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Treasury Regulation of International Wire Transfer and Money Laundering: A Case for a Permanent Moratorium

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I. Introduction

The basis of virtually every international business transaction is a transfer of assets in the form of currency, instruments or other goods or services as consideration for that transaction. Modern technology has contributed greatly to the speed and efficiency of funds transfers connected with these transactions.

Electronic funds transfers are "a series of messages to and through one or more banks that are intended to result in the payment of funds from one person to another."[1] This is accomplished through the electronic debiting of the account of the "originator" or person sending the money and a corresponding credit to the "beneficiary" or the person receiving the funds.[2] No cash is physically transported in this type of transaction. The speed and efficiency of this system has helped facilitate the expansion of international trade by making the payment process less cumbersome and, in fact, almost instantaneous.

This ease and facility has unfortunately also provided an efficient system by which to "launder" illicit cash proceeds from criminal activity such as narcotics trafficking.[3] Laundering such illegal proceeds into usable, apparently legitimate assets is essential for many criminal enterprises. Estimates of the amount of money illegally laundered for all purposes range from $100 billion to $300 billion annually.[4] Once absorbed into the system, this "dirty money" becomes increasingly difficult to dis-

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1. Proposed Amendment to the Bank Secrecy Act Regulations, 55 Fed. Reg. 41,696 (1990), *to be codified at* 31 C.F.R. pt. 103 (proposed Oct. 15, 1990). "Electronic funds transfers" is a term used in statutes and regulations domestically and will be used interchangeably with the terms "wire transfer," "electronic payments," and "electronic transfer" throughout this article.

2. *Id.*

3. "Nowhere . . . is the need for money laundering more important than in the illicit drug trade — a cash business with estimated U.S. sales in excess of $100 billion annually." U.S. Gen. Acct'g Ofc., Report to the Chairman, Subcommittee on Terrorism, Narcotics and International Operations, Committee on Foreign Relations, U.S. Senate, Money Laundering: The U.S. Government is Responding to the Problem, GAO/NSIAD-91-130, at 2 (May 1991) [hereinafter 1991 GAO Report].

4. U.S. Gen. Acct'g Ofc., Report to the Chairman and Ranking Minority Member, Subcommittee on Treasury, Postal Service and General Government, Committee on Appropriations, U.S. Senate, Money Laundering: Treasury's Financial Crimes Enforcement Network, GAO/GGD-91-53, at 2 (Mar. 1991).

tinguish from legitimate funds.[5] Commingling encourages criminal activity by allowing perpetrators to benefit from their illegally derived cash proceeds. Thus, money laundering has been described as a "dirty needle" injecting and infecting legitimate markets with the disease of greed.[6] Illicit cash proceeds are injected into the financial system, aggregated into one or more accounts of seemingly legitimate business ventures, and then "wired" to anywhere in the world.[7]

Efforts by government authorities worldwide to curb such abuses have become a higher priority recently.[8] These efforts are directed toward both currency and non-currency transactions. Efforts in the non-currency area are creating a dilemma for government officials and financial institutions, as many of these illicit transactions appear deceptively similar to legitimate banking transactions.[9] Regulation of this highly efficient and beneficial system of wire transfers must be deliberatively and carefully weighed against the burden placed on the legitimate businesses affected. This article describes the wire transfer process, money laundering mitigation efforts and recent proposals by the United States Treasury Department.

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5. U.S. electronic funds transfer systems process over $1.2 trillion dollars daily. *See infra* notes 16-19 and accompanying text.

6. Gerald Lewis, Comptroller, State of Florida, Speech to the International Symposium on Money Laundering, Coral Gables, Florida, sponsored by the University of Miami's Graduate School of International Studies (Oct. 26, 1989), *reprinted in Drug Money Laundering Control Efforts: Hearing Before the Subcomm. on Consumer and Regulatory Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 1st Sess. 492 (1989) [hereinafter *Control Efforts*].

7. As drug peddlers expand their markets, they also diversify their money laundering techniques. Law enforcement agencies are discovering money laundering activity in enterprises not usually associated with such activity. For example, beauty salons, camera shops, car rentals, dry cleaners, movie houses, fitness clubs, pet shops and even grocery stores are utilized as legitimate business fronts to facilitate the infusion of large amounts of cash into the international payments system. *Id.* at 26.

8. Examples of such efforts include: the United Nations Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (December, 1988); INTERPOL; the Basel Committee on Banking Regulations and Supervisory Practices (comprised of central bank governors); the Inter-American Drug Abuse Control Commission (CICAD) of the Organization of American States; and the Financial Action Task Force, established at the July, 1989 Paris Economic Summit of G-7 Countries and the President and Commission of the European Community. Also invited to participate in the Task Force were Denmark, Finland, Greece, Ireland, New Zealand, Norway, Portugal, Turkey, Hong Kong and the Gulf Cooperation Council. In April of 1990, the Task Force issued a report containing forty recommendations for an international effort to combat money laundering; *see* 1991 GAO Report, *supra* note 3, at 58-63. *See generally* Laura M. L. Maroldy, *Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Reporting and Recording of Wire and Electronic Funds Transfers is Not the Answer*, 66 NOTRE DAME L. REV. 863 (1991) [hereinafter *Blanket Reporting*]; Jeffrey Lowell Quillen, Note, *The International Attack on Money Laundering: European Initiatives*, 1991 DUKE J. COMP. & INT'L L. 213 (1991) [hereinafter *European Initiatives*].

9. *See Control Efforts*, *supra* note 6, at 81-88 (testimony of Chuck Morley of the Morley Group, Inc., financial consultants).

II. ELECTRONIC FUNDS TRANSFERS[10]

Before the age of microprocessors, funds transfers between banks were made primarily over international and domestic telegraph and telex networks.[11] This system was very time consuming and cumbersome. Telexes were required to be processed manually and there was no standardized format; each bank typically designed its own forms.[12]

Because these telexed instructions were nonuniform, it was not possible to process transactions without the participation of a human operator reviewing and interpreting the instructions on the transaction. There was no standard way to indicate the parties of the payment, the amount, the currency, the value, the date, etc.. This archaic system was chaotic, requiring a large staff of handlers and voluminous paperwork.[13]

Technological advancement in the development and implementation of computers has both increased the speed by which such wire transfer transactions can be accomplished and provided for a steady evolution of standards relating to the communication networks and automated systems that support the banking industry.[14] It is now possible to effect funds transfers that are processed and interpreted entirely electronically, without the involvement of human translators.

There are three primary communications systems facilitating wire transfers: the Federal Reserve Communications System ("Fedwire"); the Clearing House Interbank Payments System ("CHIPS"); and the telecommunications system run by the Society for Worldwide Interbank Financial Telecommunications S.C. ("SWIFT"). Fedwire is the nation's primary wholesale electronic funds transfer system[15] utilized by the banking

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10. Electronic and wire transfers can move funds in a matter of seconds, because what is being "moved" is not physical currency, but electronic messages. An authority on electronic funds transfers noted:

> Money itself is nothing but information. It represents the claims that individuals and institutions have for goods and services that exist within an economy. The possession of money in paper form is simply the possession of a certificate which records these particular claims. The movement of money is the movement of these claims through the accounting records of the financial, industrial and merchandising communities.

Blanket Recording, *supra* note 8, at 864 n. 9 (citing D. CHORAFAS, ELECTRONIC FUNDS TRANSFER (1988)).

11. *See Control Efforts*, *supra* note 6, at 89-141 (testimony of Joseph Madison, President of Joseph Madison Associates, Inc., a consulting firm for computer technology for banks).

12. *Id.*

13. *Id.*

14. *Id.* It has been said that these electronic systems have become "the" banking system of the global economy. *See* Philip S. Corwin and Ian W. Macoy, *A Comprehensive Look at Electronic Payments System Risk*, BANKING EXPANSION REP., Feb. 5, 1990.

15. "Wholesale electronic funds transfer generally refers to a funds transfer used to satisfy an immediate, high-dollar obligation or to enable the recipient to make immediate use of the funds." U.S. GEN. ACCT'G OFC., BRIEFING REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE, COMMITTEE ON ENERGY AND COMMERCE, HOUSE

industry to handle the payments banks make to each other on behalf of themselves and their customers.[16] CHIPS is the principal electronic funds transfer system that supports the international transfer of funds between the United States and international banks.[17] Together, CHIPS and Fedwire account for *daily* transactions of over $1.2 trillion.[18] These systems handle more than ninety-five percent of all wire transfers received or sent in the world.[19] SWIFT is an international message processing system that is the mainstay for initiating international electronic funds transfers through Fedwire and CHIPS.[20]

A. *Fedwire*

The Fedwire payment network is operated by the U.S. Federal Reserve System. Fedwire, in existence in some form since 1918,[21] connects the twelve Federal Reserve Banks and their twenty-five branches (e.g., Denver is a branch of the Kansas City Federal Reserve Bank), U.S. government agencies (e.g., Treasury), and some ten thousand depository institutions.

Fedwire has evolved from a teletype, terminal-based system to today's direct-link, computer-based system.[22] In 1987, Fedwire processed about fifty-five million fund transfers with a combined value of $153 trillion — over $695 billion on average every business day.[23] In 1990, this daily transaction rate was $792.8 billion — with an annual dollar volume of almost $200 trillion dollars.[24] Transfers over Fedwire are considered both immediate and irrevocable because the Federal Reserve guarantees payment to the recipient financial institution upon completion of the transfer.[25]

Fedwire is entirely under the regulatory authority of the Federal Reserve System. The Federal Reserve Board examines Fedwire operations during annual financial examinations of reserve bank activities.[26] In addi-

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OF REPRESENTATIVES UNITED STATES GENERAL ACCOUNTING OFFICE, ELECTRONIC FUNDS TRANSFER: INFORMATION ON THREE CRITICAL BANKING SYSTEMS, GAO/IMTEC-89-25BR, at 2, n. 1 (Feb. 1989) [hereinafter 1989 GAO Briefing].

16. *Id.* at 2.
17. *Id.* at 3.
18. *See id.* at 2-3.
19. *Wire Transfer Rules Proposed, 40,000 Are Affected*, MONEY LAUNDERING ALERT, Nov. 1990, at 1.
20. 1989 GAO Briefing, *supra* note 15, at 2.
21. *Id.*
22. *Control Efforts*, *supra* note 6, at 105 (Madison testimony).
23. 1989 GAO Briefing, *supra* note 15, at 2.
24. Letter from Philip Corwin, Director and Counsel, American Bankers Association, to Peter G. Djinis, Acting Director, Office of Financial Enforcement, Department of the Treasury 5 (Jan. 15, 1991) (comment letter on the Proposed Amendment to Bank Secrecy Act Regulations Relating to Recordkeeping for Funds Transfers by Banks, on file with the author) [hereinafter Corwin letter].
25. 1989 GAO Briefing, *supra* note 15, at 2.
26. *Id.* at 4.

tion, internal auditors of the various Federal Reserve district banks conduct periodic audits that include a review of Fedwire activities.[27]

B. *CHIPS*

CHIPS was created in 1970 and is the nation's major wholesale electronic funds transfer system for processing international U.S. dollar transfers among international banks.[28] It is a private-sector system which electronically processes international transactions for about 140 domestic depository institutions and branch offices of foreign banks. CHIPS moves dollars between participant banks for transactions, including letters of credit, collections, reimbursements, foreign exchange, and the sale of short-term Eurodollar funds. In 1987, the number of CHIPS transfers approached thirty-two million with a combined value of almost $140 trillion, or over $554 billion on average every business day.[29] In 1990, CHIPS processed about thirty-seven million transactions valued at $222 trillion.[30]

Regulation of CHIPS is conducted under the combined authority of the Comptroller of the Currency, the Federal Reserve System, and the Federal Deposit Insurance Corporation and is examined every eighteen months by a team of examiners.[31]

C. *SWIFT*

SWIFT came into being in 1977 and is designed to facilitate the electronic communications needs of international banking.[32] The Society for Worldwide Interbank Financial Telecommunications S.C. operates the SWIFT telecommunications system, which was created to provide international automated message processing and transmission services between banks. It is a Belgian cooperative society that is owned and managed by almost 1500 financial institutions worldwide.[33] SWIFT is not a system for the transfer of funds, but of information via messages, which allow institutions to transmit among themselves instructions on international payments, statements and other transactions associated with international finance. The SWIFT system connects about 2400 institutions, including non-banking institutions, in almost sixty countries. It processes about one million messages daily relating to fund transfers accomplished

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27. *Id.* at 5.
28. *Id.* at 3.
29. *Id.*
30. 1991 GAO Report, *supra* note 3, at 13.
31. The authority to review CHIPS is dictated by the Bank Service Corporation Act of 1962, 12 U.S.C. § 1867. This Act generally governs the "backroom" operations of banks that are under the authority of the various federal regulators, including such activities as clerical, accounting, and statistical functions. CHIPS officials dispute whether there is specific statutory authority within the Act for this examination. However, the officials have taken it upon themselves to allow such investigations by formally "inviting" the examiners. This cooperation has eliminated the need to settle the dispute. 1989 GAO Briefing, *supra* note 15, at 5.
32. *Id.* at 3.
33. *Id.*

through Fedwire and CHIPS.[34]

SWIFT is not subject to U.S. federal regulation. Examination of SWIFT operations is carried out by in-house auditors on a periodic basis. Additionally, an annual review is conducted by private, outside-auditors to assure the integrity of the security and confidentiality of SWIFT messages.[35]

D. *Private Networks*

Many large money center banks have developed private networks in response to customers' cash management needs and to assist in their foreign branch and correspondent operations. These networks are offered to corporate customers and to "correspondent" banks, typically smaller banks utilizing the resources of their larger cousins, for a fee of course.[36] Thus, even the smallest of depository institutions can access and transmit funds for their customers or for their own accounts through the complex, sophisticated international network of wire transfers.[37] The American Bankers Association has developed standards for its members so that these private networks for funds transfer are compatible with SWIFT, CHIPS and Fedwire. In fact, CHIPS and Fedwire implemented the ABA standards, which were essentially derived from SWIFT.[38]

All of the above systems are fully compatible, integrated and automated. They are utilized singularly and in unison to effect funds transfers in tremendous volume virtually instantaneously on a worldwide basis, from and to any place on the globe.[39] The standardization of national

34. *Id.* at 4.

35. *See id.* at 4-6.

36. *Control Efforts, supra* note 6, at 108 (Madison testimony).

37. Such private systems include: Bankers Trust Cash Connector; Morgan Guaranty's MARS; Chase Manhattan's Current Day Reporter; Chemical Bank's CHEMLINK; and First National Bank of Chicago's FirstCash systems. *Id.*

38. *Control Efforts, supra* note 6, at 118 (Madison testimony).

39. 1989 GAO Briefing, *supra* note 15, app. I. Some examples of this interconnection are as follows:

Example 1, Domestic: A Washington D.C. purchaser buys $2 million in goods from a Los Angeles manufacturer. He goes to his bank to initiate a payment order. The purchaser's bank, a member of the Federal Reserve, is linked to Fedwire and uses a computer terminal to send a funds transfer message to its district Federal Reserve Bank in Richmond, Va. Automatically proceeding over Fedwire to the manufacturer's Federal Reserve district bank in San Francisco, the funds transfer message is then instantaneously sent to the manufacturer's local bank in Los Angeles via Fedwire. The local bank credits the manufacturer's account immediately. Non-Federal Reserve member banks can accomplish the same through a correspondent relationship with a member bank or through a private system. *Id.*

Example 2, International: A British importer orders goods from a French manufacturer to be paid in U.S. dollars. After the goods have been received, the British importer instructs its London bank to send payment to the French manufacturer's bank in Paris. The London bank uses the SWIFT system to advise its New York branch office to send payment to the manufacturer's French bank. The electronic funds transfer is sent through CHIPS to the New York branch of the French bank. The New York branch office of the French bank laws generally affecting these international electronic funds transfers is a topic which has been the subject of extensive discussion over the past several years[40] and which in itself is a suitable basis for an entire article; it is not pursued further here.[41]

III. MONEY LAUNDERING

The above-described systems for instantaneously moving funds around the globe have proven quite attractive to those who illicitly accumulate and distribute large amounts of cash. Although estimates on the exact amount of funds vary, authorities believe that up to $85 billion of over $120 billion of drug money proceeds are laundered or invested annually.[42]

Money laundering has been defined as "the process whereby one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate."[43] Illegal drug

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notifies its Paris office through SWIFT of the receipt of payment. The Paris bank credits the manufacturer's account. *Id.*

Example 3, International: A Los Angeles importer instructs its local bank to send payment to a Paris manufacturer for goods received. The Los Angeles importer's bank, linked to Fedwire, sends a funds transfer message to its district Federal Reserve Bank in San Francisco. This message automatically goes to the Federal Reserve Bank in New York. The message is automatically relayed via Fedwire to a New York correspondent bank of the Paris bank. The correspondent bank advises the manufacturer's bank in Paris via SWIFT to send payment to the French manufacturer. The payment order is received by the manufacturer's Paris bank and the funds are available on demand from the manufacturer. *Id.*

40. The United Nations Commission on International Trade Law (UNCITRAL) has undertaken a project to prepare a model national law on electronic funds transfers. The U.S. Secretary of State's Advisory Committee on Private International Law Study Group on International Electronic Transactions has met and considered various proposals for positioning the U.S. delegation to this UNCITRAL project. The U.S. delegation will be advocating adoption of a model national law which is essentially Article 4A of the Uniform Commercial Code of the U.S.. Telephone conversation with Harold S. Burman, Office of the Legal Adviser, U.S. Department of State, on December 20, 1991.

41. For a more in-depth analysis of the problems of disparate treatment under international law because of a lack of uniform standards for wire transfers, see Jeffrey S. Tallackson and Norma Vallejo, *International Commercial Wire Transfers: The Lack of Standards*, 11 N.C. J. INT'L & COM. REG. 639 (1986), and Shawn E. Flatt, *Citibank, N.A. v. Wells Fargo Asia LTD.: A Threat to U.S. International Banking?*, 1991 DUKE J. COMP. & INT'L L. 241 (1991).

42. Financial Action Task Force on Money Laundering, Report of February 7, 1990, at 3-4 (on file with the author) (G-7 and other invited countries convened to work towards unified international proscriptions for money laundering); *see also* 1991 GAO Report, *supra* note 3, at 12.

43. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS AND MONEY LAUNDERING, at 7 (1984) [hereinafter THE CASH CONNECTION]. Though the legitimate world payments systems have fostered the evolution of a relatively cashless society, cash has assumed an even greater importance as the medium of exchange within the criminal world. Jonathan J. Rusch, *Hue and Cry in the Counting House: Some Observations on the Bank Secrecy Act*, 37 CATH. U.L. REV. 465 (1988); *Changes in the Use of*

money proceeds derived from sales of cocaine, heroin and cannabis certainly constitute a major portion of the illicit cash proceeds that are injected into the financial system; however, activities such as illegal gambling, extortion, bribery, loansharking and prostitution also generate large amounts of cash needing to be legitimized.[44] Money laundering could also be used by a corporation seeking to cover the trail of bribery money paid to foreign officials in violation of the Foreign Corrupt Practices Act.[45]

Electronic funds transfers can be and are used by criminals to launder money. It has been said that wire transfers "have emerged as the primary method by which high-volume money launderers ply their trade."[46] Wire transfers, however, are not the only way to move illicit money; "dirty money" can be moved into international channels in myriad ways. The most pervasive method of laundering money is physically smuggling currency and/or financial instruments across borders.[47] Money can also be laundered internationally by purchasing commodities such as cars, appliances, or precious metals and shipping them abroad to be sold for local currency, or by fraudulently invoicing international commercial transactions.[48]

Currently, the normal system of money laundering consists of cash being moved into banks and other financial institutions and then being wired offshore or to other domestic banks for the purchase of assets.[49] In some areas, money launderers have injected large volumes of cash into real estate markets; drug traffickers make large cash down payments and full price purchases of real estate. The impact of this activity distorts true market conditions, as these purchases are typically at inflated prices.[50] An example of this would be as follows: A launderer creates an apparently legal property management firm in the United States. This management firm manages property of "third parties." The launderers aggregate currency, send it offshore, put it through a series of offshore money laundering havens, then bring the funds back into the United States as loans, or as investment funds that are used to buy real estate that the management company sells and then manages.[51]

Transaction Accounts and Cash from 1984 to 1986, 73 FED. RES. BULL. 179, 191 (1987) (almost 90% of the total $177.4 billion of coin and currency in circulation outside banks was "apparently held in unreported hoards, 'underground' for illegal purposes, or offshore").

44. *See Blanket Reporting*, *supra* note 8, at 865.

45. 15 U.S.C. § 78(dd-1) (unlawful to make payment or the promise of payment by any means to a foreign official for the purposes of influencing an act or decision of the official in his official capacity).

46. Rebecca Cox, *New Path for Money Laundering*, THE AMERICAN BANKER, July 24, 1989, at 9 (letter from Donald G. Ogilvie, Executive Vice President, American Bankers Association to William J. Bennett ("Drug Czar"), then-director of the Office of National Drug Control Policy).

47. 1991 GAO Report, *supra* note 3, at 14.

48. *Id.*

49. *Control Efforts*, *supra* note 6, at 81 (Morley testimony).

50. *Id.* at 26 (testimony of Gerald Lewis).

51. *Id.* at 81 (Morley testimony).

Identifying the amount of illegal funds that are laundered internationally is difficult. Huge sums are transferred electronically each day in connection with conventional banking activities such as collections, reimbursements, letters of credit and foreign exchange transactions.[52] The large volume of currency and monetary instruments that legitimately traverse borders make identifying illegal funds difficult, since these funds are often mixed with and are indistinguishable from legitimate currency, cashier's check and bearer bond transactions.[53]

While cash provides criminal enterprises with a ready medium of exchange, the sheer physical volume of such mountains of paper can prove quite a challenge. According to U.S. Customs Service reports, U.S. currency notes weigh about one gram each, with about 450 bills to the pound.[54] Fifty pounds of ten-dollar bills is $227,000.[55] A million dollars in twenty-dollar bills weighs 113 pounds.[56] Because of this logistical problem, money laundering has become increasingly sophisticated and is evolving into a highly specialized field. Illicit transactions are more and more often being carried out by independent money laundering experts working for a percentage of the laundered funds.[57]

Typical money laundering activities follow three basic steps: placement, layering and integration.[58] Placement implements the physical disposal of bulk currency through various means, including the commingling of funds with legitimate business proceeds, smuggling and converting cash into deposits or assets at banks.[59] Due to statutory and regulatory requirements of reporting currency transactions of $10,000 or more,[60] this process can involve "structuring"[61] where deposits are made in increments of less than $10,000, or "smurfing," in which couriers, or "smurfs," make multiple purchases of money orders, cashiers checks, or other finan-

52. 1991 GAO Report, *supra* note 3, at 13.

53. U.S. Customs Service data show that during 1989, almost $56 billion in cash and monetary instruments moved into and out of the United States. This figure is most likely understated, because many legitimate and routine international banking transactions are currently exempt from the reporting requirement of the Bank Secrecy Act. *Id.*

54. *Id.*

55. *Id.*

56. *Money Laundering in Florida: Banking Compliance, Federal Enforcement Measures, and the Efficacy of Current Law, Hearing Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs*, 101st Cong., 1st Sess. 500 (1989) (statement of Charles Intriago, Publisher, Money Laundering Alert) (how Federal agencies assigned to money laundering operations carry out their assignments in Florida, what statutory tools they use to carry out their investigations, and the particular problems financial institutions face when operating in a region known to be a major port of entry for drugs and a major port of exit for drug profits) [hereinafter *Money Laundering in Florida*].

57. 1991 GAO Report, *supra* note 3, at 13.

58. *Id.* at 14.

59. *Id.*

60. *See infra* note 75 and accompanying text.

61. 1991 GAO Report, *supra* note 3, at 14 n.1.

cial instruments in smaller increments.[62]

This infusion of cash into the legitimate economy is the most critical for criminal enterprise. Banks are not the only conduit for this infusion; launderers also utilize other financial institutions such as casinos, check cashing establishments, currency exchanges, and securities brokers, as well as non-traditional channels such as underground banking systems that deal in barter that are prevalent in the Republics of the former Soviet and Eastern block nations where official economies are in shambles.[63]

Layering is aggregating funds within accounts and transferring those funds electronically.[64] Integration occurs when the laundered funds are injected back into the legitimate economies, apparently derived from legal sources such as real estate deals, loans from front companies and fraudulent import and export invoicing as discussed above.[65] The only difference between criminal and legitimate transactions at this point is the initial source of the cash. To identify what is, in fact, a money laundering operation, one must associate the funds involved, or the person controlling, depositing or transferring those funds, with some illegal activity.[66]

The magnitude of criminally sophisticated manipulation of otherwise legitimate commercial pathways has caused great consternation within governments and the private sector worldwide. Over the past twenty-five years, statutes, regulations and private efforts to curb such abuses have been enacted, yet the problems persist. New initiatives have been enacted and proposed to enhance the effectiveness of past efforts.

IV. GOVERNMENT EFFORTS TO CURB MONEY LAUNDERING

"Without the ability to freely utilize its ill-gotten gains, the underworld will have been dealt a crippling blow."[67] Attacking the profits of the drug trade is predicted to eventually prove more effective in combating drugs in society than all other combined efforts on eradication and interdiction.[68] There is increasing pressure internationally to clamp down on drug money laundering and its accompanying scandals, such as the one concerning the Bank of Credit and Commerce International (BCCI). The government of Japan,[69] the European Community,[70] Central and

62. *Id.* Originally, "smurfs" referred to small numerous gnome-like cartoon characters with blue complexions. I could not locate the origin of use in this context, but it is a common reference for this particular type of laundering technique.

63. *See generally* 1991 GAO Report, *supra* note 3, at 14.

64. *Id.*

65. *Id.*

66. *Blanket Reporting*, *supra* note 8, at 867.

67. THE CASH CONNECTION, *supra* note 43, at iii (statement of Irving R. Kaufman, Chairman of the President's Commission on Organized Crime); *see also Blanket Reporting*, *supra* note 8, at 863.

68. 137 CONG. REC. 4203, 4206 (daily ed. June 10, 1991) (statement by Congressman Annunzio).

69. *Teenage Drug Abuse Grows Rapidly in Japan*, The Reuter Library Report, Au-

South American nations,[71] as well as the federal and state governments in the United States[72] are undertaking to broaden and strengthen money laundering controls. The banking industry itself has begun massive efforts to curb abuses.[73]

A. *United States*

The core statutory enactments governing currency transaction reporting and recordkeeping are found within the provisions of the Bank Secrecy Act,[74] administrated by the Department of the Treasury. These provisions are designed to assist in the detection and prosecution of money laundering violations through the collection and in some cases reporting of data which is available to enforcement officials within the U.S. Customs Service, Internal Revenue Service, Office of Financial Enforcement, the Department of Justice and the Office of Financial Crime Enforcement Network (FINCEN).[75]

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gust 13, 1991 ("Police have drafted new regulations to control money-laundering related to drugs and stricter laws against gangsters involved in the business. Parliament is expected to approve the regulations later this year.").

70. *See generally European Initiatives, supra* note 8; *see also Banking and Financial Services*, European Update, November 28, 1991 at 59-67, *available in* WESTLAW, Eurupdate database [hereinafter European Update].

71. The Document of Cartegena, signed by the presidents of Columbia, Peru, Bolivia and the United States at the February 1990 Andean Summit, included provisions under which the parties agreed to:
* identify, trace, freeze, and seize drug money proceeds;
* attack the financial aspects of the drug trade;
* criminalize money laundering;
* provide exceptions to banking secrecy; and
* implement a system for forfeiting and sharing drug proceeds.

Also, a panel was established at the 1990 Organization of American States Ministerial Meeting to draft model regulations concerning criminalization of money laundering, asset seizure and currency transaction reporting. 1991 GAO Report, *supra* note 3, at 62.

72. *See, e.g., N.Y Enacts Law Aimed at Illegal Transmitters*, MONEY LAUNDERING ALERT, Aug. 1990, at 8 (broadened definition of "financial institution" in state penal code to include unlicensed money transmitters, auto and boat sellers, and real estate brokers).

73. In January of 1989, the American Bankers Association established the Money Laundering Task Force to address all possible methods of stopping the flow of illicit funds. Corwin letter, *supra* note 24, at 2.

74. Amendments to the Federal Deposit Insurance Act (Bank Secrecy Act) Titles I and III, Pub. L. 91-508, 84 Stat. 1114-1124 (1970), *codified at* 12 U.S.C. §§ 1730(d), 1829(b), 1951-1959; 18 U.S.C. § 6002; 31 U.S.C. § 321, 5311-5314, 5316-5322 (1988).

75. The Financial Crimes Enforcement Network (FINCEN) was established by order the Secretary of the Treasury to provide a government-wide, multisource intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes by federal, state, local and foreign law enforcement agencies. It is important to note that FINCEN has no authority to conduct independent investigations but is designed to assist, with tactical and strategic information resources, those organizations with proper investigatory authority. *See* Organization, Functions, and Authority Delegations: Financial Crimes Enforcement Network, 55 Fed. Reg. 18433-03 (1990) (Dept. of Treasury Notice); *see also* U.S GEN. ACCT'G OFC., REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON TREASURY, POSTAL SER-

The Bank Secrecy Act reporting requirements include the Currency Transaction Report (CTRs) and the Report of International Transportation of Currency or Monetary Instruments (CMIRs).[76] Generally, CTRs and CMIRs are required when customers of financial institutions make transactions at or exceeding $10,000 dollars in currency, or in the case of CMIRs, of currency or financial instruments of any kind that are transported into or out of the United States. The Act also requires the Report of Foreign Bank and Financial Accounts, which must be filed by persons with signature authority or a financial interest in foreign bank security or deposit accounts at or exceeding $10,000 dollars.

Financial institutions[77] must file these currency transaction reports with the Internal Revenue Service within fifteen days following the reportable transaction.[78] CMIR reports are filed with the Commissioner of Customs. If currency is transported, the filing must occur at the time of entry into the United States.[79] The recipient is required to file within fifteen days of receipt.[80]

Financial institutions must provide the identity and the occupation of the individual who conducted the transaction with the financial institution, the identity of the individual on whose behalf the transaction was

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VICE AND GENERAL GOVERNMENT, COMMITTEE ON APPROPRIATIONS, U.S. SENATE, MONEY LAUNDERING: TREASURY'S FINANCIAL CRIMES ENFORCEMENT NETWORK, GAO/GGD-91-53 (Mar. 1991).

76. 31 U.S.C. §§ 321, 5311-5314, 5316-5322 (1988).

77. "Financial Institution" is defined by the regulations to mean:

> . . . each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below:
>
> (1) a bank (except bank credit card systems);
>
> (2) a broker or dealer in securities;
>
> (3) a currency dealer or exchanger, including persons engaged in the business of check cashing;
>
> (4) an issuer, seller or redeemer of travelers checks or money orders, except as a selling agent exclusively who does not sell more than $150,000 of such instruments within a given 30 day period;
>
> (5) a licensed transmitter of funds, or other person engaged in the business of transmitting funds;
>
> (6) a telegraph company;
>
> (7)(i) a casino or gambling casino licensed as a casino or gambling casino by a state or local government and having gross annual gaming revenue in excess of $1 million;
>
> (7)(ii) a casino or gambling casino includes the principle headquarters and any branch or place of business of the casino or gambling casino;
>
> (8) a person subject to supervision by any state or federal bank supervisory authority;
>
> (9) the United States Postal Service with respect to the sale of money orders.

31 C.F.R. § 103.11(i) (1991).

78. 31 C.F.R. § 103.27 (1991).

79. 31 C.F.R. § 103.23 (1991).

80. *Id.*

conducted, the account number involved in the transaction, and a description of the transaction.[81]

The Bank Secrecy Act recordkeeping and reporting requirements apply only to domestic financial institutions and foreign banking entities doing business in the United States. The Act does not extend to financial institutions offshore, even if it is a branch of a U.S. institution doing business outside U.S. borders.[82]

While the Bank Secrecy Act was enacted in 1970, enforcement was virtually non-existent until the mid-1980s. The Bank Secrecy Act was originally designed to help deter white collar crime, such as income tax evasion, by furnishing law enforcement officials with greater evidence of illegal financial transactions.[83] In 1985, the U.S. Senate Permanent Subcommittee on Investigations fully disclosed the money laundering scandal at the Bank of Boston. The impact of this scandal on compliance was dramatic: CTR filings by financial institutions in 1984 numbered only 700,000, but in 1989 reached almost seven million.[84]

The Bank Secrecy Act regulations authorize the Secretary of the Treasury to "target" transactions with certain foreign institutions[85] and transactions of domestic financial institutions that take place in certain geographic regions of the United States.[86] These additional regulations provide the Secretary with broad discretion to channel his resources to particular institutions and regions that might be more prone to abuses

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81. *Blanket Reporting*, *supra* note 8, at 873.

82. 1991 GAO Report, *supra* note 3, at 15 (Foreign banks and foreign branches of U.S. banks are subject to host country regulations. Such reporting could violate host country secrecy laws.).

83. Cliff E. Cook, *Complying with the Spirit of BSA: "Know Your Customer" Policies and Suspicious Transactions Reporting*, ABA BANK COMPLIANCE, Summer 1991, at 7 [hereinafter *Know Your Customer*].

84. *Control Efforts*, *supra* note 6, at 85 (Morley testimony).

85. 31 C.F.R. § 103.25(a) (1991) (the Secretary, when he deems appropriate, may promulgate regulations requiring specified financial institutions to file reports of certain transactions with designated foreign financial agencies).

86. If the Secretary of the Treasury finds, upon the Secretary's own initiative or at the request of an appropriate Federal or State law enforcement official, that reasonable grounds exist for concluding that additional recordkeeping and/or reporting requirements are necessary to carry out the purposes of this part . . . the Secretary may issue an order requiring any domestic financial institutions in a geographic area and any other person participating in the type of transaction to file a report. . . .

31 C.F.R. § 103.26(a) (1991).

> "Geographic Area" means any area in one or more States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, the territories and possessions of the United States, and/or political subdivisions or subdivisions thereof. . . .

31 C.F.R. § 103.26(d)(4) (1991).

and illicit manipulation.[87]

Adding to the arsenal of federal statutory weapons to fight money laundering was the enactment of the Anti-Drug Abuse Act of 1986,[88] the Anti-Drug Abuse Act of 1988[89] and the Crime Control Act of 1990.[90] The 1986 Act contained a provision finally making the laundering of money a crime.[91] Specifically, 31 U.S.C. § 1956 provides for a "financial transactions" offense and a "monetary transportation" offense for the transportation of monetary instruments other than currency. Also, 31 U.S.C. § 1957 specifically prohibits the knowing engagement in transactions consisting of criminally derived assets valued in excess of $10,000. Included under this Subtitle is a provision prohibiting "structured" transactions and a directive to financial regulators to impose regulations requiring their wards to establish and maintain internal mechanisms to ensure compliance.[92]

Title II of the 1986 Act mandates economic sanctions against foreign nations involved in the production or transmission of drugs.[93] Under this section, the President may waive sanctions by certifying to Congress that these nations are cooperating with U.S. narcotics control efforts and are taking adequate steps to eliminate, "to the maximum extent possible," the laundering of drug profits. The President may also waive sanctions if it is in the vital national interest of the United States.[94]

The 1988 Act Amendments enacted several provisions to bolster federal programs for the coordination and cooperation of money laundering mitigation efforts with foreign countries. The Secretary of the Treasury is directed by 31 U.S.C. § 5311 to negotiate with foreign finance ministers toward the establishment of an international currency control agency. Section 5311 also requires that the Secretary negotiate agreements with foreign countries regarding recordkeeping for large U.S. currency transactions and their disclosure to U.S. law enforcement officials.

Penalties for non-compliance with the above provisions are stiff;[95] civil penalties of up to $100,000 or the amount involved in the transaction can be imposed for a single violation, and criminal penalties of up to $500,000 in fines and/or ten years in jail are authorized for willful violations.[96] Banks are more than encouraged to comply.

As is evident, currency transaction recordkeeping and reporting are

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87. *Blanket Reporting, supra* note 8 at 874-880.
88. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 26 (1986).
89. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).
90. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).
91. The Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352, 100 Stat. 3207-18, 18-21 (1986).
92. *Id.* at §§ 1354, 1359.
93. Anti-Drug Abuse Act of 1986, *supra* note 88, at § 2005.
94. *Id.*
95. *See Blanket Reporting, supra* note 8, at 879-881.
96. *See* 31 U.S.C. §§ 5321, 5322.

the primary focus of U.S. efforts. In October of 1989, the Treasury Department filed an Advance Notice of Proposed Rulemaking to address the problem of money laundering through international payments through wire transfers.[97] Citing authority under the Bank Secrecy Act, 31 U.S.C. §§ 5314 and 5318(a)(2), and the commensurate regulations under 31 C.F.R. § 103, whereby the Secretary "may require reports or records relating to transactions between persons subject to the jurisdiction of the United States and foreign financial agencies," and that domestic financial institutions "maintain appropriate procedures" to ensure compliance with any regulation proscribed, Treasury proposed these regulations to address the continuing problem of money laundering.[98] Under these proposed regulations, domestic financial institutions would be required to keep a record of *each* international transaction over $10,000, including international wire transfers of funds and book transfers of credit.[99] The Department of the Treasury also solicited comments from financial institutions concerning ways in which Treasury could utilize efforts undertaken within the private sector, such as the "know your customer" procedures.[100] On October 15, 1990, the Treasury Department issued a Notice of Proposed Rulemaking[101] setting out its proposals for amending 31 C.F.R. § 103. Included in the proposed Rulemaking are amendments to 31 C.F.R. § 103.25, the foreign financial agencies targeting, and 31 C.F.R. § 103.33, effecting mandatory recordkeeping by financial institutions. The Notice also included proposed amendments to the definitions in the regulations, 31 C.F.R. § 103.11.[102] These proposals would require recordkeeping of, but not the reporting of, electronic funds transfers conducted by a bank.[103] Non-bank purveyors of currency and monetary instruments

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97. *Bank Secrecy Act Regulatory Applications to the Problem of Money Laundering Through International Payments*, 54 FED. REG. 45769 (1989) (to be codified at 31 C.F.R. 103).

98. *Id.* at 45770.

99. *Id.*

100. *Id.* at 45771; *see also Know Your Customer, supra* note 83, at 7. Know your customer policies basically require financial institutions to require complete and thorough identification upon opening account with follow-up procedures for the institution to become familiar with the types of services utilized and potential needs of this account holder. Any deviation from a pattern thus established would be "suspicious," and could be flagged and reported.

101. *Proposed Amendment to the Bank Secrecy Act Regulations Relating to Recordkeeping for Funds Transfers by Banks and Transmittals of Funds by Other Financial Institutions*, 55 Fed. Reg. 41,696 (1990) [hereinafter *Proposed Rulemaking*].

102. *Id.* at 41699.

103. Banks would be required to retain the following information for each funds transfer:

> (1) The name of the originator of the payment order, and the originators account number, if applicable;
>
> (2) unless the originator is a publicly traded corporation, public utility, or government agency, the name of any person on whose behalf the funds transfer was originated, if different from the originator at (1);
>
> (3) the amount of the funds transfer;
>
> (4) the execution date of the funds transfer;

would also be subject to record retention for transmittals or receipts of funds. Non-bank institutions subject to these proposed regulations would include telegraph offices, travel agencies and check cashing companies.[104] If a non-account holder requests a transfer, the bank must verify the name and address of the person originating the transfer and maintain a separate record of the person's name, address, social security number and date of birth.[105] These proposals are designed to standardize the currently inconsistent recordkeeping required under existing regulations.

It is estimated that 40,000 institutions will be required to be in compliance with these proposed regulations.[106] Treasury received over 400 comments from a variety of sources including banks, securities brokers, Western Union, American Express, check cashing services, travel agencies and anyone who might transmit funds by electronic impulse.[107] It is an understatement to say that these proposed regulations are not being received with open arms in the financial community. They have evoked almost unanimous opposition and sparked a flurry of protest regarding the burdens, costs, utility and impact of these rules.[108] According to the Department of the Treasury, most comments noted that the essence of the automated international payments system is the speed with which it moves funds and that any regulation which would impede this efficiency would make United States banks less competitive.[109]

The Bankers Association for Foreign Trade (BAFT) filed one of the most comprehensive comments stating that the proposals fail to meet the required standards of a Reagan Administration executive order requiring federal agencies to measure proposed regulations under two standards: that they be a part of a cohesive, practical and effective strategy and that they should meet a rational cost-benefit analysis.[110] BAFT contends that these regulations will cost financial institutions in excess of $100 million annually for increased compliance and lost revenues and that the pro-

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(5) the payment instructions, if any;

(6) the identity of the beneficiary's bank; and

(7) the name of the beneficiary of the payment order, and the account number if applicable.

Id.

104. *Id.* at 41700.

105. *Id.* at 41701.

106. *Cost, Utility of Wire Transfer Regulation Questioned*, MONEY LAUNDERING ALERT, Feb. 1991, at 6 [hereinafter *Regulation Questioned*].

107. *Id.*

108. *Id.*

109. *Proposed Rulemaking*, *supra* note 101.

110. *Regulation Questioned*, *supra* note 106, at 6. CHIPS' comment stressed that the U.S. dollar in recent years has been challenged in its primacy by the yen and the mark. CHIPs maintains that it has kept its position as the primary conduit of foreign wire transfers because the mechanisms for making dollar payments are the most secure and efficient in the world. It emphasized that to jeopardize that situation would not be in the long-term interests of the U.S. because movement by the European Community toward a common currency could pose a significant challenge to the dollar's status. *Id.*

posed regulations would significantly and adversely effect competition and U.S.-based business' ability to compete with foreign competition.[111] It was estimated that the 300 largest U.S. banks would incur start-up and first year implementation expenses of over $160 million dollars.[112]

The American Bankers Association, in its letter of comment to the Department of the Treasury on the proposed Rulemaking summarized its concerns as follows.

> — The proposal, if implemented, would likely be circumvented by money launderers using the funds transfer mechanism by providing erroneous and unverifiable information.
>
> — The costs borne by the banking industry to comply with this proposal would easily exceed $120 million at a time when the banking industry is facing other substantial Bank Secrecy Act related compliance costs and declining profitability.
>
> — Users of the highly efficient large-dollar funds transfer mechanism would face increasing costs and decreased efficiency, thus diminishing the competitiveness of domestic financial institutions, hampering U.S. dollar-denominated trade, and encouraging offshore netting and settlement of U.S. dollar transactions.
>
> — Many of the aspects of the proposal are inconsistent with existing funds transfer conventions and law.
>
> — Money laundering activity represents an extremely small proportion of both the number of transactions and dollar volume conveyed by the transfers. Treasury's confinement of exempted transfers to just those between domestic banks for their own accounts is too limited.[113]

There are other problems with the proposed regulations. One such problem is that there is apparent conflict with long established norms and conventions that have governed party rights and obligations. Article 4A of the Uniform Commercial Code specifies the duties of an "originator's" bank and a "beneficiary's" bank and the time frames for taking certain actions.[114] At a time when the Department of State will be pushing for international adoption of Article 4A as the model national law in the UNCITRAL meetings, it seems inconsistent at best for Treasury to be endorsing efforts which undermine the Code's predictability and integrity.[115]

The Proposed Rulemaking contains a requirement that the originating bank determine from the originator the name of the person or persons "on whose behalf" the person is acting before executing the payment order. Additionally, the rules would require the beneficiary's bank to *with-*

111. *Id.*
112. *Id.*
113. Corwin letter, *supra* note 24, at 1-2.
114. *See* U.C.C. art. 4A § 207, and comments 1-9.
115. Telephone discussion with Harold S. Burman, *supra* note 40.

hold payment to a non-deposit account holder beneficiary if such information is absent.[116] This proposal directly contradicts the orderly process outlined within Article 4A-207. The confusion, potential liability and commensurate cost of the delays inherent in this proposal are staggering to imagine.

Another difficulty with the Proposed Rulemaking is that a particular monetary threshold triggering compliance is not provided. Regardless of whether the amount is $1.00, $10.00, $100 or $1,000,000 dollars, financial institutions will be required to record the mandatory data. While this provision appears to be aimed at the prevention of "structuring" laundered money in any size increment, it will place an inordinate burden on institutions to keep detailed data on far more transactions than presently recorded. This makes little sense, since it is hardly plausible that a "smurf" would be laundering millions in increments of one hundred dollars.

The Proposed Rulemaking has yet to be issued in its final form. It was predicted that the final form might have materialized as early as late January, 1992;[117] however, President Bush's State of the Union moratorium for ninety days on the enactment of federal regulations has furthered delayed its arrival. Previously, however, such release dates have been suggested and not been met for many months. In fact, the delay now of almost two years since the Advance Notice of Proposed Rulemaking on this issue has frustrated Congress to the point of introducing mandatory release dates.[118] The issue has been further complicated by the Treasury Department's release of yet additional proposals set forth under the Bank Secrecy Act to combat money laundering. These proposals govern the daily aggregation of cash transactions by or on behalf of an accountholder and magnetic filing of currency transaction reports by certain financial institutions.[119]

116. *See Proposed Rulemaking, supra* note 83.

117. Telephone discussion with Pamela Johnson, Director of Compliance, Office of Financial Enforcement, Department of the Treasury, December 26, 1991. This timeframe was confirmed by John Byrne, Chief Counsel, American Bankers Association, and Lamar Smith, Minority Chief of Staff, Senate Committee on Banking Housing and Urban Affairs.

118. *See Treasury May Have FED for Partner on Money Laundering Rule, Attorney Says*, BNA'S BANKING REPORT, Aug. 19, 1991 at 290 (S. 543 and H.R. 26, mandating Treasury to work with the Federal Reserve to issue joint rules on money laundering by a specified date). Note that provisions on money laundering were stripped from the ultimate version of the banking bill prior to final passage during the last session of Congress. *Compare* H.R. 26 *with* the amended S. 543, P.L. 101-242, the final enacted measure. Also, as of the final edit of this article, there were discussions on renewing indefinitely the current moratorium on federal regulations implementation.

119. *See* Mandatory Aggregation of Currency Transactions for Certain Financial Institutions and Mandatory Magnetic Reporting of Currency Transaction Reports, 55 Fed. Reg. 36663 (1990).

V. ALTERNATIVES TO RECORDKEEPING

Present regulations requiring currency transaction reporting produce a quantity of records so vast that the government has neither the resources or the inclination to utilize the information they currently obtain.[120] Even the Attorney General of the United States expressed his concern over the vast expansion of reports being filed with the government. In a speech before the New York convention of the American Bankers Association in October of 1989, Attorney General Richard Thornburgh stated that because of the tremendous increase in the number of reports filed, "In equal candor, I must admit that these millions are now part of the problem as well as the solution."[121] The Treasury Department seems to have taken the comments of the former Attorney General to heart and are now requiring that the vast and costly mountains of information that will be generated not be reported to Treasury, but be maintained within the institutions themselves. The primary problem with broadly based reporting and recordkeeping requirements is that huge amounts of information are generated and little of it is utilized. As has been stated, the vast majority of wire transfers are conducted for legitimate purposes. Even the Federal Reserve Board, an organization with far superior experience and expertise in regulating large-volume wire transfers by banks than the Treasury Department,[122] has expressed concern about the high costs that would be imposed on banks and their customers who send and receive funds transfers. Additionally, the Board expressed its concern that the proposed regulations could seriously impede the efficiency of the nation's large-dollar electronic funds transfer systems.[123]

The Federal Reserve included with its comment letter to the Treasury a staff prepared analysis of the Proposed Rulemaking setting forth its concerns and proposals for alternatives, which states in part:

> If adopted as proposed, the amendment would impose very substantial costs on banks handling funds transfers; however, Treasury has not demonstrated that the particular elements of the proposal that are likely to impose the greatest costs on banks will yield commensurate benefits in terms of improved ability to investigate money laundering activities or prosecute criminals. In particular, Treasury has not demonstrated, as required by the Bank Secrecy Act under 31 U.S.C. Sec. 1952, that these recordkeeping requirements "have a high

120. Jeanne Iida, *IRS' Kirby Braces to Fight Drugs With Electronic Data*, THE AMERICAN BANKER, October 19, 1990 at 2; *see also Control Efforts*, *supra* note 6, at 149 (testimony of Donald Sergeant, President, Independent Bankers Association of America).

121. *See Control Efforts*, *supra* note 6.

122. Letter from William Wiles, Secretary of the Board of Governors of the Federal Reserve System to Peter K. Nunez, Assistant Secretary, Department of the Treasury, January 25, 1991 (comment letter) [hereinafter Wiles letter]; *see also Treasury May have FED for a Partner on Money Laundering Rule, Attorney Says*, BNA'S BANKING REPORT, Aug. 19, 1991, at 290.

123. Wiles Letter, *supra* note 122.

> degree of usefulness in criminal, tax or regulatory investigations and proceedings." The Board believes that simplified and less costly recordkeeping requirements could be established that would provide adequate information on funds transfers for those law enforcement purposes for which the records will most likely be used. If subsequent experience demonstrated that these records were inadequate and that additional requirements are needed to effectively serve law enforcement purposes, such requirements could be added at a later date.[124]

The letter goes on to suggest that wire transfer recordkeeping could be effective to: *detect* financial crimes, such as money laundering, or the underlying illegal activity, such as drug trafficking; *investigate* such activity by linking parties in a chain of transfer of illicit proceeds; or *trace* the proceeds of illegal activity for potential seizure.[125] However, the Board insists that there are less burdensome, less complex and less costly alternatives. The Board adopts three principles prior to providing its suggestions. First, because timely processing is an essential characteristic of the nations' large-volume funds transfer system, any requirement should not result in the delay of the execution of any payment orders. Second, any mandatory recordkeeping should not require greater manual intervention than is present in today's highly automated payments mechanism. Finally, the rule should not require banks to obtain information not generally obtainable under current regulations unless the costs to obtain the additional information are outweighed by the benefits to law enforcement in detecting and investigating money laundering activity.[126] Generally, the Board suggests that only the minimum necessary information, already collected by the originator's bank, be sent with the payment order to the beneficiary bank for retention. Additionally, the Board recommends that all bank-to-bank transfers and transfers of less than $10,000 (like the currency transaction reporting) be exempted from any requirements.[127]

Imposing a monetary threshold on the recording requirement alone could reduce much of the useless information that would be collected under Treasury's current proposals. It has been suggested that exempting amounts under $1000 would eliminate the need for reporting the one-time consumer transactions or emergency transmissions of funds to stranded

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id. See also* European Update, *supra* note 70 (discussing an EC directive on the prevention of use of the financial system for the purpose of money laundering):

> The principle of the Directive is that institutions are in the best position to judge whether laundering is taking place or not and builds on agreements already incorporated in the 1988 UN Vienna Convention against drug trafficking . . . . This system was chosen above the U.S. system which requires all transactions above US 10,000 dollars to be automatically reported to the authorities, and the US system was considered too expensive as it does not differentiate between normal and suspect transactions.

For a more in depth review of current anti-money laundering activities in Europe, see *European Initiatives, supra* note 8.

travelers.[128]

Broader implementation of "know your customer" policies could assist in the government's enforcement efforts. Although solicited for comment in the Advanced Notice, Treasury failed to integrate such policy into its Proposed Rules. Under "know your customer" policies, banks make reasonable efforts to become familiar with its deposit and loan customers, and makes a reasonable assessment of the types of use and reasons for a customer's use of ancillary services such as wire transfers, cashiers checks, money orders, etc. Banks should then decline to do business with individuals failing to provide sufficient information and businesses which refuse to provide proper background information and credentials.[129] A concerted effort toward meeting these basic principles allows the institution to assist in identifying suspicious deposit and transaction account activities. For instance, a neighborhood delicatessen typically has no business need to open multiple accounts that receive volumes of cash in increments of less than $10,000 dollars and which are periodically aggregated and wired to a numbered account in Luxembourg. Such discrepancies would be apparent to the institution, and information regarding that particular suspicious account would then be reported to enforcement officials. The great majority of transfers undertaken for legitimate and valid business and personal reasons would not need to be reported.

VI. CONCLUSION

The Treasury Department should heed industry warnings, concerns and admonitions contained in the comment letters on the Proposed Rulemaking on wire transfer recordkeeping. With the domestic banking industry currently experiencing economic pressure from several different fronts, an additional layer of mandatory recordkeeping could prove more costly than the compliance figures indicate. Although it professes a laudable objective, if this proposal is approved in the form proposed, serious adverse consequences may result. Not only is the Treasury Department out of sync with its fellow domestic bank regulators in the Federal Reserve, it is out of sync with the rest of the financial world. It is imperative that the Treasury Department reconsider the cost and benefit of mandating such far-reaching recordkeeping requirements, especially when there exist less intrusive avenues toward combatting the ills of money laundering. This worthy battle must not detract from the efficiencies and competitive advantages currently enjoyed by this nations' electronic funds transfer international payments system. This proposal should not survive the moratorium on the release of federal regulations imposed by President Bush in his State of the Union message.

Gerard Wyrsch

128. *See Blanket Reporting, supra* note 8, at 890.
129. *See Know Your Customer, supra* note 83, at 8.