of the design and implementation of the system. FinCEN has

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[68] 31 U.S.C. § 5318(n)(5)(B).
[69] 12 U.S.C. § 3401et seq (2009).
[70] 5 U.S.C. § 552a (2009).
[71] Federal Information Security Management Act of 2002, Title III, E-Government Act of 2002, Pub.L.No. 107-347, Dec. 17, 2002.
[72] The routine uses for Bank Secrecy Act data are set forth at 70 FR 45756, 45760 (August 8, 2005) (Bank Secrecy Act Reports System—Treasury/FinCEN .003).
[73] E-Government Act of 2002, Pub.L.No. 107-347, section 208, (Dec. 17, 2002).
[74] Office of Management and Budget, Memorandum M-03-22, Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002 (Washington, D.C., Sept. 26, 2003).

more than twenty years of experience in handling sensitive financial information about persons through the reporting it currently receives from financial institutions in the United States. FinCEN imposes strict limits on the use and re-dissemination of the data it provides to its law enforcement, regulatory, and foreign counterparts and strictly monitors those persons and organizations to which it grants access to the data.[75]

## V. Section-By-Section Analysis

The proposed rule (a) would implement section 6302 of the IRTPA by requiring certain banks and money transmitters ("first-in/last-out" financial institutions) to file periodic reports with respect to certain CBETFs (mostly defined as reportable on the basis of method of transmission and monetary threshold), and (b) would require all banks to file an annual report with the account number and accountholder's U.S. tax identification number of accounts involved in certain CBETFs.

The rule describes the types of transmittal orders and advices of transmittal orders that should be subject to report, the information that should be reported, and the timeframe for the filing of the reports.

*General (§ 103.14(a))*

FinCEN proposes to add 31 CFR § 103.14(a). That new paragraph would add a requirement that reporting financial institutions (as defined in this section) file reports with FinCEN with respect to CBETFs that meet the conditions in the rule and subject to the exemptions therein. The conditions that make a transaction reportable are the means of communication of the related transmittal order (or the advice of the transmittal order, when applicable), and, in the case of the CBETF periodic report, the position of the

[75] For a detailed discussion of the collection of the information contained in the proposed rule, *see Feasibility Report* at Section 7.0 - Information Security Protection.

financial institution making or receiving the communication in the transmittal chain, and the amount of the transmittal of funds involved.

*Definitions (§ 103.14(b))*

Most of the terms utilized in this section have the meanings previously set forth in Part 103 of Chapter I of Title 31.[76] Some of these terms, and all the terms defined specifically for this section, merit additional comment.

*Account*. Account is defined in 103.90(c). This definition covers "a formal banking or business relationship established to provide regular services, dealings, and other financial transactions …," and includes the ongoing contractual relationships between some providers of money transmitting services and their customers. If (1) at the moment of opening an account for a person (or shortly thereafter), the financial institution has obtained and maintains on file the person's name and address, as well as TIN (*e.g*., social security or employer identification number) or, if none, alien identification number or passport number and country of issuance; and (2) the financial institution provides financial services to such person relying on that information, then that person would constitute an "established customer" of the financial institution as defined in 103.11(l).

*Cross-Border Electronic Transmittal of Funds.* The definition of "cross-border electronic transmittal of funds" lies at the heart of a successful implementation of the reporting requirement. The nature of the electronic funds transfer process as it has evolved in the United States poses specific difficulties in creating a definition that at once captures all of the nuances of the payment systems and avoids needless complexity. Section 6302 contemplates a reporting requirement that is coextensive with the scope of

[76] *See* 31 CFR 103.11 (2009).

the BSA funds transfer rule (31 CFR § 103.33). Accordingly, for the purposes of the first stage of a phased approach to the cross-border electronic transmittal of funds reporting rulemaking process, the Feasibility Report focused on electronic "transmittals of funds" as defined in 31 CFR § 103.11, and did not address any debit card type of transmittals, point-of-sale (POS) systems, transaction conducted through an Automated Clearing House (ACH) process, or Automated Teller Machine (ATM).[77] Furthermore, within the current regulatory definition of "transmittals of funds," the Feasibility Report concentrated for the first step in the staged implementation of Section 6302 of the IRTPA on those transactions involving depository institutions that exchange transmittal orders through non-proprietary messaging systems, and all money transmitters, and where the U.S. institution sends or receives a transmittal order directing the transfer of funds to or from an account domiciled outside the U.S. Refining an appropriate regulatory definition of what transactions fall within the new reporting requirement will implicate a number of concerns that were identified by the Feasibility Report and should be further addressed during future studies.

In consideration of these determinations, FinCEN proposes to define a CBETF generally as "[a] transmittal of funds where either the transmittal order or the advice is: (i) communicated through electronic means; and (ii) sent or received by either a first-in or a last-out financial institution."

The definition as provided concentrates on the evidence of the payment (as opposed to the actual payment itself), represented by a transmittal order (the combination of an instruction to pay and an authorization to debit an account or a confirmation of how the reimbursement for the payment is being disbursed) or an advice of a transmittal order

[77] *See Feasibility Report*, at Section 8.0 – Conclusions and Recommendations.

(the notification that a credit to an account has been made, in relation to a CBETF). These messages have to be exchanged by electronic means between a foreign financial institution and either a first-in financial institution (for incoming CBETFs) or a last-out financial institution (for outgoing CBETFs).

The definition does not intend to capture either (1) notifications of a debit to the account maintained by the foreign financial institution at the first-in financial institution, effected to cover the CBETF; (2) a retransmission of a transmittal order for the sole purpose of adding authentication; or (3) notifications to the third party that originates or is the beneficiary of the transmittal of funds. In certain business systems currently in use, the notification to a foreign financial institution of the credit to its correspondent account, processed in connection with a CBETF, is used by the foreign financial institution as the operative instrument for the payment to the beneficiary; this type of advice, which is used in lieu of the more traditional transmittal order, is among the types of additional electronic communication that the regulation seeks to capture.

Additionally, the regulation will require the reporting of transmittal orders where the actual payment of the order does not occur for any reason. FinCEN acknowledges that this will result in the reporting of transactions where settlement never occurred, populating the database with unsettled transmittal orders. However, because the settlement could be cancelled after the reporting of the transmittal order to FinCEN, if FinCEN did not require the reporting of this message the financial institution would be subject to liability under the Right to Financial Privacy Act. Thus, to protect financial institutions and limit the costs of reporting, FinCEN will review whether there are classes

of transactions where settlement did not occur for which it would be practicable and appropriate for FinCEN to arrange to exclude from the database.[78]

*Electronic means* are those means that utilize technology that has electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.[79]

*First-in financial institution.* For purposes of this section, in an incoming CBETF, FinCEN defines a first-in financial institution as any bank or money transmitter that receives a transmittal order or the advice of a transmittal order from a foreign financial institution. FinCEN views the bank or money transmitter in an incoming CBETF that received the transmittal order or the advice of the transmittal order directly from the foreign financial institution and maintains such foreign financial institution's correspondent account, as having more consistently complete information about the transaction than other U.S. financial institutions that may be involved in the same transmittal of funds.[80]

*Last-out financial institution*. For purposes of this section, in an outgoing CBETF, FinCEN defines a last-out financial institution as any bank or money transmitter that sends the transmittal order or the advice of the transmittal order to a foreign financial institution. The last-out financial institution will have more consistently complete

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[78] *See Feasibility Report*, at Section 5.0 – Form, Manner, and Content of Reporting. The ABA suggests, "regardless of the nature of any imagined reporting requirement, the financial services industry's responsibility should extend only to the simple transmittal of raw data, with FinCEN assuming full responsibility for the refinement and distillation of the data into a format useful to law enforcement agencies." While FinCEN believes that accommodation of every possible format is unreasonable, the approach proposed in the text recognizes the potential cost and strikes a balance aimed at accommodating the widest possible variation in reporting formats.

[79] 15 U.S.C. § 7006(2) (2006).

[80] The quantity and quality of the information that is transmitted along the payment chain, either embedded in the payment itself or contained in a separate message, tends to degrade as such information is communicated among the links of the chain; the details contained in optional fields may be lost, abridged, or transcribed with errors from transmittal order to transmittal order along the chain.

information about the transaction than other U.S. financial institutions that may be involved in the same transmittal of funds.[81]

*Reporting Financial Institution*. For purposes of this section, FinCEN defines a reporting financial institution as any bank (reporting bank) or money transmitter (reporting money transmitter) acting as a first-in or last-out financial institution.

Whether a "first in" or "last out" institution, because of the size and nature of institutions that serve in correspondent roles for CBETFs, these banks are more likely to be connected with and use centralized message systems (SWIFT, Fedwire, CHIPS) and their standardized message formats. These standardized formats increase the ability of these institutions to handle the transactions with little manual intervention. In addition, these larger banks may often automatically "map over" messages from one system's format to another (e.g., from SWIFT to Fedwire; from SWIFT to CHIPS). Accordingly, many would have systems in place to perform much of the data extraction necessary to create the reports required.

In other words, the obligation to report should fall upon those U.S. institutions that transmit an electronic funds transfer instruction directly to a non-U.S. financial institution or conversely, those that receive such instructions directly from a non-U.S. financial institution. This approach aims to capture a funds transfer instruction at the point at which it crosses the U.S. border. The advantages of the approach are that it

[81]*See the Feasibility Report* at 12-14. If more than one U.S. financial institution took part in the transmittal of funds, the last-out financial institution's records should identify the transmittor, the transmittor's financial institution, and other information about the transaction (*e.g.*, recipient, recipient's financial institution, information exchange, additional financial institutions involved and their roles, date, amount, etc.). Similarly, the U.S. bank's records may provide a more complete picture of the entities involved in the overall chain of the transaction. Investigators and analysts could then determine where to turn for further information on the transaction and customer. In addition, the customer identification (to the extent it is included in the original message) and other transaction detail information should remain intact and available throughout this correspondent stage and therefore remain available in the instructions handled by the last-out financial institution.

focuses the reporting requirement upon larger institutions that are most familiar with international funds transfers, have the technological systems in place to facilitate such transfers, and are in the best economic position to implement compliance systems and processes.[82]

*Reporting Threshold*. Reporting banks would be required to file periodic CBETF reports on transactions of any amount (zero threshold), while reporting money transmitters would be required to file periodic CBETF reports on transactions for amounts equal to or greater than $1,000, or its equivalent in any other currency. In the case of transactions denominated in foreign currency, the exchange rate that is applied should be that exchange rate that was provided to the customer at the time of the transaction.

*Filing procedures (§103.14(c)).*

This section describes what reporting banks and reporting money transmitters would be required to report under the CBETF report proposal, in what format they must report the information, how often they must report it, and explicitly recognizes the possibility of reporting via a third party although responsibility for compliance with the reporting obligations would remain with the reporting financial institution.

To accommodate these requirements, FinCEN had to adopt a limited number of standard forms for CBETF reporting. These standards had to accommodate automated

[82] In its response to FinCEN's March 2006 industry survey, the American Bankers Association offered that "An unscientific poll of bankers visiting ABA's compliance web page revealed that only 1 in 4 respondents identified themselves as conducting "last out, first in" cross-border transfers." The ABA also noted "for some [banks] it required less IT logic to be built into the reporting system." Significantly, the ABA opined ". . . a "last out, first in" reporting obligation would suffice to capture the cross border transfer of funds and whatever information is attached to that transmittal. Although this method shifts much of the reporting cost to a smaller number of generally larger banks, many of the[m] possess sufficient capacity to perform the reporting with greater efficiency than would be the case if the obligation rested with all originating or beneficiary's institutions."

filing of large collections of CBETF reports, manual uploading of mid-sized collections of CBETF reports, and discrete filing by small volume CBETF service providers. In addition, the standards had to assimilate the variations between the different CBETF message systems from which the reporting institutions would extract the data. Finally, the standards had to be such that reporting institutions could convert the source data from their systems into the required format with a minimum of manual intervention or system modifications.[83] The proposed regulation will permit institutions to comply with this requirement through the submission of customized reports that comply with a format prescribed by FinCEN or through the submission of certain pre-existing formats (e.g., CHIPS or SWIFT messages) that contain the required data elements. The pre-existing forms deemed acceptable by FinCEN would serve as proxies for formally prepared reports.

Reporting financial institutions would be required to report on CBETF at or above their respective thresholds (no threshold for banks and a $1,000 threshold for money transmitters) by submitting a copy of the respective transmittal order or advice of the transmittal order, provided that the transmittal order or advice format has been approved for direct submission by FinCEN. If the reporting financial institution is unable to submit a copy of the respective, approved transmittal order or advice, then the reporting financial institution may discharge its reporting obligation by submitting the following information, if available, in a form specified by FinCEN:

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[83] *See Feasibility Report*, at Section 5.0 – Form, Manner, and Content of Reporting. The ABA suggests, "regardless of the nature of any imagined reporting requirement, the financial services industry's responsibility should extend only to the simple transmittal of raw data, with FinCEN assuming full responsibility for the refinement and distillation of the data into a format useful to law enforcement agencies." While FinCEN believes that accommodation of every possible format is unreasonable, the approach proposed in the text recognizes the potential cost and strikes a balance aimed at accommodating the widest possible variation in reporting formats.

i) Unique transaction identifier number;

ii) either the name and address or the unique identifier of the transmittor's financial institution;

iii) name and address of the transmittor;

iv) the account number of the transmittor (if applicable);

v) the amount and currency of the transmittal of funds;

vi) the execution date of the transmittal of funds;

vii) the identity of the recipient's financial institution;

viii) the name and address of the recipient;

ix) the account number of the recipient;

x) any other specific identifiers of the recipient or transaction; and

xi) for transactions of $3,000 or more conducted through a money transmitter, the U.S. taxpayer identification number of the transmittor or recipient (as applicable) or, if none, the alien identification number or passport number and country of issuance.

The data points requested coincide with the combined recordkeeping requirements imposed on financial institutions by the recordkeeping rule[84] and the travel rule,[85] with the addition of the unique transaction identifier number, if such an identifier exists. The addition of the identifier is an operational necessity for FinCEN, for two major reasons: (1) given the very large amount of transactions processed on a daily basis by reporting financial institutions involving the same amounts, transmittors, recipients, and intermediary financial institutions, the unique identifier number may be the only

[84] *See* 31 CFR 103.33(e), (f) (2009).
[85] *See* 31 CFR 103.33(g) (2009).

effective and efficient way for FinCEN and law enforcement to distinguish one particular transaction from others, which will become particularly useful in facilitating any follow-up communications with reporting financial institutions, and (2) given that a certain degree of duplication on the reporting is considered unavoidable, the unique transaction identifier is the most effective and efficient tool to allow deconfliction of several reports involving the same CBETF by FinCEN without requiring institutions to expend resources segregating reports relating to the same transaction.

This section requires the reporting financial institution to file reports with FinCEN no later than five business days after issuing or receiving the transmittal notice or its advice.

FinCEN understands that an institution required to file reports under section 103.14 may prefer to designate a third party to file those reports. As long as the reports are filed in the manner required by section 103.14, FinCEN will allow such a designation. However, it is important to emphasize that it is the responsibility of the reporting financial institution to comply with the reporting obligation, and the reporting financial institution is ultimately liable for any failures by the designated third party to file a report as required by the proposed rule.

*Nature and form of reports (§ 103.14(d)).*

All CBETF reports shall consist of electronic submissions filed either discretely on a transaction-by-transaction basis or by batching transactions in a format approved by FinCEN. FinCEN may authorize a designated reporting financial institution to report in a different manner if the financial institution demonstrates to FinCEN (1) that the form of the required report is unnecessarily onerous on the institution as prescribed; (2) that a

report in a different form will provide all the information FinCEN deems necessary; and (3) that submission of the information in a different manner will not unduly hinder the effective administration of this part.

*Additional Annual Reports (§ 103.14(e)).*

On an annual basis, all banks must submit to FinCEN a report that provides the following information: the account number that was credited or debited to originate or receive a CBETF, and the U.S. taxpayer identification number of the respective accountholder. This report shall be submitted to FinCEN no later than April 15 of the year following the transaction date of the CBETF.

FinCEN shall endeavor to link the periodic information submitted in the CBETF reports with the information provided in the TIN annual reports, matching transactions on the basis of common key data items contained in both reports: the U.S. transmittor's or receiver's account number. FinCEN's ability to combine both sets of information will depend on the quality and integrity of the common key data items.

*Exemptions (§ 103.14(f)).*

At this time, FinCEN proposes that the following CBETFs be exempted from reporting requirements: (1) CBETFs where either the transmittor is a bank as defined in 31 CFR 103.11(c), and the recipient is a foreign (not within the United States) bank, or, the transmittor is a foreign bank and the recipient is a bank, and, in each case, there is no third-party customer to the transaction; or (2) the transmittal order and advice of the transmittal order are communicated solely through systems proprietary to a bank.

## VI. Proposed Location in Chapter X

As discussed in a previous Federal Register Notice, 73 FR 66414, Nov. 7, 2008, FinCEN is separately proposing to remove Part 103 of Chapter I of Title 31, Code of Federal Regulations, and add Parts 1000 to 1099 (Chapter X). If the notice of proposed rulemaking for Chapter X is finalized, the changes in the present proposed rule would be reorganized according to the proposed Chapter X. The planned reorganization will have no substantive effect on the regulatory changes herein. The regulatory changes of this specific rulemaking would be renumbered according to the proposed Chapter X as follows:

Section 103.14 would be moved to § 1010.380.

## VII. Executive Order 12866

This proposed rule is a significant regulatory action, although not economically significant, and has been reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866 (EO 12866).

## VIII. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), Public Law 104-4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on

balance the proposals in the Notice of Proposed Rulemaking provide the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

## IX. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" that will "describe the impact of the proposed rule on small entities." (5 U.S.C. § 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Reporting of Cross-Border Electronic Transmittals of Funds:

*Estimate of the number of small entities to whom the proposed rule will apply:*

The reporting requirement proposed pursuant to the IRTPA, requires certain banks and money transmitters to report to FinCEN information associated with individual CBETFs on a periodic basis.

For purposes of the RFA, both banks and credit unions are considered small entities if they have less than $175 million in assets.[86] Of the estimated 8,000 banks, 80% have less than $175 million in assets and are considered small entities.[87] Of the estimated 7,000 credit unions, 90% have less than $175 million in assets.[88] FinCEN estimates that this rule will impact 300 banks and credit unions. Of these 300 banks and

[86] *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* , Small Business Administration Size Standards 28 (SBA Aug. 22, 2008) [hereinafter *SBA Size Standards*].

[87] Federal Deposit Insurance Corporation, *Bank Find*, http://www2.fdic.gov/idasp/main_bankfind.asp; *select* Size or Performance: Total Assets, *type* Equal or less than $: "175000", *select* Find [hereinafter FDIC Bank Find].

[88] National Credit Union Administration, *Credit Union Data*, http://webapps.ncua.gov/customquery/; *select* Search Fields: Total Assets, *select* Operator: Less than or equal to, *type* Field Values: "175000000", *select* Go [hereinafter NCUA Data].

credit unions, FinCEN estimates that no more than 190 are small entities.[89] While all banks[90] can maintain customer accounts that are used to originate or receive CBETFs, not all banks are equipped to complete a CBETF on their own: for example, in the case of an outgoing CBETF the actual transaction may have to be channeled from small/medium banks to large, internationally active banks with whom they maintain correspondent banking relationships (last-out banks), and from these to a foreign bank. As part of the ordinary process of a transaction (and, in the case of outgoing CBETFs for amounts of $3,000 or higher, also because of BSA/AML regulatory requirements),[91] these larger first-in/last-out banks receive from the typically smaller originating bank all the data points FinCEN has deemed necessary to request. Therefore, FinCEN estimates that this reporting requirement will only impact 1.5% of all small banks and credit unions because, as stated above, these smaller institutions rely on large banks to process CBETFs.

For the purposes of the RFA, a money transmitter is considered small if it has less than seven million in gross receipts annually. Of the estimated 19,000 money transmitters, FinCEN estimates 95% have less than seven million in gross receipts

[89] *See Implications and Benefits Study*, App. C, 6 figs. 1-2. FinCEN was able to determine that 110 institutions that would be impacted by the proposed rule had assets over $1 billion. FinCEN also determined that 8 institutions that would be impacted by the proposed rule had assets less than $175 million. FinCEN was unable to determine an asset size for the estimated 182 additional institutions that would be impacted by the proposed rule. For purposes of estimating the population impacted by the rule for purposes of the RFA analysis, FinCEN includes these additional institutions in the estimate of small entities.

[90] *See* 31 CFR 103.11(c) (2009) (The definition of "bank" under the BSA regulations includes commercial banks and trusts, private banks, savings and loan associations, credit unions, U.S. agencies and branches of foreign banks, etc).

[91] 31 CFR 103.33(e) (2009) (Recordkeeping requirements for banks); 31 CFR 103.33(f) (2009) (Recordkeeping requirements for nonbank financial institutions).

annually.[92] Generally, small money transmitters do not have the infrastructure and international network necessary to process CBETFs resulting in a relatively small percentage of the total population that act as first-in or last-out institutions. Therefore, FinCEN estimates, the proposed rule will impact an estimated 4% of these small money transmitters. Therefore, FinCEN has determined that neither a substantial number of small banks nor money transmitters will be significantly impacted by the proposal.

*Description of the projected reporting and recordkeeping requirements of the proposed rule:*

During a week that a bank processes at least one CBETF as a first-in or last-out institution, the bank must report to FinCEN up to 10 data items for each CBETF processed. These data items are necessary for the proper messaging and settlement of a CBETF, and also correspond to data banks are obligated to obtain, retain, and retransmit for transactions at or above $3,000. During a week that a money transmitter conducts a CBETF as a first-in or last-out institution, a money transmitter will be required to report up to 10 data items per transaction at or above $1,000 and an additional 11$^{th}$ data point for transactions at or above $3,000. The information money transmitters will be required to report is information that they already obtain either in the ordinary course of business or to comply with other regulatory obligations.

For RFA analysis, and relying on its specific studies, FinCEN has determined that this requirement would impose a significant impact on these first-in and last-out institutions. However, as discussed above, this significant impact would be limited to a minimal number of small entities that conduct fewer CBETFs. In the year 2006, FinCEN

[92] *See* FinCEN *MSB Registration List (2/10/2010),* http://www.fincen.gov/financial_institutions/msb/msbstateselector.html (Sort list by entities that engage in money transmission and remove repeat registrations).

estimates that each large bank (as defined above) conducted 2 million reportable transactions on average. FinCEN estimates that small banks (also as defined above) conducted only eight thousand reportable transactions on average.[93]

The specific studies revealed that the individual average estimated cost of implementing the CBETF periodic report would consist of $94,000 per year for large banks, and $11,900 for small banks. [94] In the case of money transmitters, the same cost would be split into a set-up and an annual ongoing portion: $250,000 set-up cost and $52,000 annual costs for large money transmitters, and no set-up cost and $20,000 annual costs for small money transmitters.[95]

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[93] *Implications and Benefits Study,* App. C, 11 fig. 13. The number of annual reportable transactions per large bank (as defined under the RFA) covered a wide range, with few very large institutions processing tens of millions of reportable transactions, and a large number of relatively smaller institutions processing reportable transactions in the tens of thousands or fewer. The average of 2 million transactions per large bank compensates both extremes of this wide range.

[94] *Implications and Benefits Study* at 45 tbl. 6-1. As indicated in table 6-1, the annual cost for medium sized banks (92 institutions) is $20,100 and the annual cost for small banks (150 institutions) is $6,800. For purposes of the Regulatory Flexibility Act analysis, FinCEN is considering both medium and small banks to be small banks. Therefore, the weighted average annual effect on these institutions is $11,900. These figures, which assume use of the hybrid model (*supra* III. Sec. B.*)*, were based on separate, but limited follow-up information received from industry and not the numbers pertaining to cost estimates received from industry through FinCEN's CFI survey per se. The hybrid model was conceived based on some of the general survey responses, but was not a targeted matter of inquiry with respect to costs in the CFI survey (*supra* III. Sec. B.). Given the evolution of services available to the financial sector within the context of third-party centralized messaging systems since then, FinCEN, as emphasized infra (X. Request for Comments), is soliciting comment from industry on the current validity of these cost estimates.

[95] *Id*. The cost estimates in table 6-1 were derived in consideration of a $3,000 reporting threshold. The proposed rule anticipates a $1,000 reporting threshold for money transmitters and no reporting threshold for banks. This change will affect the cost estimate for small money transmitters because FinCEN anticipates that such transmitters will comply through discrete transaction-by-transaction reporting. FinCEN anticipates that the change in threshold will increase the number of reports and consequently increase the average annual effect on small money transmitters from $395 to $20,000. Alternatively, because FinCEN anticipates that banks and large money transmitters will utilize automated reporting systems, a change in the threshold does not change the estimated annual costs. *See* America's Community Banker's Ltr. *supra* n. 53; *see Implications and Benefits Study* at 45 tbl. 6-1 (one-time implementation cost of developing automated reporting systems is estimated at $250,000). Furthermore, several new reporting services have evolved or been made more widely available by third-party centralized messaging systems such as SWIFT, since the research period of the Implications and Benefits Study, which could reduce the annual reporting cost of banks significantly below the figures calculated in the Study.

Although the impact of the proposal will, for purposes of the RFA, be significant, the proposal will not impact a substantial number of institutions. Additionally, the impact on small institutions will be much less than the impact on larger institutions.

Reporting of Taxpayer Identification Numbers of Accountholders:

*Estimate of the number of small entities to whom the proposed rule will apply:*

The second reporting requirement contained within this proposal would require all banks to report the account number and TIN information of accountholders that transmitted or received a CBETF required to be reported under this section. For purposes of the RFA, both banks and credit unions are considered small entities if they have less than $175 million in assets.[96] Of the estimated 8,000 banks, 80% have less than $175 million in assets and are considered small entities.[97] Of the estimated 7,000 credit unions, 90% have less than $175 million in assets.[98] Banks and credit unions that would not be considered first-in/last-out institutions may still be required to report under this second proposal. This is because they may have one or more customers that transmitted or received a CBETF during the year. Therefore FinCEN estimates that this rule will impact all banks and credit unions.

*Description of the projected reporting and recordkeeping requirements of the proposed rule:*

The second reporting requirement contained within this proposal would require all banks to report on an annual basis the account number and TIN information of

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[96] *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* , Small Business Administration Size Standards 28 (SBA Aug. 22, 2008) [hereinafter *SBA Size Standards*].

[97] Federal Deposit Insurance Corporation, *Bank Find*, http://www2.fdic.gov/idasp/main_bankfind.asp; *select* Size or Performance: Total Assets, *type* Equal or less than $: "175000", *select* Find [hereinafter FDIC Bank Find].

[98] National Credit Union Administration, *Credit Union Data*, http://webapps.ncua.gov/customquery/; *select* Search Fields: Total Assets, *select* Operator: Less than or equal to, *type* Field Values: "175000000", *select* Go [hereinafter NCUA Data].

accountholders that transmitted or received a CBETF required to be reported under this section. The economic impact of this proposal will not be significant. The information required to be reported is information that banks are already required to record as part of their customer identification procedures.[99]

FinCEN understands that banks will be able to leverage from automated systems already designed to address current regulatory requirements, make relatively inexpensive internal modifications to existing queries that extract information from their customer information and transactional databases, and produce a summary annual report when a customer account shows evidence of CBETF activity during the year. The cost of the TIN annual reporting is based on the burden (measured in hours) of running these queries and producing and formatting the report (at clerical level), and spot-checking the report prior to transmission (at supervisory level).

FinCEN has determined that existing regulatory reports of a similar nature involve an annual burden of 1 hour. Therefore, FinCEN estimates that the impact on a small bank to produce this report would be $24.47 annually[100] with a collective impact on small banks of $7,000. As such, FinCEN does not believe the impact of generating such report is significant.

Certification:

When viewed as a whole, FinCEN does not anticipate the proposals contained in this rulemaking will have a significant impact on a substantial number of small businesses. Accordingly, FinCEN certifies that this rule will not have a significant economic impact on a substantial number of small entities.

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[99] *See* 31 CFR § 103.121 (2009).
[100] *See* Bureau of Labor Statistics, *Occupational Employment and Wages, May 2006*, http://www.bls.gov/oes/2006/may/oes131041.htm.

FinCEN is seeking comments on this determination.

## X. Paperwork Reduction Act

The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number. Comments on the information collection should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, D.C. 20503, or by the Internet to oira_submission@omb.eop.gov with a copy to the Financial Crimes Enforcement Network by mail or as part of the comments through the Internet. Comments are welcome and must be received by [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

*Cross-border Electronic Transmittals of Funds Report (the "CBETF periodic report")*

Description of Affected Financial Institutions: Banks as defined in 31 CFR 103.11(c) and money transmitters as defined in 31 CFR 103.11(uu)(5).

Estimate Number of Affected Financial Institutions: 1,000 (300 banks[101] and 700 money transmitters operating as principals).[102]

Estimated Average Annual Burden Hours Per Affected Financial Institution:

[101] *See* 31 CFR 103.11(c) (2009) (For purposes of the BSA, the term "bank" includes credit unions).
[102] *Implications and Benefits Study* at ii.

On a weekly basis, first-in and last-out institutions will be required to submit a report containing information on all CBETFs conducted during the week. Each institution will be required to submit a maximum of 52 reports per year. For a large institution, FinCEN estimates that on the average each weekly report will contain information on 40,000 CBETFs.[103] For a small institution, FinCEN estimates that each weekly report will contain information on 115 CBETFs. Despite the number of CBETFs contained in each report, FinCEN estimates that the average burden associated with verifying and filing the report is one hour for each weekly report. FinCEN is not considering the time necessary to gather the information required for the report because the gathering of this information is usual and customary in processing these transactions. For banks, this information is included in the message that is transmitted between institutions and only needs to be retransmitted to FinCEN in the same messaging format as was originally sent.

For money transmitters, FinCEN understands that to be active in the highly competitive cross-border remittances market, and to comply with current BSA/AML monitoring requirements involving their own activity and the activity of their agents, all money transmitters covered by the proposed reporting requirement must already possess a degree of automation that will allow them to generate the CBETF periodic report with minimal manual intervention. Manual intervention at operator level will consist of running the queries on the transaction and customer information databases, and inserting a single FinCEN Uniform Resource Locator (URL) in the computer- generated report;

[103] *Implications and Benefits Study*, App. C, 11 fig. 13. The number of annual reportable transactions per large bank (as defined under the RFA) covered a wide range, with few very large institutions processing tens of millions of reportable transactions, and a large number of relatively smaller institutions processing reportable transactions in the tens of thousands or fewer. The average of 2 million transactions per large bank compensates both extremes of this wide range.

manual intervention at supervisor level will consist of spot-checking the generated report prior to transmitting it to FinCEN. While the number of weekly CBETFs per individual money transmitter (large or small) might vary, the actual number of weekly CBETFs is not considered a burden-determinant factor: having an operator execute and address an automated weekly report would require substantially the same time regardless of the number of transactions. The time required by manual intervention at the supervisory level for quality assurance will be affected by the number of weekly transactions; however, the sample size required for spot-checking at an industry-standard confidence level will not have to be increased in direct proportion to the number of reported transactions. Furthermore, those money transmitters that process the largest portion of CBETFs subject to reporting are also those that currently possess enough technological resources to automate not only the generation of the report, but the spot-checking function as well.

Estimated Average Total Number of CBETF Periodic Reports per Annum: 52,000 (52 weekly reports submitted by 1,000 reporting institutions).

Estimated Total Annual Burden: 52,000 hours (52,000 reports at 1 hour per report).

The total number of reports to be filed per calendar year (or, in the case of banks, the number of times a year SWIFT retransmits their CBETF activity to FinCEN) is a function of the mandated periodicity of the reports. The proposal reflects the obligation to file a weekly report (an average of 52 reports per reporting institution per calendar year). Total number of weekly reports to be filed by all reporting banks is 15,600 a year;

total number of weekly reports to be filed by all reporting money transmitters is 36,400 a year.

*Annual Tax Identification Number Report (the "TIN annual report")*

Description of Affected Financial Institutions: Banks as defined in 31 CFR 103.11(c).

Estimate Number of Affected Financial Institutions: 15,000 banks.

Estimated Average Total Number of TIN annual reports per Annum: 15,000 (1 annual report submitted by 15,000 reporting institutions).

Estimated Total Annual Burden: 15,000 hours (15,000 reports at 1 hour per report).

Under the TIN annual reporting portion of this proposed rule, FinCEN estimates that the number of affected banks would increase to a maximum of 15,000.[104] FinCEN stipulates that the banks covered by the proposed TIN annual report requirement already possess the degree of automation required to search their transaction and customer information databases and generate the report with minimum manual intervention: the same bank population is currently subject to other regulatory reporting requirements, such as annual reporting on the IRS series of 1099 forms that require substantially similar data processing capacity. The estimated average burden is one hour per reporting bank per year. Therefore, the average total annual burden hours would increase to 15,000.

*Request for Comments Regarding the Paperwork Reduction Act Analysis*

FinCEN is seeking comments on these estimates. Comments are specifically requested concerning:

[104] Federal Deposit Insurance Corporation, *Bank Find*, http://www2.fdic.gov/idasp/main_bankfind.asp; *select* Find; *Credit Union Directory 2009*, NCUA Credit Union Directory 190-192 (NCUA, 2009).

- Whether the proposed collection of information is necessary for the proper performance of the functions of FinCEN, including whether the information will have practical utility;
- The accuracy of the estimated burden associated with the proposed collection of information;
- How the quality, utility, and clarity of the information to be collected may be enhanced; and,
- How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology.

## XI. Request for Comments

FinCEN invites comments on any and all aspects of the proposal to require select financial institutions to report to FinCEN transmittal orders associated with certain CBETFs. If you are commenting on behalf of a bank, please indicate in your response whether you are a small institution (less than $175 million in assets). If you are commenting on behalf of an MSB, please indicate in your response whether you are a small MSB (gross receipts are below $7 million annually).[105]

FinCEN specifically invites comment on requests above, as well as the following:

*Third-party Carriers:* In the proposed rule, banks will be able to report by either submitting the complete copy of the transmittal order that it sends or receives or by submitting the ten data points listed in 103.14(c) of the proposed regulation. FinCEN

[105] Please note that the inclusion of this information is not a condition of FinCEN's full consideration of your comment. However, this data will help FinCEN allocate the comment among the population of large and small business entities, and produce a better evaluation of the impact of the proposed rule in accordance with the Regulatory Flexibility Act.

anticipates that banks, which provide complete copies of the CBETF transmittal orders, will fulfill this obligation by using third-party carriers of the transmittal orders to submit the copy on behalf of the bank. Alternatively, for banks that submit the ten data points requested in 103.14(c) of the proposed regulation, FinCEN anticipates providing an internet-based form to report the information. FinCEN requests comments on alternative formats for reporting the proposed information that FinCEN should consider in developing systems to accept CBETF reporting. Additionally, FinCEN requests comments on third-party carriers, other than SWIFT, that could make such reports on behalf of the bank. Although FinCEN is focusing on messaging systems, FinCEN welcomes comments from the public regarding possible payment or settlement systems that could provide the information requested under the proposed rule.

*Message Standards:* If institutions that would be covered by this rule believe that there is a significant portion of their funds transfers that would be required to be reported under this proposed rule that would not be covered by reporting the identified standardized person-to-person transmittal orders (MT 103 and MT 202-COV), FinCEN encourages comments in this area.

*Bank Proprietary Systems:* FinCEN requests comment on the utility of reporting CBETFs that are processed solely through bank proprietary systems and on the potential costs of supplying such reports. At this time, FinCEN is not proposing to collect information on CBETFs that are processed through bank proprietary systems. FinCEN acknowledges that these systems are used in a limited context and that within these contexts there is a higher degree of transparency. When commenting, please note if you have information contrary to these acknowledgements.

*Duplicate Messages:* FinCEN is requiring submissions of copies of transmittal orders or advices with the intention of collecting the evidence that a transmittal of funds has occurred or will occur. FinCEN is asking for advices in order to capture situations where a proprietary system may be used in order to execute the transmittal order but where a third-party system is used in addition to sending an advice to facilitate straight-through processing. It is not FinCEN's intention to collect duplicate records in the rare cases where a transmittal order and an advice are both covered under this proposed regulation. As such, FinCEN is seeking comments on situations where the regulations as proposed might result in duplicate reporting and, if so, whether institutions view this duplication as something that they believe is less costly to simply report (with FinCEN reconciling the two reports) or whether they believe that it would be of value to exempt duplicate filings, with suggestions as to how to avoid such duplication.

*Frequency of Reports*: FinCEN requests comments on the frequency that reports are required to be provided including the feasibility of requiring daily reporting. FinCEN is aware that other countries require daily reporting with significant benefits accruing to law enforcement from the access to near real-time information. FinCEN is interested in receiving information from financial institutions about the impacts that this would have on their operations. In determining the costs of compliance with this proposal, FinCEN has relied on feedback from banks stating that the reporting requirements of the proposal can be fulfilled by copying FinCEN on a SWIFT message. Thus, FinCEN anticipates that the costs of compliance for banks would not be significantly increased if these messages are sent to FinCEN daily as opposed to batch-sent to FinCEN weekly. If your

institution (including any money transmitter) has information suggesting otherwise, please include that information within your comment.

*Effects of the Rule on Customer Privacy:* FinCEN has included an extensive discussion of its proposal for ensuring the security of the information in this NPRM.[106] In addition, it is also seeking comments regarding the impact of this information collection on customer privacy and on the ability of banks and MSBs to continue to fulfill their obligations to preserve their customer's privacy while implementing the provisions of this rule.

*Effects of FinCEN's Proposed Reporting Requirements:* To establish an efficient reporting system that not only meets the goal of providing information that is needed by law enforcement but does not require significant changes in the business and payment systems of banks and MSBs, FinCEN is proposing that first-in/last-out banks report all CBETFs and that first-in/last-out money transmitters report all CBETFs at or above $1,000. FinCEN discussed its estimates of the implications of the proposed rule in its Regulatory Flexibility Analysis[107] and its discussion of the Implications and Benefits Study.[108] Considering these discussions and the reporting requirements defined by FinCEN in the NPRM, FinCEN is seeking comments from banks and MSBs on the costs and impact of these broad parameters on the funds transfer operations and systems of the banks and MSBs affected by this rule.

*Migration to other CBETF Channels:* FinCEN would like to solicit comments from institutions regarding specific instances where they believe that, as a result of such a reporting requirement, financial institutions or their customers may move to execute

[106] S*upra* IV. Sec. I Protection of Private Personal Financial Information.
[107] S*upra* IX. Regulatory Flexibility Act.
[108] S*upra* III. Sec. B. Implications of CBETF Reporting of the Financial Industry.

CBETFs by some other means that would not be subject to the proposed reporting requirement, including informal value transfer mechanisms or non-U.S. based payment mechanisms (please provide details).

*Effect of the Rule on Remittances:* FinCEN requests comments on the effect any such reporting is likely to have on retail consumers of cross-border remittances, including how any such reporting may change the relationship between the remittance consumer and the money transmitter and how such reporting may produce cost or price effects likely to be passed on to such consumers. Please be specific in identifying any such monetary effects, as well as any non-monetary effects caused by such a proposed rule, if adopted.

*Reporting Channels:* In the proposed rule, FinCEN requires reporting from money transmitters for transactions of $1,000 or more. FinCEN anticipates that large money transmitters will implement automated systems to provide the information requested in 103.14(c) of the proposed regulation. FinCEN requests comments on possible formats for this reporting to assist FinCEN in developing a user-friendly format to reduce the implications on money transmitters. FinCEN understands that smaller institutions might benefit from submitting reports on an internet-based form provided by FinCEN. For those institutions with a lower volume of CBETF transactions, FinCEN believes that use of the internet-based form would allow cost savings versus self-implemented automated reporting systems and requests comments from the industry on this proposal.

*Foreign-Exchange Conversions:* In the proposed rule, FinCEN requires reporting from money transmitters for transactions of $1,000 or more or the equivalent in other

currencies. FinCEN would like to solicit comments on how, with respect to non-U.S. dollar denominated transactions, institutions would perform the currency exchange rate calculations in practice and what systems or approaches may be available to facilitate compliance with this requirement.

*Effect of TIN Reporting on the Banking Industry:* FinCEN requests comments on how the annual TIN reporting requirement will impact the banking industry and how the industry will comply with this requirement, including how reportable accounts would be identified for reporting under this methodology. FinCEN understands that banks will be able to leverage from automated systems already designed to address current regulatory requirements, and make relatively inexpensive internal modifications to existing queries that extract information from their customer information and transactional databases, and produce a summary annual report when a customer account shows evidence of CBETF activity during the year. These automated systems are used to comply with other regulatory requirements including the filing of the IRS series of Form 1099. If you have information suggesting that banks are unable to leverage off of these systems, please include that information within your comment.

*Effect of TIN Reporting on the Money Transmitter Industry:* FinCEN is interested in soliciting comments from the money transmitter industry regarding the additional requirement of providing the TIN of the transmittor or recipient for transactions of $3,000 or more. As stipulated above, in order to be active in the highly competitive cross-border remittances market, and to comply with current BSA monitoring requirements involving their own activity and the activity of their agents, all money transmitters covered by the proposed periodic reporting requirement must already possess a degree of automation

that will allow them to generate the CBETF periodic report with minimal manual intervention. If you have information suggesting that money transmitters that process CBETFs are unable to rely on automated systems coupled with minimal manual transaction testing, please include that information in your comment.

*TIN Reporting Threshold for the Money Transmitter Industry:* Lastly, FinCEN solicits comments on whether the money transmitters required to report under these proposals would prefer to consolidate the reporting thresholds ($1,000 for CBETF reports and the $3,000 level for including the taxpayer identification number in the report) into a single $1,000 threshold for both reporting the transaction and reporting the taxpayer identification number (meaning that a TIN would be required with every CBETF reported).

**List of Subjects in 31 CFR Part 103**

Administrative practice and procedure, Banks, Banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

**Authority and Issuance**

For the reasons set forth in the preamble, part 103 of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 103 – FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FINANCIAL TRANSACTIONS**

1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314, 5316-5332; title III, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107-56, 115 Stat. 307.

2. Add new § 103.14, to read as follows:

**§ 103.14 Reporting Relating to Cross-Border Electronic Transmittal of Funds.**

(a) *Periodic Reports*. Each reporting financial institution shall file periodic reports with FinCEN with respect to any cross-border electronic transmittal of funds, denominated in any currency, for an amount equal to or exceeding the applicable reporting threshold, to the extent and in the manner required by this section.

(b) *Definitions— In general.* For purposes of this section, the following terms shall have the meanings set forth below:

(1) *Account* shall have the meaning set forth in 31 CFR § 103.90(c).

(2) *Bank* shall have the meaning set forth in 31 CFR § 103.11(c).

(3) *Money transmitter* shall have the meaning set forth in 31 CFR § 103.11(uu)(5).

(4) *Recipient* shall have the meaning set forth in 31 CFR § 103.11(cc).

(5) *Transmittor* shall have the meaning set forth in 31 CFR § 103.11(ll).

(6) *Transmittal order* shall have the meaning set forth in 31 CFR § 103.11(kk).

(7) *Transmittal of funds* shall have the meaning set forth in 31 CFR § 103.11 (jj).

(8) *Electronic means.* Means that utilize technology that has electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(9) *Financial institution* shall have the meaning set forth in 31 CFR § 103.11(n).

(10) *Foreign financial institution* shall have the meaning set forth in 31 CFR § 103.175(h).

(11) *First-in financial institution*. The first financial institution with respect to a transmittal of funds that receives a transmittal order or advice from a foreign financial institution.

(12) *Last-out financial institution*. The last financial institution with respect to a transmittal of funds that sends a transmittal order or advice to a foreign financial institution.

(13) *Cross-border electronic transmittal of funds.* A transmittal of funds where either the transmittal order or the advice is:

(i) Communicated by electronic means; and

(ii) Sent or received by either a first-in or last-out financial institution.

(14) *Reporting financial institution*. Any bank ('reporting bank') or money transmitter ('reporting money transmitter') acting as a first-in or last-out financial institution.

(15) *Reporting threshold*. For reporting banks, the reporting threshold is zero. For reporting money transmitters, the reporting thresholds for the periodic cross-border electronic transmittal of funds is $1,000 or more, or the equivalent in other currencies.

(c) *Filing procedures*—(1) *What to file*. Reporting financial institutions shall discharge their reporting obligations with respect to cross-border electronic transmittals of funds required by paragraph (a) of this section by submitting a copy of the respective transmittal order or advice, provided that the transmittal order or advice is in a standardized format that has been approved for direct submission by FinCEN. If the reporting financial institution is unable to submit a copy of the respective transmittal order or advice in an approved format, then the reporting financial institution may discharge its reporting obligation by submitting the following information, if available, in a form specified by FinCEN:

(i) Unique transaction identifier number;

(ii) Either the name and address or the unique identifier of the transmittor's financial institution;

(iii) Name and address of the transmittor;

(iv) The account number of the transmittor (if applicable);

(v) The amount and currency of the transmittal of funds;

(vi) The execution date of the transmittal of funds;

(vii) The identity of the recipient's financial institution;

(viii) The name and address of the recipient;

(ix) The account number of the recipient (if applicable);

(x) Any other specific identifiers of the recipient or transaction, and

(xi) For transactions of $3,000 or more, reporting money transmitters shall also include the U.S. taxpayer identification number of the transmittor or recipient (as applicable) or, if none, the alien identification number or passport number and country of issuance.

(2) *Where to file.* A report required by paragraph (a) of this section shall be filed with FinCEN, unless otherwise specified.

(3) *When to file.* A report required by paragraph (a) of this section shall be filed by the reporting financial institution within five business days following the day when the reporting financial institution sent or received the transmittal order.

(4) *Designated third-party filers*. A reporting financial institution may designate a third party to file a report required under this section utilizing procedures prescribed by FinCEN.

(d) *Nature and form of reports*. All reports required by paragraph (a) of this section shall consist of electronic submissions filed in a format approved by FinCEN either discretely, on a transaction-by-transaction basis, or by batching transactions. FinCEN may authorize a designated reporting financial institution to report in a non-electronic manner if the financial institution demonstrates to FinCEN that the form of the required report is unnecessarily onerous on the institution as prescribed; that a report in a different form will provide the information FinCEN deems necessary; and that submission of the information in a different manner will not unduly hinder the effective administration of this part.

(e) *Annual Reports.* On an annual basis, all banks must submit to FinCEN a report that provides the following information: the number of the account that was credited or debited to originate or receive a cross-border electronic transmittal of funds, and the U.S. taxpayer identification number of the respective accountholder. This report shall be submitted to FinCEN no later than April 15 of the year following the transaction date of the cross-border electronic transmittal of funds. The report shall be in a form and manner to be determined by FinCEN.

(f) *Exemptions*. The following cross-border electronic transmittals of funds are not subject to the reporting requirements of paragraphs (a) and (e) of this section:

(1) Cross-border electronic transmittals of funds where either the transmittor is a bank and the recipient is a foreign bank, or the transmittor is a foreign bank and the recipient is a bank and, in each case, there is no third-party customer to the transaction; or

(2) The transmittal order and advice of the transmittal order are communicated solely through systems proprietary to a bank.

_____
James H. Freis, Jr.
Director
Financial Crimes Enforcement Network

Dated:_____