

5-1-1996

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Recommended Citation

Baldwin, Fletcher N. Jr. (1996) "Money Laundering and Wire Transfers: When the New Regulations Take Effect Will They Help?," *Penn State International Law Review*: Vol. 14: No. 3, Article 2.
Available at: <http://elibrary.law.psu.edu/psilr/vol14/iss3/2>

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ARTICLES

Money Laundering and Wire Transfers: When the New Regulations Take Effect Will They Help?

Fletcher N. Baldwin, Jr.*

I. Introduction

World stability is increasingly threatened by sophisticated criminal organizations and their creative implementation of money laundering schemes. Potentially, one of the most harmful effects of money laundering by these highly skilled organizations is the worldwide undermining of financial institutions — both banks and non-banks, alike. In order to gain much needed hard currency, some nations encourage money laundering. Most of the industrial countries of the world, however, fight back by utilizing a three prong attack: 1) treaties and conventions; 2) police-government cooperation; and 3) domestic tightening of money controls combined with relaxed bank secrecy restrictions.

The United States implements the three prong attack. Not all prongs of the United States approach are equally efficient. In scrutinizing the bank control prong, one is almost stymied by the blizzard of proposed or actual regulations accompanying legislation.

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Consequently, even though the bank controls are designed to take the profit out of crime, there is concern that the regulations negatively impact the efficiency of banking without effectively restraining laundering activities. The fact is, it will take greater understanding on the part of the upper-echelon United States legislative and executive branch officers if they intend to provide anything more than just minimal support for national as well as transnational bankers attempting to, in good faith, assist in the fight against organized financial criminals.

The other two prongs appear to be the more successful weapons for law enforcement, particularly the various civil and criminal forfeiture programs.¹ In recent years a pattern of modest enforcement success has emerged transnationally.² These successes can be attributed to both cooperation among field agents in forfeitures and the aggressive implementation of mutual legal assistance treaties, not to mention a generous asset-sharing program.

Since 1986 the Office of International Affairs with the assistance of foreign law enforcement and the Asset Forfeiture Office of the Department of Justice have utilized forfeiture to freeze and seize illicit assets in foreign jurisdictions.³ This procedure not only aids domestic crime prevention, it enhances cooperative international crime detection. The vigor with which the United States moves to force forfeiture of foreign or domestic funds has been fueled by a desire to take the profit out of crime. An additional governmental goal is to increase the amount of forfeited funds in order to utilize the profits in the fight against national and transnational crime.⁴ In effect, law enforcement is putting the forfeited ill-gotten gain to work against the very criminals from

1. Civil forfeiture programs are now under constitutional attack. The Double Jeopardy Clause being the primary weapon for challenge; *see* *United States v. \$405,089.13 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted*; *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, 116 S.Ct. 762 (Jan. 12, 1996).

2. *See* U.S. DEP'T OF STATE INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 465-495 (Mar. 1991) [hereinafter NARCOTICS CONTROL REPORT].

3. *Id.* at 1-7. *See also* World Ministerial Conference on Organized Transnational Crime, U.N. ESCOR, Agenda Item 8, at 1-12, U.N. Doc. E/Conf.88/2 (1994) [hereinafter World Ministerial Conference].

4. NARCOTICS CONTROL REPORT, *supra* note 2, at 45-54.

whom the funds were forfeited in the first place. Essentially, forfeiture has now become a somewhat modest "use tax."⁵

At least one federal agency now sets its budget with an eye toward the expected amount of forfeited revenue⁶ because the revenue, or up to 50 percent of it, remains within the office of the "case" agency.⁷ When the forfeiture involves foreign police cooperation, foreign agencies receive an equitable share.⁸

The extent of the United States government's financial stake in forfeiture is apparent. In a 1990 memo the Attorney General urged United States attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

We must significantly increase production to reach our budget target. Failure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.⁹

A troubling feature of the forfeiture program is the fact that there is little or no legislative oversight.¹⁰

The United States is certainly one of the leading money laundering nations in the world despite its continued enactment of regulation upon regulation to curb the illicit trade of "dirty money."¹¹ At the 1988 White House Conference for a Drug Free America, former President Ronald Reagan estimated that over 170 billion dollars of organized economic crime money is churned every year in the United States.¹² Estimates of the amount of illicit

5. William B. Pollard, *Federal Asset Forfeiture Law in Money Laundering, Asset Forfeiture and White Collar Crime* 123 (1994) (unpublished manuscript, on file at the Centre for Int'l Financial Crimes Studies, Univ. of Florida).

6. *Id.*; see also *United States v. Good*, 114 S.Ct. 492, 502 n.2 (1993).

7. Pollard, *supra* note 5, at 124.

8. NARCOTICS CONTROL REPORT, *supra* note 2, at 51.

9. *Good*, 114 S.Ct. 492.

10. Pollard, *supra* note 5, at 124.

11. See CLAIRE STERLING, *THIEVES-WORLD* 229-243 (1994). See also F. Baldwin, *The United States and International Cooperation: Are There Constitutional Flaws?* in FLETCHER N. BALDWIN & ROBERT J. MUNRO, 1 *MONEY LAUNDERING, ASSET FORFEITURE & INTERNATIONAL FINANCIAL CRIMES* (1994) [hereinafter BALDWIN & MUNRO]; Raphael Francis Perl, *The United States in INTERNATIONAL HANDBOOK ON DRUG CONTROL* 67-68 (Scott B. MacDonald & Bruce Zagaris ed., 1992).

12. Barry A.K. Rider, *Organized Economic Crime* 8 (July 1992) (unpublished manuscript, on file with Tulane University Law School); see also ROWAN BOSWORTH-DAVIES & GRAHAM SALTMARSH, *MONEY LAUNDERING: A PRACTICAL GUIDE TO THE NEW LEGISLATION* 201-204 (1994); DECLARATION OF

money circulating worldwide indicate that organized criminal activity jumped to an annual global trade in drugs alone of between \$200 billion to \$500 billion annually.¹³ Other nations proffer equally dramatic estimates of illicit funds generated within their borders.¹⁴ Illicit money breeds corruption. For example, several years ago one private Japanese concern reported that ninety-eight percent of all Japanese public companies listed on the three largest securities exchanges made payments to organized crime groups.¹⁵ Money also translates into political power.

Be warned, however, that such statistics cannot be relied on to make meaningful numerical comparisons. Most crime funds are hard to detect; and crime bosses are unwilling to report their massive financial empires. Indeed, accuracy in describing the size of international crime may be irrelevant. What can be gained from these varying figures is that they are of immense proportions. Ultimately, the numbers indicate that worldwide economic crime is a thriving growth industry of epic proportions that threatens the very political existence of the vulnerable nation-state.

Economic crime does not end with predicate crimes such as extortion, pornography, narcotics sales, or arms smuggling. The "dirty" money associated with illicit activity must be "cleaned" so that the funds can be openly transported and then spent in the world marketplace. For example, it was reported that the late Pablo Escobar of the Medellin cartel had \$400 million in drug revenues literally rot in the basement of a Los Angeles home because he could not disassociate the currency from the narcotics trade.¹⁶ The criminals' need to utilize the proceeds of their activity has spawned the industry of money laundering¹⁷ and the concomitant efforts by law enforcement to prevent the laundering of illegal funds.¹⁸

A NATIONAL EMERGENCY WITH RESPECT TO FOREIGN NARCOTICS TRAFFICKERS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. 104-129 (1995).

13. World Ministerial Conference, *supra* note 3, at 8.

14. *Id.*

15. *Id.* at 7.

16. See Douglas Frantz, *Tidal Wave of Dirty Drug Dollars*, L.A. TIMES, June 26, 1991, at 1.

17. A recent report by the seven leading industrialized nations estimates that leading drug dealers in the United States and Europe earn \$232,155 a minute.

18. *Hearings before the Subcommittee on Ways and Means*, 103rd Cong., 2nd Sess. (1994) (statement of Margaret Milner Richardson, Commissioner of Internal Revenue). In FY 1993, 2,147 money laundering investigations were initiated by the IRS Examination Division, which is responsible for some of the enforcement

Simply put, money laundering is the process whereby illegally derived proceeds take on the appearance of legitimacy through the comingling of the illicit proceeds with otherwise legitimate funds.¹⁹ The success or failure of the laundering process often turns upon whether the launderer has been able to minimize, if not completely eliminate, the creation of an evidentiary paper trail that would facilitate law enforcement efforts tracing laundered proceeds back to their illegal source.²⁰ Therefore, the concealment of the proceeds' illegal source is often accomplished through the creation of an intricate web of financial transactions in legitimate financial institutions.²¹

According to the International Narcotics Control Strategy Report of 1995, money laundering schemes have become dangerously "internationalized" by a financial system that has no geographic horizons, operates around the clock in every time zone, and maintains one of the faster paces on the electronic highway.²² For example, launderers have been able to create intricate and almost untraceable series of financial transactions through the utilization of wire transfers.²³

The wire transfer has emerged as a major weapon at the disposal of the launderer. Furthermore, it clear is that the current system of wire transference enables launderers to access United States financial institutions and then, through domestic and international wire transfers, instantaneously move the proceeds of illegal activity from account to account, within and among international financial institutions. For this reason, wire transfers "have emerged as the primary method by which high-volume money launderers ply their trade."²⁴ There is little doubt that as complex as the subject matter is, wire transfer recordkeeping requirements nevertheless

responsibilities under the Bank Secrecy Act — 34% of the total investigations initiated. See also *Federal Government Response to Money Laundering, Hearings before the House Committee on Banking, Financial and Urban Affairs*, 103rd Cong., 1st Sess. (1993).

19. See BALDWIN & MUNRO, *supra* note 11, at 3.

20. *Id.* at 6.

21. *Id.* at 4.

22. NARCOTICS CONTROL REPORT, *supra* note 2, at 481.

23. See Gerard Wyrsh, *Treasury Regulation of International Wire Transfer and Money Laundering: A Case for a Permanent Moratorium*, 20 DENV. J. INT'L L. & POL'Y 515 (1992).

24. *Id.* at 522 (quoting in part Rebecca Cox, *New Path for Money Laundering*, THE AM. BANKER, July 24, 1989, at 9 (letter from Donald G. Ogilvie, Executive Vice President American Bankers Association to William J. Bennett ("Drug Czar" of the Office of National Drug Control Policy))).

are needed to assist law enforcement authorities with the difficult task of unraveling the launderers' intricate web and tracing the laundered proceeds back to their illegal sources. Those requirements have now been promulgated through regulations. This article will analyze 1) the necessity for the new regulations and 2) the complexity of those regulations.

II. The Economic Criminals And Their Industry

What is the economic crime industry? Of what does it consist? The activities which make up economic crime are as broad as the expression itself. The industry comprises all notions of Mafia, drug dealers, or any organized criminal activity involving the funneling of money out of legitimate hands into criminal hands within the economic crime umbrella. The common characteristic of economic criminals is the desire to conceal their ill gotten gains. To do this the economic criminals must transfer funds, or launder money, through various jurisdictions. This is done in such a fashion that the money is at least untraceable, if not undiscovered by the authorities.

All economic criminals, though diverse in their criminal activity, must launder the proceeds of their illegal activity. It is the cleaning of dirty money that keeps organized criminal activity alive and allows criminal organizations entry into the legitimate business world. By enabling the criminals to retain and use the profits of their illegal activity, money laundering makes crime profitable. Therefore, it is the practice of money laundering or cleaning which keeps organized criminal activity alive.²⁵

Laundering the proceeds of illegal activity involves a five step process: consolidation, externalization, agitation, legitimization, and repatriation.²⁶ By way of illustration, consider the following. A

25. As a prime example of organized crime's ability to style itself after big business and use current profits to fund future criminal activity, it is not necessary to look further than the Colombian cartels. After realizing that the United States cocaine market was reaching a saturation point, the cartels invested tremendous amounts of resources to begin cultivating approximately 70,000 acres of opium. For a detailed explanation, see generally, *The Crisis of Governance: Present and Future Challenges: Hearings before the Subcommittee on Terrorism, Narcotics, and International Operations, Senate Foreign Relations Committee*, 103rd Cong., 2nd Sess. (1994) (statement of Dr. William J. Olson). See also *Western Hemisphere Drug Control Strategy, Hearing before the Subcommittee on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess. 74 (1995).

26. Barry A.K. Rider, Lecture at Clare College, Cambridge University (July 1992). See also JEFFREY ROBINSON, *THE LAUNDREYMEN* (1995).

person is involved in the activities of organized crime. The particular crime family profits from "organized crime activities." Because these illicit profits are collected in small dollar denominations, it is impossible to use these funds without raising the suspicion of law enforcement or being reported under statutes governing cash transactions. Hence, the money must be laundered.

The initial step in the laundering process is the collection of all of the illegal money. This is defined by Barry Rider and Jeffrey Robinson as the consolidation process. Second, the funds must be transferred, for example, to a bank, from which they are then wire transferred out of the United States. This is called the externalizing of funds. Externalizing can be accomplished, for example, via a legitimate offshore Channel Islands bank. The cooperating Channel Islands bank would house the funds in accounts in one of its Guernsey or Jersey Central banks. The third step, termed agitation, would involve the use of the funds in a series of transactions that, for example, could be authorized by a New York law firm. Various commercial transactions may then be made among corporations in Delaware, Hong Kong, and Germany out of the Central Bank accounts. These funds could eventually end up in a London business entity. From London, the funds could be further agitated through shell companies and then placed in various other accounts. When this point is reached, the money is "legitimized." This is the fourth step. The money can now be freely utilized because it is associated with legitimate business and not illegal activity. The final step in the cleansing process is the repatriation, or return, of the funds to the country from which it originated. The repatriation could be accomplished by incorporating dummy companies in the United States and issuing worthless stock.²⁷

A. Legitimization of Economic Crime in Modern Society

The tragedy of economic crime and laundering methods, in addition to undermining the political stability of a vulnerable nation-state, is the manner in which it undermines the international community, both overtly and subtly. Overtly, the impact is reflected by news events of terrorist crimes, violence, and the general feeling of a loss of security. The more subtle threat to international stability and political morality by economic crime, however, is not reflected in the evening world news.

27. The entire hypothesis comes from Professor Rider. See Rider, *supra* note 12, at 15. See also ROBINSON, *supra* note 26, at 11-16.

Legitimization, once attained, makes it easy for economic crime to proliferate. For example, one popular scheme is that of the advance fee fraud.²⁸ The advance fee fraud involves duping a victim by posing as a legitimate financial or business entity and enticing the victim to invest sums of money without asking too many questions.²⁹ As ridiculous as it sounds for a person to invest blindly, when cloaked in the guise of legitimacy, the advance fee fraud can be quite successful. Typically, the operation consists of a monied individual receiving a glossy, well prepared piece of correspondence from a foreign conglomerate, replete with seals and phony letters of reference, describing a unique, sure-hit, one-time investment opportunity with mind-boggling returns. The communication flatters the recipient by making him feel part of an exclusive opportunity with some very important world financiers. The ploy often ends with the victim wiring funds to a secret foreign bank account. The funds are never seen again; the investor is never contacted. Apprehension of the fraudsters is often stymied by the unwillingness of the humiliated victim to report the crime.³⁰

B. Is World-Wide Government Ill-Equipped To Effectively Prosecute Economic Criminal Activity?

The public no longer believes that the system is capable of bringing the perpetrators of serious fraud expeditiously and effectively to book. The overwhelming weight of evidence laid before us suggests that the public is right. The Roskill Committee on Fraud Trials, 1986. (UK)³¹

Economic crime prospers because neither general understanding, law enforcement, nor traditional roles between jurisdictions are sophisticated enough to adequately address the problem of economic crime. Economic crime and money laundering will continue to thrive as long as public ignorance, criminal law, and jurisdictional barriers exist, and economic crime, in the form of paperless exchange, is considered outside of the conventional notions of criminal activity.

28. See David D. Andelman, *The Drug Money Maze*, FOREIGN AFF., July/Aug. 1994, at 94.

29. *Id.*

30. *Id.* The example is all too familiar to law enforcement. See Sergeant Alan Lambert, Detective, Financial Investigation Unit, Hertfordshire, U.K., Lecture (On file, The Centre for Int'l Financial Crimes Studies, College of Law, Univ. of Florida).

31. *Id.*

Money laundering and economic crime is confusing to the average individual because it is difficult for him to conceptualize the millions, billions, or trillions of dollars involved. Additionally, the nature of economic crime is sufficient for the general public to lose interest. The crimes are paperless, leave no physical evidence, and involve transactions and numbers. Of course, as soon as the average citizen loses interest in such an activity, it is highly unlikely that political leaders will appropriate the necessary resources and interest to combat it. Apathy among the citizenry, legislature, and judiciary is a major deterrent in fighting economic crime; the urgency and impact of the problem is not understood.³²

Perhaps the public's failure to understand economic crime is related to the failure, in several areas, of criminal justice systems to prosecute it. First, the standards of proof necessary for conviction are often too high for seemingly invisible money laundering activities.³³ Second, the slowness of police procedures prevents laws enforcement from succeeding against the organized economic criminal.³⁴ In addition, the successful economic criminal is far more likely to acquire sophisticated and influential legal advice, at times, the government is unable to match the economic criminal's fire power. Finally, it appears that any successful money laundering scheme will use multiple jurisdictions to avoid prosecution, that means that governments must learn to work together for a common good.³⁵

III. Attempts To Take The Profit Out Of Crime By Focusing Upon Wire-Transfers

The demand for physical U.S. Currency is enormous. At the end of 1994, U.S. currency in circulation totaled approximately \$405 billion.³⁶ Of this amount, domestic holdings were about \$135 billion and foreign holdings \$270 billion.³⁷

32. Rider, *supra* note 12, at 17-18.

33. See, e.g., *Ratzlaf v. United States*, 114 S.Ct. 655 (1994).

34. Barry A.K. Rider, *Policing the International Securities Markets: An English Perspective*, 16 BROOK. J. INT'L L. 194, 195 (1990).

35. Barry A.K. Rider & Anthony Shipman, *Organized Crime International*, in DEFENCE ANNUAL REFERENCE BOOK 6 (United Kingdom, 1987).

36. Colloquy, *Exploring the World of Cyberpayments: An Introductory Survey*, A Colloquium Sponsored by FinCEN, U.S. Dep't of the Treasury, Sept. 27, 1995, at 6 (citing 81 FED. RESERVE BULL., Mar. 1995, at A5).

37. *Id.*

Wire transfers, also referred to as electronic funds transfers (EFT), involve "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."³⁸ The transfer is initiated when the person sending the funds delivers a payment or transmittal order to his or her bank;³⁹ this can be accomplished in person, by telephone, magnetic tape, computer terminal, telex, or written instructions.⁴⁰ Before executing the transmittal order, the originator bank after receiving it, will verify the authenticity of the order and reformat it for transmission to either an intermediary or beneficiary bank.⁴¹

In cases involving multiple transfers through several intermediary banks, each receiving bank will reformat the transmittal order received as necessary to communicate the requisite instructions to the next bank in the chain.⁴² Intermediary banks strip off the information that is not necessary to their stage of the transaction in order to save electronic space.⁴³ Generally, the information contained in a reformatted transmittal order will be limited to that which is relevant to the particular stage of the transfer.⁴⁴ Such information is likely to include: the identity of the originator, the beneficiary, and the beneficiary's bank; the account number of the originator and the beneficiary; the amount of the transfer; and payment and routing instructions.⁴⁵

Actual payment of the transferred funds occurs when the beneficiary bank accepts the transmittal order; the originator bank electronically debits the originator's account; and the beneficiary bank electronically credits the beneficiary's account.⁴⁶ The entire transaction, which generally occurs on one of the primary electronic funds communication systems, is effected through electronic messages without physically transferring any cash.⁴⁷ The primary electronic communication systems include: the Federal Reserve Communications System (Fedwire); the Clearing House Interbank

38. Wyrsh, *supra* note 23, at 515.

39. Sarah J. Hughes, *Policing Money Laundering Through Funds Transfers: A Critique of Regulation Under the Bank Secrecy Act*, 67 IND. L.J. 283, 290 (1992).

40. *Id.* at 290.

41. *Id.* at 291.

42. *Id.* at 292.

43. *Wire Transfer Rules May Benefit From Medical Technology*, 6 MONEY LAUNDERING ALERT, Nov. 1994, at 3.

44. Hughes, *supra* note 39, at 292.

45. *Id.* at 292-93.

46. *Id.* at 288-94.

47. Wyrsh, *supra* note 23, at 515.

Payment System (CHIPS); and the Society for Worldwide Interbank Financial Telecommunications S.C. (SWIFT).⁴⁸ In 1995, "[a]ccording to government figures, there [were] more than 110 million wire transfers per year, causing the movement of \$474 trillion."⁴⁹

A. Fedwire

Fedwire, controlled and operated by the Federal Reserve System since 1918, is the nation's primary wholesale electronic funds transfer system connecting United States government agencies, Federal Reserve member banking institutions, their customers, and the twelve regional Federal Reserve Banks.⁵⁰ Transfers by Fedwire are initiated in much the same way as other electronic fund transfers, with the originator delivering a transmittal order to a member bank.⁵¹ Upon receipt of the order, the originator bank verifies its authenticity and reformats it for transmission to one of the twelve regional Federal Reserve Banks (FRB).⁵² At the FRB, the order is processed, the beneficiary bank notified, and the transfer settled through a series of debits and credits to the appropriate Federal Reserve Bank accounts maintained by the originator and beneficiary banks.⁵³ Functioning as the exclusive intermediary in Fedwire transfers, Federal Reserve banks serve as clearing houses for transfers between member banks, their customers and the Federal Reserve.⁵⁴

B. CHIPS

Created in 1970, the Clearing House Interbank Payment System (CHIPS) is a private-sector system connecting the United States with international banking institutions.⁵⁵ Unlike the domestic nature of Fedwire, CHIPS is the primary international electronic funds transfer system in the United States.⁵⁶ Regulatory authority over CHIPS is vested in the Comptroller of the Currency, the

48. *Id.* at 517.

49. *Wire Transfer Exemption*, 5 DEP'T OF JUSTICE ALERT 10, Jan. 1995, at 8.

50. Wyrsh, *supra* note 23, at 517-518.

51. Hughes, *supra* note 39, at 292.

52. *Id.*

53. *Id.* at 292-93.

54. *Id.* at 292.

55. Wyrsh, *supra* note 23, at 519.

56. *Id.*

Federal Reserve System, and the Federal Deposit Insurance Corporation.⁵⁷

Currently, there are approximately 140 domestic financial institutions and branch offices of foreign banks participating in CHIPS.⁵⁸ In 1970, average daily CHIPS transfers exceeded \$554 billion, with annual transfers approaching \$140 trillion.⁵⁹ Growing at an annual rate of approximately 16.6%, 1990 CHIPS transfers averaged approximately \$222 trillion.⁶⁰ When considered in light of the Fedwire transfers, these two EFT systems combine for an average in excess of \$1.2 trillion in annual daily transfers, or over ninety-five percent of all wire transfers worldwide.⁶¹

C. SWIFT

Created in 1977, the SWIFT telecommunication system is owned and operated by the Society for Worldwide Interbank Financial Telecommunications S.C., a Belgian cooperative society comprised of approximately 1500 international financial institutions.⁶² SWIFT is an international "automated message processing and transmission service," which operates in conjunction with Fedwire and CHIPS in facilitating international wire transfers.⁶³ Although it is not an electronic funds transfer system, nor subject to United States federal regulation, SWIFT facilitates the transmission of fund transfers through Fedwire and CHIPS by processing and transmitting relevant international financial information, such as payment instructions, statements, and other related information.⁶⁴ Connecting approximately 2400 institutions in approximately sixty countries worldwide, SWIFT processes an average of one million electronic messages per day relating to Fedwire and CHIPS transfers.⁶⁵

D. Private Networks

In addition to Fedwire, CHIPS, and SWIFT, private electronic fund transfer networks have surfaced.⁶⁶ These private networks

57. *Id.*

58. *Id.*

59. *Id.*

60. Wyrsh, *supra* note 23, at 519.

61. *Id.* at 518-20.

62. *Id.* at 519-20.

63. *Id.*

64. *Id.*

65. Wyrsh, *supra* note 23, at 519-20.

66. *Id.* at 520.

were developed by large money centers to assist the needs of their customers, foreign branches, and correspondent operations.⁶⁷ As a result of the American Bankers Association's compatibility standards, most of these networks are fully compatible and integrated with the Fedwire, CHIPS, and SWIFT systems.⁶⁸

IV. Regulations: Past, Present, And Future

Beginning in 1970, the United States government officially recognized the usefulness of evidentiary paper trails in its efforts to combat money laundering by enacting the Bank Secrecy Act (BSA).⁶⁹ Under the BSA, the government was able to impose recordkeeping and reporting requirements upon certain financial institutions involved in currency and monetary transactions exceeding \$10,000.⁷⁰ The goal of the reporting requirements was to draw law enforcement authorities' attention to highly suspicious financial transactions at the inception of the laundering process.⁷¹ Since its enactment in 1970, the BSA has been amended several times: The Comprehensive Crime Control Act of 1984;⁷² The Money Laundering Control Act of 1986;⁷³ The Anti-Drug Abuse Act of 1988;⁷⁴ and The Annunzio-Wylie Anti-Money Laundering Act of 1992 (Annunzio-Wylie Act).⁷⁵

In particular, the BSA requires certain financial institutions to file currency transaction reports (CTRs) when engaged in currency or monetary transactions in excess of amounts specified by the Secretary of the Treasury (Secretary).⁷⁶ In addition, the BSA requires the reporting of suspicious transactions⁷⁷ and the encouragement of "know your customer" policies. Upon conviction for money laundering or CTR violations,⁷⁸ the BSA provides for the termination of an institution's federal depository institution charter or state depository institution insurance, as well as the elimination of a responsible party's position in such an institution. Despite the

67. *Id.*

68. *Id.*

69. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970).

70. BALDWIN & MUNRO, *supra* note 11, at 7.

71. *Id.* at 8.

72. Pub. L. 98-473, Title II, Oct. 12, 1984.

73. Codified at 18 U.S.C. § 1956-1957 (1988).

74. Pub. L. 100-690, Nov. 18, 1988.

75. Pub. L. No. 102-550 (1992) U.S.C.C.A.N. (106 Stat. 3680).

76. *See* 31 U.S.C. § 5313(a).

77. 31 U.S.C. 5314.

78. 12 U.S.C. § 93 (1982); 12 U.S.C. § 1464 (1987); 12 U.S.C. § 1818 (1989); 12 U.S.C. § 1786 (1989).

seemingly comprehensive nature of the BSA's anti-money laundering provisions, none of the provisions go so far as to impose recordkeeping or reporting requirements upon financial transactions which do not involve the physical transfer of currency, that is, transactions effectuated through the use of wire transfers.⁷⁹

Launderers have used wire transfers to access United States financial institutions and then use domestic and international wire transfer systems to instantaneously move the proceeds of illegal activity from account to account, within and among international financial institutions.⁸⁰ The launderers may use the complexity and speed of the wire transfer system to create an intricate and almost untraceable web of financial transactions.⁸¹ Because of its usefulness in concealing the origin of illicit funds, wire transfers "have emerged as the primary method by which high-volume money launderers ply their trade."⁸² Thus, wire transfer recordkeeping requirements are needed to assist law enforcement authorities with their difficult task of unraveling the launderers' intricate web and tracing the laundered proceeds to their illegal sources.

On December 23, 1992, the Federal Reserve Board (Board), upon the recommendation of the Federal Financial Institutions Examination Council, issued a press release announcing that the Board had adopted a policy statement for addressing the problem of money laundering through wire transfer systems.⁸³ Recognizing law enforcement's growing interest in identifying and prosecuting money laundering activities, domestically as well as abroad, the Board encouraged financial institutions engaging in funds transfers through Fedwire, CHIPS and SWIFT, to the extent practical, to assist law enforcement efforts by including complete originator and beneficiary information in fund transmittal orders.⁸⁴

79. BALDWIN & MUNRO, *supra* note 11, at 13.

80. Wyrsh, *supra* note 23.

81. *See id.* at 515.

82. *Id.* at 522 (quoting in part Rebecca Cox, *New Path for Money Laundering*, THE AM. BANKER, July 24, 1989, at 9 (letter from Donald G. Ogilvie, Executive Vice President American Bankers Association to William J. Bennett ("Drug Czar" of the Office of National Drug Control Policy))).

83. Sarah J. Hughes, *Fed Breaks Ice on Wire Transfer Regs*, 4 MONEY LAUNDERING ALERT, Jan. 1993, No. 4, at 8.

84. Federal Reserve Press Release, Dec. 23, 1992 (58 Fed. Reg. 14,400 (Mar. 17, 1993)); Hughes, *supra* note 83, at 8.

A. *Prior Attempts at Wire Transfer Regulations*

On October 31, 1989, under the authority of the BSA, the Department of Treasury issued an advance notice of proposed rulemaking authority entitled the Bank Secrecy Act Regulatory Applications to the Problem of Money Laundering Through International Payments.⁸⁵ In order to facilitate the identification of the source, volume, and frequency of international funds transfers, the advance notice proposed to increase recordkeeping and reporting requirements for banks involved in such transfers.⁸⁶ In particular, the advance notice proposed to require all international wire transfers to contain the name and account number of persons qualifying as either a foreign originator or beneficiary to the transaction.⁸⁷ The advance notice further proposed to require banking institutions to verify the legitimacy of the originator or beneficiary's business, to develop suspicious wire transfer profiles, and to file suspicious wire transfer reports with the Department of Treasury.⁸⁸

On October 15, 1990, the Department of Treasury issued a revised proposal entitled the Proposed Amendment to the Bank Secrecy Act Regulations Relating to Recordkeeping for Funds Transfers by Banks and Transmittals of Funds by Other Financial Institutions.⁸⁹ The revised proposal sought to expand the reach of the 1989 proposal, so as to cover domestic as well as international wire transfers,⁹⁰ and to standardize otherwise inconsistent recordkeeping requirements.⁹¹

In April, 1992, after receiving over four hundred comments and facing almost unanimous opposition from some 40,000 institutions estimated to be affected by the revised proposal, the Department of Treasury decided not to further pursue the propos-

85. 54 Fed. Reg. 45,769 (Oct. 31, 1989) (to be codified at 31 C.F.R. part 103); Hughes, *supra* note 39, at 284 (Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered titles of U.S.C.)).

86. Hughes, *supra* note 39, at 284, 297.

87. *Foes of Wire Regs Included in Dragnet*, 1 MONEY LAUNDERING ALERT, May 1990, No. 8, at 2.

88. *Id.* at 2.

89. 55 Fed. Reg. 41,696 (Oct. 15, 1990) (to be codified at 31 C.F.R. part 103); Wyrsh, *supra* note 23, at 520.

90. Hughes, *supra* note 39, at 284.

91. Wyrsh, *supra* note 23, at 530. Non-bank institutions subject to these proposed regulations would include telegraph offices, travel agencies, and check cashing companies.

al.⁹² Bankers asserted that the proposal was a reflection of the Department of Treasury's "poor understanding of the nature and complexities of international wire transfers and what can realistically be achieved through regulations intended to identify money-laundering activities."⁹³ The bankers further questioned the usefulness of many of the proposed recordkeeping requirements as the government already had access to a significant portion of the information required under the proposal.⁹⁴

Critics warned that the regulatory burden of the proposed recordkeeping and reporting requirements would significantly outweigh the benefits. In particular, they warned that such requirements would seriously impair the wire transfer systems' speed and efficiency, thereby making the United States banks less competitive.⁹⁵ Some argued that a minimum-monetary threshold for triggering the recordkeeping and reporting requirements was justified in light of the high probability that launderers would not attempt to launder millions of dollars in small increments.⁹⁶ In a recent article,⁹⁷ Sarah Hughes, a Professor of Bank Regulation and Commercial Law⁹⁸ concluded that "the proposed recordkeeping requirements would impose significant additional costs on financial institutions and other wire transfer industry members without yielding information that would be highly useful in law enforcement proceedings."⁹⁹

The Bankers Association for Foreign Trade (BAFT) estimates that the proposed recordkeeping and reporting requirements would cost financial institutions in excess of \$100 million dollars due to

92. *Tough Money-Laundering Bill Awaits President's Signature*, 2 THE REG. COMPLI. WATCH, (1992) at 1 [hereinafter *Money Laundering Bill*]; Wyrsh, *supra* note 23, at 529-30.

93. *Money Laundering Bill*, *supra* note 92, at 1; *Bankers Prepare for Final Treasury Rule on Fedwire, CHIPS Transaction Reporting*, 2 THE REG. COMPLI. WATCH, (1992) at 3 [hereinafter *CHIPS Transaction Reporting*].

94. *CHIPS Transaction Reporting*, *supra* note 93, at 3; Wyrsh, *supra* note 23, at 530.

95. Wyrsh, *supra* note 23, at 530.

96. *Id.* at 532.

97. Hughes, *supra* note 39.

98. Sarah Hughes, *Treasury, Fed Close to the Wire on Wire Transfer Regs*, 4 MONEY LAUNDERING ALERT, (1993) at 5.

99. Hughes, *supra* note 39, at 299 (stating The Bank Secrecy Act authorized the Secretary of the Treasury to promulgate regulations to provide information on wire transfers that would have a 'high degree of utility' in criminal, tax, or regulatory investigations. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 114 (1970)).

compliance costs and lost revenue.¹⁰⁰ The BAFT further warned that such requirements would cause United States institutions to suffer a significant competitive disadvantage with respect to foreign competition.¹⁰¹ The American Bankers Association (ABA) agrees with the BAFT that compliance costs coupled with a less efficient wire transfer network would hurt the United States' ability to compete internationally.¹⁰² However, the ABA anticipated that the compliance costs triggered by the revised proposal would approach \$120 million, a figure significantly greater than that estimated by BAFT.¹⁰³

The ABA viewed the revised proposal as a costly and ineffective anti-money laundering initiative.¹⁰⁴ Of particular concern to the ABA was the likelihood that launderers would circumvent the recordkeeping and reporting requirements "by providing erroneous and unverifiable information."¹⁰⁵ The ABA further criticized the untimeliness of the costly proposal, citing the declining profitability of the banking industry coupled with increased compliance costs triggered by other BSA initiatives.¹⁰⁶

The Federal Reserve agreed with many of the concerns expressed by the BAFT and the ABA.¹⁰⁷ Although it acknowledged that wire transfer recordkeeping requirements could be an effective tool in fighting money laundering, the Federal Reserve insisted that less burdensome and costly alternatives to the proposed regulation existed:

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. . . . The Board believes that simplified and less costly recordkeeping requirements could be established that would provide adequate information on funds transfers for

100. Wyrsh, *supra* note 23, at 530-531.

101. *Id.*

102. *Id.* at 531.

103. *Id.*

104. *Id.*

105. Wyrsh, *supra* note 23, at 530.

106. *Id.* at 531.

107. *Id.* at 533.

those law enforcement purposes for which the records will most likely be used.¹⁰⁸

Another line of criticism focused on the relatively insignificant portion of all wire transfers which represent laundering transactions.¹⁰⁹ J. P. Morgan, a leading provider of payment and clearing services, claimed that its company processed in any given day "a dollar volume of legitimate funds transfers greater than the annual cash proceeds of illegal drug dealing in the United States."¹¹⁰ Citicorp compared the "task of finding a money-laundering transfer [through a wire transfer network] to searching for tainted dollars that mathematically represent a grain of sand in the Sahara."¹¹¹ Other critics have argued that certain categories of wire transfers, such as those involving high or low denominations, and those originated by regulated companies, are unlikely to be used for money laundering.¹¹² "Although the Treasury did not ultimately adopt th[e] proposed rule, it did consider the comments received on the 1990 proposal when it drafted the proposed Recordkeeping Rule and the Travel Rule jointly with the Federal Reserve in 1993."¹¹³

After several failed attempts by the Department of Treasury,¹¹⁴ the Secretary of the Treasury and the Federal Reserve System (Federal Reserve), pursuant to the authority prescribed in the Annunzio-Wylie Anti-Money Laundering Act of 1992 (Annunzio-Wylie),¹¹⁵ jointly proposed enhanced recordkeeping requirements relating to domestic and international wire transfers by

108. *Id.* at 533-34 (quoting 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, Jan. 25, 1991 (comment letter)).

109. Hughes, *supra* note 39, at 308-09.

110. *Id.* at 308 (quoting Comment Letter from Morgan Guaranty Trust Co. of New York to the Department of the Treasury (Feb. 5, 1991)).

111. *Id.* at 308 (quoting Comment Letter from Citicorp to the Department of the Treasury 3, 9 (Jan. 15, 1991)).

112. *Id.* at 309.

113. Robert G. Ballen et al., *Electronic Payments: The New Recordkeeping Regulations*, 112 BANKING L.J. 786 (1995).

114. Bank Secrecy Act Regulatory Applications to the Problems of Money Laundering Through International Payments, 54 Fed. Reg. 45,769 (1989) (to be codified at 31 C.F.R. part 103); Proposed Amendment to the Bank Secrecy Act Regulating to Recordkeeping for Funds Transfers by Banks and Transmittals of Funds by other financial Institutions, 55 Fed. Reg. 41,696 (1990) (to be codified at 31 C.F.R. part 103).

115. Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. No. 102-550 (1992) U.S.C.A.N. (106 Stat. 3680); *see also* Ballen et. al., *supra* note 113.

certain financial institutions on August 31, 1993.¹¹⁶ Additionally, on the same day, the Treasury issued the proposed Travel Rule.¹¹⁷ With comments due on October 4, 1993 and the international wire transfer recordkeeping requirements required by statute to be in effect prior to January 1, 1994, the Secretary and the Board proposed to make the domestic and international wire transfer recordkeeping requirements effective as of December 31, 1993.¹¹⁸

Shortly after the effective date was published, the Treasury and the Federal Reserve announced that the final proposed rules would not be made available until some time later in 1994.¹¹⁹ For nearly two years the Federal Reserve and the Treasury sought comments from affected financial institutions.¹²⁰ Responding to those comments by amending the proposed rules, the Federal Reserve and the Treasury issued the final Recordkeeping Rule and Travel Rule in early 1995.¹²¹ Optimistically, it was announced that these final rules would become effective on January 1, 1996.¹²² However, that date has been pushed back to April 1, 1996.¹²³ "Given the severe penalties that can result from violations of these rules, it is imperative that bank and nonbank financial institutions are fully aware of the rules, and are prepared to be in full compliance by their effective date."¹²⁴

The new Recordkeeping Rule and Travel Rule are found at 31 CFR §§ 103 et seq. In addition, the jointly adopted final regulations can be found in the Amendment to the Bank Secrecy Act Regulations Relating to Recordkeeping for Funds by Financial Institutions at 60 Fed. Reg. 220 (1995) and Recordkeeping Requirements for Certain Financial Records at 60 Fed. Reg. 231 (1995).

116. Proposed Amendment to the Bank Secrecy Act Regulations Relating to Recordkeeping for Funds Transfers and Transmittals of Funds by Financial Institutions Part IV, 58 Fed. Reg. 46,014 (1993) (to be codified at 31 C.F.R. part 103).

117. Ballen et al., *supra* note 113, at 786.

118. Reimbursement for Providing Financial Records; Recordkeeping Requirements for certain Financial Records, 58 Fed. Reg. 46,024 (1993) (to be codified at 12 C.F.R. part 219, subpart B); 58 Fed. Reg. 46,014 (1993) (to be codified at 31 C.F.R. part 103).

119. Ballen et al., *supra* note 113, at 788.

120. *Id.*

121. *Id.*

122. *Id.* at 786.

123. *Wire Rules Amended; Now Effective April 1*, 6 MONEY LAUNDERING ALERT, (1995), at 1 [hereinafter *Wire Rules*].

124. Ballen et al., *supra* note 113, at 786-787.

V. Requirements Of The New Regulations Governing Suspicious Transactions

On January 3, 1995, the Financial Crimes Enforcement Network (FinCEN) of the Treasury and the Board jointly announced another round of transfer regulations as an amendment to The Bank Secrecy Regulations codified in 31 CFR Part 103.¹²⁵ The final rules, with an effective date of January 1, 1996,¹²⁶ which has now been pushed back to April 1, 1996,¹²⁷ require each domestic financial institution involved in a wire transfer to collect and retain certain information for a period of five years.¹²⁷ The amount and type of the information would depend upon the type of financial institution, its role in the particular wire transfer, and the relationship of the parties to the transaction with the financial institution.¹²⁸

This information is intended to facilitate law enforcement efforts in tracing, identifying, and prosecuting persons engaged in money laundering activities.¹²⁹ The Secretary and the Board believe that "maintenance of these records will have a high degree of usefulness in criminal, tax or regulatory investigations of money laundering operations without having a significant adverse effect on either the cost or the efficiency of wire transfer systems operations."¹³⁰ In addition to Treasury, the new regulations have been supported by various agencies, the Department of Justice, the Internal revenue Service, and the Office of the Chief Postal Inspector.¹³¹ These government agencies commented that the additional information gathered by the regulations will be of great assistance in counteracting money laundering activities.¹³² In fact, there have been suggestions that the rules be strengthened.¹³³

"The Recordkeeping Rule (Rule) applies to both bank and nonbank (such as broker-dealers and money transmitters) financial

125. *Id.*

126. *Wire Rules*, *supra* note 123, at 1.

127. Ballen et al., *supra* note 113, at 796.

128. *Id.*

129. 58 Fed. Reg. at 46,015 (1993) (to be codified at 31 C.F.R. part 103).

130. *Id.*

131. Amendment to the Bank Secrecy Act regulations Relating to Recordkeeping for Funds Transfers and Transmittals of Funds by Financial Institutions, 60 Fed. Reg. 220 (1995).

132. *Id.*

133. *Id.*

institutions.”¹³⁴ After reviewing the comments received, FinCEN and the Federal Reserve rejected the suggestion that the rule provide for a small institution exemption.¹³⁵ In arriving at this decision, the regulators concluded “that such an exemption would permit money laundering operations to evade the recordkeeping requirements of this new rule by directing their illegal operations through small institutions.”¹³⁶

The Rule is one of general applicability to any “payment order” which is the first in a series of transactions comprising the funds transfer.¹³⁷ While a payment order is typically an oral, electronic, or written instruction, that instruction must have three characteristics to be deemed a payment order under the Rule.¹³⁸ First, the instruction may not include a condition to payment, though a time condition would be permitted.¹³⁹ Second, payment must be made to the receiving bank by the sender either through the debit of the sender’s account or the payment directly to the beneficiary bank.¹⁴⁰ Finally, the instructions must be transmitted directly to the beneficiary.¹⁴¹ “As a general matter, payment orders sent through Fedwire, the Clearinghouse Interbank Payments System (CHIPS), and the Society for Worldwide Interbank Financial Telecommunications (SWIFT) are payment orders subject to the Recordkeeping Rule.”¹⁴²

Interestingly, the Rule allows for the exemption of transfers covered by the Electronic Fund Transfer Act of 1978.¹⁴³ Additionally, specifically excluded are transfers made through automated teller machines, point of sale systems, and automated clearinghouses.¹⁴⁴ No justification was given for the exclusion of such transfers. The result of the exemption is that a transfer through an ATM terminal is automatically exempt without regard to the identity of the originator.

Motivated by the comments received by Treasury, the final rule exempts wire transfers below \$3,000.¹⁴⁵ This threshold was

134. Ballen et al., *supra* note 113, at 788-789.

135. *Id.* at 789.

136. *Id.* (citing 60 Fed. Reg. at 227 (1995)).

137. *Id.*

138. *Id.*

139. Ballen et al., *supra* note 113, at 789.

140. *Id.*

141. *Id.*

142. *Id.* at 790.

143. *Id.*

144. Ballen et al., *supra* note 113, at 790.

145. *Id.* at 791; 60 Fed. Reg. at 223 (1995).

selected by surveying Fedwire and finding that 22% of transactions in a sample day were for amounts less than \$3,000, while 36% were for less than \$10,000.¹⁴⁶ Banks are expected to notify law enforcement when a person sends multiple small dollar transfers to circumvent the threshold requirement.¹⁴⁷ This "structuring" will engender the presumption that the transfers are intended to circumvent the Rule. Other modifications limit instances where verification is required.¹⁴⁸ These exemptions have been implemented in an attempt to strike a balance between the needs of law enforcement and the burden placed on financial institutions required to comply with the regulations.¹⁴⁹ Even though the exemptions cannot prevent launderers from using the wire transference system, the regulations will help trace the proceeds of the illegal activity and identify the participants in money laundering schemes.¹⁵⁰

The definitions in the new regulations are familiar to those familiar with Article 4A of the Uniform Commercial Code.¹⁵¹ They parallel those found in Article 4A, such as transmitter, transmitter's financial institution, etc.¹⁵² The Official Comment to UCC 4A is helpful in understanding many of the definitions adopted in the final rule.¹⁵³ Terms used in the regulations that are not defined have the meaning given to them in the UCC unless otherwise indicated in the rule.¹⁵⁴

A. *Established Customers*

A significant term in the Joint Rule is that of "established customer."¹⁵⁵ Established customers are defined as persons with an account with the financial institution, or persons on whom the financial institution maintains files including the customers' name, address, and the customer's taxpayer identification number.¹⁵⁶ Examples of established customer accounts include deposit

146. 60 Fed. Reg. at 223 (1995).

147. *Id.*

148. *Id.* at 223.

149. *Id.*

150. 60 Fed. Reg. at 223 (1995).

151. *Id.* at 221.

152. *Id.*

153. *Id.*

154. 60 Fed. Reg. at 221 (1995).

155. *Id.* at 222.

156. *Id.* at 222.

accounts, loan agreements, trust accounts, custody accounts, and mutual fund accounts.¹⁵⁷

The final rule requires that if a payment order is from an originator other than an established customer and is made in person, the originator's bank shall verify the identity of the person placing the payment order.¹⁵⁸ It is noteworthy because additional requirements are imposed for persons who are not established customers of the financial institution subject to the Joint Rule.¹⁵⁹ If it accepts the payment order, the originator's bank shall obtain and retain a record of the person's name and address, the type of identification reviewed, the number of the identification document, as well as the taxpayer identification number (social security or employer identification number) or, if none, the person's alien identification number, or passport number and country of issuance.¹⁶⁰ For payment of proceeds of a funds transfer in person to a beneficiary bank to a beneficiary who does not have a deposit or loan account, the beneficiary's bank shall verify the identity of the person receiving proceeds and shall obtain and retain information similar to that required to be retained by originator's banks for originators who are not established customers.¹⁶¹ Ultimately, the final rule has been clarified to require that the identity of an originator or beneficiary that is not an established customer be verified by examination of a document, preferably one that contains the person's name, address, and photograph.¹⁶²

B. Originator Bank Requirements

The originator's bank will be required to maintain the following information for each payment order that it accepts of \$3,000 or more:

- (A) originator's name and address;
- (B) amount of the wire transfer
- (C) date of the payment order;
- (D) any payment instructions received from the originator;
- (E) identity of the beneficiary's bank;

157. *Id.*

158. 60 Fed. Reg. at 224 (1995).

159. *Id.* at 224.

160. *Id.*

161. *Id.* at 224.

162. *Id.* at 225.

(F) name, address, account number and any other specific identifier of the beneficiary if received with the payment order.¹⁶³

Additionally, the originator's bank must retain all payment instructions received with the order.¹⁶⁴ Payment instructions may include the purpose of the funds transfer, directions to the beneficiary's bank regarding how to notify the beneficiary of the receipt of the funds, or other information.¹⁶⁵ Combined with these requirements, the originator's bank may face three possible scenarios if the originator is not an established customer.

First, if the payment order is made in person, the bank will be required to verify the identity of the person placing the order and record that person's name, address, identification and taxpayer identification number, alien identification number or passport number, or note the lack of such a number.¹⁶⁶

Second, if the originator's bank has knowledge that the person placing the payment order is not the originator, the bank would be required to record the originator's tax identification number, or if not, alien identification number or passport number, or note the lack thereof.¹⁶⁷

Third, if the payment order is not made in person, the bank will obtain and retain a record of the name and address of the person placing the payment order, as well as the person's taxpayer identification number, or if none, alien identification number, passport number, or a notation in the record of the lack of such information, and a copy or a record of the method of payment.¹⁶⁸

The final rule requires that the originator's bank retain as many of the means of identification of the beneficiary as are received with the payment order.¹⁶⁹ To fulfill this requirement, originator banks are encouraged to request that originators provide complete beneficiary information when possible.¹⁷⁰

163. *Id.* at 229.

164. 60 Fed. Reg. at 224 (1995).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. 60 Fed. Reg. at 223 (1995).

170. *Id.*

C. Beneficiary Bank Requirements

A beneficiary bank will have to retain the original or a copy of each payment order it accepts.¹⁷¹ If the beneficiary is not an established customer of the beneficiary's bank and the proceeds are delivered in person, then the beneficiary's bank also will be required to verify that person's identity and record his or her name and address, the identification and social security number, alien registration number or passport number, or note the lack of such information.¹⁷² If the proceeds are not delivered in person, the beneficiary's bank must retain a copy or record of the check or other instrument used to effect payment and the name and address of the person to whom it was sent.¹⁷³

D. Non-Bank Financial Institution Requirements

Brokers and dealers in securities and other non-bank financial institutions are required to obtain and retain information similar to that required of financial institutions.¹⁷⁴ In addition to that information, a transmitter's financial institution other than a bank must keep the original or a copy for five years of any form that is completed or signed by the person placing the transmittal order.¹⁷⁵ A recipient's financial institution other than a bank must keep any form completed or signed by the recipient.

Non-bank financial institutions, under previous versions of the rule, would have been required to retain records of the identities of all originators.¹⁷⁶ The final rule exempts NBFIs from collecting information on originators/transmitter or beneficiaries/recipients if they are "established customers."¹⁷⁷

E. Compliance Exceptions

Treasury and the Board stated that they understand that some banks, particularly those that send payment orders electronically, may rely on the records of the payment orders they execute, supplemented by the originator name and address information in their customer information file, to meet the record keeping require-

171. *Id.* at 222.

172. *Id.* at 224.

173. *Id.* at 224-225.

174. 60 Fed. Reg. at 222 (1995).

175. *Id.* at 225.

176. *Id.* at 222.

177. *Id.*

ments of this rule for established customers.¹⁷⁸ The current Fedwire format does not have sufficient space to include all means provided by the originator of identifying the beneficiary. The final rule provides an exception to the requirement that the bank retain as many means of identifying the beneficiary as provided by the originator, until completion of the bank's conversion to the expanded Fedwire format.¹⁷⁹ For NBFIs, this temporary exemption is limited to the domestic brokers and dealers in securities.¹⁸⁰ Treasury and the Board believe that only this category of NBFIs is likely to electronically send transmittals of funds that ultimately are effected through Fedwire.¹⁸¹ The Treasury and Board will monitor the experience of law enforcement and the industry under the rule to determine whether law enforcement efforts are hindered materially due to the lack of beneficiary information.¹⁸² If it is determined that there is a material hindrance, Treasury and the Board will consider mandating that beneficiary information to be retained for all payment orders.¹⁸³ Additionally, Treasury believes that suspicious transaction reports and anti-money laundering policy and program rules due out for comment in 1995 should materially reduce any attempts to take advantage of the fact that there is no requirement to obtain beneficiary information.¹⁸⁴

To eliminate redundancy in the proposed list of exemptions and provide consistent treatment for wholly-owned domestic subsidiaries of domestic banks and domestic brokers or dealers in securities, the final rule has been revised to exempt transfers where the originator and the beneficiary are any of the following:

- (A) a domestic bank;
- (B) a wholly-owned domestic subsidiary of a domestic bank;
- (C) a domestic broker or dealer in securities;
- (D) a wholly-owned subsidiary of a domestic bank;
- (E) the United States;
- (F) a state or local government; or
- (G) a federal, state, or local government agency or instrumentality.¹⁸⁵

178. *Id.* at 223.

179. 60 Fed. Reg. at 223-224 (1995).

180. *Id.* at 224.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. 60 Fed. Reg. at 226 (1995).

The final rule exempts transfers where both the originator and the beneficiary are the same person and the originator's bank and the beneficiary's bank are the same domestic bank.¹⁸⁶ Likewise, the exemption applies to transmittals of funds where both the transmitter and the recipient are the same person and the transmitter's financial institution and the recipient's financial institution are the same domestic broker or dealer in securities.¹⁸⁷ The rule also exempts other fund transfers made through an automated clearinghouse, an ATM or a point-of-sale system.¹⁸⁸

Records under the rule pertain to records of transfers made on or after January 1, 1996 and must be retained for a period of five years.¹⁸⁹ Brokers and dealers are exempted from this retention requirement to the extent that they may continue to comply with current Securities and Exchange Commission regulations.¹⁹⁰ Treasury and the Board will monitor the effectiveness of the retention requirement and determine at a later date if a longer retention period, even if materially affecting the cost of compliance, is necessary.¹⁹¹

F. Stated Areas Of Potential Revision

Treasury and the Board will monitor the experience of law enforcement and the industry under this rule for 36 months.¹⁹² If, at the end of this period, it is determined that law enforcement efforts are materially hindered due to lack of beneficiary information in the records retained under this rule, Treasury and the Board will consider mandating that beneficiary information be retained for all payment orders.¹⁹³ Additionally, Treasury and the Board expect that the suspicious transaction reporting and anti-money laundering policy and program rules issued for comment by Treasury in 1995 should materially reduce any wrongdoing stemming from the fact that an originator's bank is not explicitly required by this rule to obtain beneficiary information.¹⁹⁴

186. *Id.*

187. *Id.*

188. *Id.* at 222.

189. *Id.* at 226-227.

190. *Id.* (Brokers and dealers subject to the Bank Secrecy Act must preserve records according to 31 C.F.R. Part 103 if those periods are longer than those required by the SEC under 17 C.F.R. 240.17a-8).

191. 60 Fed. Reg. 227 (1995).

192. *Id.* at 221.

193. *Id.* at 224.

194. *Id.* 60 Fed. Reg. 46556 (1995).

The aim of FinCEN and the Federal Reserve is to create a system by which banks may report suspicious transactions in a more efficient manner.¹⁹⁵ Under the new regulations, "banks will report possible violations of law on the new Suspicious Activity Report, or SAR."¹⁹⁶ The SAR replaces the previously-used CRF, Criminal Referral Form.

Under the proposed regulations, banks will no longer check a box on the Currency Transaction Report (CTR) indicating that a transaction may be suspicious.¹⁹⁷ Rather, all suspicious activity, whether or not a cash transaction, will be reported on the SAR.¹⁹⁸ Additionally, the banks will only file *one* report with FinCEN, rather than a number of reports to multiple agencies.¹⁹⁹ Because FinCEN will be automated for easy access, those persons using multiple institutions to facilitate laundering activities will be more easily detected and tracked. The final alteration in bank reporting addresses the "dollar threshold for reporting known or suspected crimes, other than BSA and money laundering and/or insider crimes."²⁰⁰

Treasury intends to offer final regulations that are "identical" to those of FinCEN.²⁰¹ However, it appears that the regulations of Treasury are, in actuality, broader than those of FinCEN.²⁰² Due to the potential penalties that could be imposed upon a bank failing to comply with the regulations, the broad regulations could trigger a number of unnecessary reports and defeat the intended goal of improved efficiency.

There are, however, a number of similar problems with both sets of proposed regulations. First, under both proposals, banks will

195. Linda Noonan, *Proposed SAR Regulations: What You Can Expect*, MONEY LAUNDERING REP., No. 5, Dec. 1995. *The Treasury Notice of Proposed Rulemaking* was published on Sept. 7, 1995, 60 Fed. Reg. 46556. The regulators' proposals are found as follows: Board of Governors of the Federal Reserve, 60 Fed. Reg. 34481 (1995) (Proposed 1995); Comptroller of the Currency, 60 Fed. Reg. 34476 (July 3, 1995); Office of Thrift Supervision, 60 Fed. Reg. 36366 (1995) (proposed 1995); and Federal Deposit Insurance Corporation, 60 Fed. Reg. 47719 (1995) (proposed 1995). *Id.* at n.1.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* Other agencies will be able to access the information through FinCEN and all other documentation will remain with the bank as needed. *Id.*

200. Noonan, *supra* note 195, at n.1. "The threshold has been raised from \$1,000 to \$5,000 for non-insider crimes, where the suspect has been identified, and from \$5,000 to \$25,000 where the suspect cannot be identified." *Id.*

201. *Id.*

202. *Id.*

be required to report attempted suspicious transactions, rather than giving the banks the discretion to determine when an attempted transaction is sufficiently suspicious.²⁰³ Second, there is the potentiality of double penalties for banks in violation of the reporting requirements.²⁰⁴ Third, the regulations may not provide enough time for a bank to complete an investigation into a suspicious transaction. Fourth, there remains one final inefficiency. If currency over \$10,000 is involved, the bank will have the obligation to file both a SAR and a CTR.²⁰⁵ There is no justifiable reason to require a bank to file both forms.²⁰⁶

VI. Increased Detection Of Wire Transfers

The new wire transfer regulations taking effect this year are designed to increase the production of information regarding existing money laundering operations. They enable authorities "to find and retrieve evidence on suspected money launderers, but will offer no real help in detecting new money laundering operations."²⁰⁷ After all, by the time the safeguards of the current regulations trigger the suspicion of law enforcement officials, the money laundering operation is already in full swing. "Recently, proposals on the use of artificial intelligence systems to detect money laundering through wire transactions in the broader effort to investigate drug trafficking, terrorism, espionage, and illegal arms trade have begun to surface."²⁰⁸ In September, the Office of Technology Assessment (OTA) determined it would be nearly impossible to develop a "fully automated computer screening of wire transfers."²⁰⁹

Today, FinCEN uses some artificial intelligence to aid in the identification of money launderers. FinCEN analyzes a compilation of data, including CTR's, to identify and monitor potentially illegal patterns of behavior characteristic of money laundering.²¹⁰ However, a survey of law enforcement agents by the OTA revealed that the information provided by FinCEN is actually more useful in building a case against money launderers than in the initial

203. *Id.*

204. Noonan, *supra* note 195, at n.1.

205. *Id.*

206. *Id.*

207. Holly R. Skolnick, *Can Artificial Intelligence Be Used To Detect Laundering*, 6 MONEY LAUNDERING LAW REP., No.5, at 1, Dec. 1995.

208. *Id.*

209. *Id.*

210. *Id.* at 6.

detection of them.²¹¹ While the monitoring of data obtained from wire transactions would be more helpful than the current monitoring of CTR's, there are four identifiable problems with such a use of data: 1) illicit transfers mirror those which are legitimate; 2) very little information is generated by a wire transfer; 3) scarce resources would be consumed due to the inability to distinguish between legitimate and illegitimate transfers; and 4) the unavoidable infringement on privacy.²¹²

The most important of these concerns is the potential infringement on the privacy of the bank customer. Questions have already been raised as to the propriety of FinCEN's current practices of piecing together data to determine an individual's financial activities and patterns.²¹³ "The intrusion on privacy rights could potentially be even broader and more indiscriminate given admittedly blunt identification methods; for every money launderer identified, thousands of law-abiding citizens would see their financial privacy reduced."²¹⁴ Government would have increased access to financial records of innocent persons whose transfers mimic those of a money launderer. In addition, corporations which may have a vested interest in keeping financial information confidential would worry that information could be obtained by competitors.²¹⁵ While it remains unanswered whether these tracking methods would violate the letter of the Right to Financial Privacy Act,²¹⁶ they appear to violate the spirit of that law.²¹⁷

In its report, OTA suggests that, before attempting to create an artificial intelligence system monitoring data from wire transfers, FinCEN be given "unilateral power to selectively gain 'rapid access to wire transfer records' related to CTR's already identified as suspicious."²¹⁸ In essence, this would be equivalent to giving FinCEN an electronic subpoena with which FinCEN would have "total and unregulated access to wire transfer information for investigatory purposes."²¹⁹ By doing so, FinCEN could circumvent the usual methods and safeguards for obtaining such records, thereby creating more questions about violating privacy rights.

211. *Id.*

212. Skolnick, *supra* note 207.

213. *Id.* at 7.

214. *Id.*

215. *Id.*

216. 12 U.S.C. § 3409 et seq.

217. Skolnick, *supra* note 207.

218. *Id.*

219. *Id.*

VII. The Competing Interests Of Enabling Statutes And Financial Privacy.

A. *The Statutory Authority of the Bank Secrecy Act & the Annunzio-Wylie Amendment*

The wire transfer recordkeeping²²⁰ and travel regulations²²¹ were proposed under the authority of the BSA, as amended by the Annunzio-Wylie Act.²²² Under the BSA, the Secretary and the Board jointly prescribe domestic wholesale fund transfer record-keeping requirements for insured depository institutions whenever they determine that the maintenance of such records will have a "high degree of usefulness in criminal, tax, or regulatory investigations."²²³ The records must comport with the primary purpose

220. 58 Fed. Reg. 46,014 (1993) (to be codified at 31 C.F.R. pt. 103) (proposed Aug. 31, 1993); 58 Fed. Reg. 46,024 (1993) (to be codified at 12 C.F.R. pt. 219, subpart B) (proposed Aug. 31, 1993).

221. 58 Fed. Reg. 46,021 (1993) (to be codified at 31 C.F.R. pt. 103) (proposed Aug. 31, 1993).

222. Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. No. 102-550, Title XV of the Housing and Community Development Act of 1992.

223. 12 U.S.C. § 1829b (Title 12. Banks and Banking. Chapter 16. Federal Deposit Insurance Corporation).

(a) Congressional findings and declaration of purpose.

(1) . . .

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured depository institutions in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

(b) Recordkeeping regulations.

(1) In general. Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records or other evidence by insured depository institutions has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

(2) Domestic funds transfers. Whenever the Secretary and the Board of Governors of the Federal Reserve System hereafter in this section referred to as the "Board") determine that the maintenance of records, by insured depository institutions, of payment orders which direct transfers of funds over wholesale funds transfer systems has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, the Secretary and the Board shall jointly prescribe regulations to carry out the purposes of this section with respect to the maintenance of such records.

(3) International funds transfers.

(A) In general. The Secretary and the Board shall jointly prescribe, after consultation with State banking supervisors, final regulations requiring that insured, businesses that provide

of the BSA, that being the identification of the source, volume, and movement of funds.²²⁴

check cashing services, money transmitting businesses, and businesses that issuer or redeem money orders, travelers' checks or other similar instruments maintain such records of payment orders which —

- (i) involve international transactions; and
- (ii) direct transfers of funds over wholesale funds transfer systems or on the books of any insured depository institution, or on the books of any business that provides check cashing services, any money transmitting business, and any business that issues or redeems money orders, travelers' checks or similar instruments that will have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

(B) Factors for consideration. In prescribing the regulations required under subparagraph (A), the Secretary and the Board shall consider —

- (i) the usefulness in criminal, tax, or regulatory investigations or proceedings of any record required to be maintained pursuant to the proposed regulations; and
- (ii) the effect the recordkeeping required pursuant to such proposed regulations will have on the cost and efficiency of the payment system.

(C) Availability of records. Any records required to be maintained pursuant to the regulations prescribed under subparagraph (A) shall be submitted or made available to the Secretary or the Board upon request.

(c) Identity of persons having account and persons authorized to act with respect to such accounts' exemptions. Subject to the requirements of any regulations prescribed jointly by the Secretary and the Board under paragraph (2) or (3) of subsection (b), each insured depository institutions shall maintain such records and other evidence, in such Form as the Secretary shall require The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

(d) . . .

(e) . . .

(f) . . .

(g) Retention period. Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

(h) . . .

(i) Application of provisions to foreign banks. The provisions of this section shall not apply to any foreign bank except with respect to the transactions and records of any insured branch of such a bank.

(j) Civil penalties. . . .

224. 12 U.S.C. § 1829b.

In addition to domestic wholesale fund transfer recordkeeping requirements, the Secretary and the Board also jointly prescribe international wholesale fund transfer recordkeeping requirements having "a high degree of usefulness in criminal, tax, or regulatory investigations."²²⁵

These regulations, which were supposed to be in effect before January 1, 1994,²²⁶ would be applicable to insured depository institutions and businesses providing check cashing, money transmitting, and other related services.²²⁷ Prescribing such recordkeeping requirements, the Secretary and the Board prepared a cost benefit analysis, balancing the perceived usefulness of proposed regulatory requirements in criminal, tax, or regulatory investigations against the perceived costs in which such regulations would impose upon the wholesale fund transfer system.²²⁸

12 U.S.C. § 1829(b) limits the period in which regulated institutions may be required to retain records relating to domestic and international wire transfers.²²⁹ While such records must be kept for as long as the Secretary prescribes, in the absence of a prior determination by the Secretary that a longer period is required to satisfy the purposes of the statute, such period may not exceed six years.²³⁰

12 U.S.C. § 1953 further provides that the Secretary may require any uninsured bank or financial institution to maintain appropriate records for activities, such as domestic and international wire transfers, where the maintenance of the records has a "high degree of usefulness in criminal, tax, or regulatory investigations."²³¹ The significance of this section is that it broadens the

225. 12 U.S.C. § 1829b(b)(3); (proposed Aug. 31, 1993) 58 Fed. Reg. 46,014 (1993) (to be codified at 31 C.F.R. pt. 103).

226. 58 Fed. Reg. 46,024 (1993) (to be codified at 12 C.F.R. pt. 219, subpt. B) (proposed Aug. 31, 1993).

227. 12 U.S.C. § 1829b(b)(3); 58 Fed. Reg. 46,014 (1993) (to be codified at 31 C.F.R. pt. 103) (proposed Aug. 31, 1993).

228. *Id.*

229. 12 U.S.C. § 1829b(g).

230. 12 U.S.C. § 1829b(g) (Retention period. Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence).

231. 12 U.S.C. § 1953 (Title 12. Banks and Banking. Chapter 21. Financial Recordkeeping)

(a) Where the Secretary determines that the maintenance of the appropriate records and procedures by any uninsured bank or uninsured

Secretary's regulatory authority beyond that of insured banks. Thus, the authority includes any financial institution defined in 31 U.S.C. § 5312(a)(2).²³²

Finally, 31 U.S.C. § 5314 authorizes the Secretary to require financial institutions to develop and participate in anti-money laundering programs.²³³ At a minimum, the Secretary may require such financial institutions to develop internal policies, procedures and controls.²³⁴ The Secretary's proposed travel regulations are its first steps towards the implementation of this provision.²³⁵

institutions, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its function referred to in subsection (b), any records or evidence of any type which the Secretary is authorized under Section 21 of the Federal Deposit Insurance Act [12 U.S.C. 1829b] to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter [12 U.S.C. 1951 et seq.] . . .

(b) Institutions subject to recordkeeping requirements. The authority of the Secretary of the Treasury under subsection (a) extends to any financial institution (as defined in 5312(a)(2) of title 31, United States Code), other than any insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act [12 U.S.C. 1813(h)]) and any insured institution (as defined in section 401(a) of the National Housing Act [12 U.S.C. 1724(a)]), and any partner, officer, director, or employee of any such financial institution.

232. 12 U.S.C. § 1953.

233. The Annunzio-Wylie Anti-Money Laundering Act, *supra* note 222, § 1517,

(h) Anti-Money Laundering Programs. —

(1) In General. —In order to guard against money laundering through financial institutions, the Secretary may require financial institutions to carry out anti-money laundering programs, including at a minimum

(A) the development of internal policies, procedures, and controls,

(B) the designation of a compliance officer,

(C) an ongoing employee training program, and

(D) an independent audit functions to test programs.

(2) Regulations. —The Secretary may prescribe minimum standards for programs established under paragraph (1).

234. 58 Fed. Reg. 46,021 (1993) (to be codified at 31 C.F.R. pt. 103) (proposed Aug. 31, 1993).

235. *Id.*

B. The Limiting Effect of the Right to Financial Privacy Act on Proposed Legislation

While finding its authority under the BSA, the proposed wire transfer regulations²³⁶ must also comply with the Right to Financial Privacy Act (RFPA).²³⁷ Under the RFPA, the government, subject to exceptions,²³⁸ may not access a customer's financial records unless the government reasonably describes the financial records and satisfies at least one of five conditions: 1) the government must acquire the customer's consent; 2) obtains an administrative subpoena or summons; 3) obtains search warrant; 4) obtains judicial subpoena; or 5) makes a formal written request.²³⁹

There are currently at least fourteen exceptions to the RFPA which, in addition to allowing government access to customers' financial records, are applicable to the proposed wire transfer regulations.²⁴⁰ These exceptions include: the limited access exception;²⁴¹ the foreign intelligence and Secret Service protective function exception;²⁴² the unidentified customer exception;²⁴³ the supervisory agency's exception;²⁴⁴ the Internal Reve-

236. 58 Fed. Reg. 46,014 (1993) (to be codified at 31 C.F.R. pt. 103) (proposed Aug. 31, 1993); 58 Fed. Reg. 46,021 (1993) (to be codified at 31 G.F.R. pt. 103) (proposed Aug. 31, 1993).

237. 12 U.S.C. § 3401, et seq. (12 U.S.C. 3402) Access to financial records by Government authorities prohibited; exceptions.

Except as provided by . . . (12 U.S.C. 3403(c), (d), 3413, 3414), no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and—

(1) such customer has authorized such disclosure in accordance with . . . [12 U.S.C. 3404];

(2) such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of . . . [12 U.S.C. 3405];

(3) such financial records are disclosed in response to a search warrant which meets the requirements of . . . [12 U.S.C. 3406];

(4) such financial records are disclosed in response to a judicial subpoena which meets the requirements of . . . [12 U.S.C. 3407]; or

(5) such financial records are disclosed in response to a formal written request which meets the requirements of . . . [12 U.S.C. 3408].

238. 12 U.S.C. §§ 3403(c), (d), 3413, 3414.

239. 12 U.S.C. §§ 3404, 3405, 3406, 3407, 3408.

240. 12 U.S.C. § 3401 et seq.

241. 12 U.S.C. § 3403(c).

242. 12 U.S.C. § 3414.

243. 12 U.S.C. § 3413(a).

244. 12 U.S.C. § 3413(b).

nue Code exception;²⁴⁵ the Federal statute and rule exception;²⁴⁶ the Federal Rules of Civil or Criminal Procedure or comparable rules exception;²⁴⁷ the administrative subpoena exception;²⁴⁸ the limited access law enforcement inquiry exception;²⁴⁹ the grand jury exception;²⁵⁰ the General Accounting Office exception;²⁵¹ the Department of Treasury exception;²⁵² the Board of Governors of the Federal Reserve System exception;²⁵³ and the Resolution Trust Company exception.²⁵⁴

Given the numerous and accessible conditions and exceptions to the RFPA permitting government access to customers' financial records, coupled with the fact that the proposed wire transfer regulations merely prescribe recordkeeping as opposed to reporting requirements, the proposed wire transfer regulations do not appear to run afoul of the RFPA. Nevertheless, the government must comply with the terms of the RFPA before it will be permitted access to customers' financial records.

C. *Commentary*

Since their announcement on August 31, 1993,²⁵⁵ the jointly proposed enhanced recordkeeping requirements relating to domestic and international wire transfers by certain financial institutions have been the subject of great debate. Despite concerns about the short implementation period, the cost of reprogramming computer systems to handle increased recordkeeping requirements, the expense of maintaining additional records, the risks of overburdening a system whose viability depends upon its speed and efficiency, and the overall usefulness of the recordkeeping requirements, initial feedback has been generally favorable.²⁵⁶ Sources involved in the regulatory process are projecting

245. 12 U.S.C. § 3413(c).

246. 12 U.S.C. § 3413(d).

247. 12 U.S.C. § 3413(e).

248. 12 U.S.C. § 3413(f).

249. 12 U.S.C. § 3413(g).

250. 12 U.S.C. § 3413(i).

251. 12 U.S.C. § 3413(j).

252. 12 U.S.C. § 3413(k).

253. 12 U.S.C. § 3413(m).

254. 12 U.S.C. § 3413(n).

255. 58 Fed. Reg. 46014 (1994) (to be codified at 31 C.F.R. pt. 103) (proposed Aug. 31, 1994).

256. Robyn Meredith, *Treasury Department Postpones Rule on Wire Transfers*, THE AM. BANKER, Dec. 30, 1993, at 14; *Treasury and Federal Reserve Publish Three Proposals on BSA Requirements*, 61 BNA BANKING REPORT, Sept. 13, 1993,

that the joint proposal be implemented without substantive change.²⁵⁷

Industry experts credit the fact that the proposed recordkeeping requirements are significantly less onerous than previous Treasury proposals.²⁵⁸ For example, the joint proposal streamlines previous proposals by allowing many of the records already retained by affected financial institutions to substitute for additional recordkeeping requirements. Of further significance is the elimination of the highly criticized "on whose behalf" requirement, the exemption of several large classes of funds transfers, and the recognition that a significant portion of the required information may already be retained for unrelated purposes.²⁵⁹ Nonetheless, the banking industry and former Deputy Assistant Secretary of the Treasury, Robert E. Powis, question the feasibility of the proposed December 31, 1993 effective date for domestic and international wire transfer recordkeeping requirements.²⁶⁰ They were correct! Not long after their statements, the ABA asked the Secretary and the Board to delay implementation of the joint proposal until it has had a sufficient opportunity to ensure regulatory compliance.

The banking industry also expressed some reservation concerning the anticipated compliance costs required by the joint proposal's enhanced recordkeeping storage and retrieval requirements.²⁶¹ According to some industry experts, even the largest banks with their sophisticated automated computer systems, lack sufficient storage capacity to ensure compliance with the enhanced record-

No. 9, at 372 [hereinafter *Three Proposals*]; *New Wire Transfer Regs Receive Lukewarm Welcome*, 4 MONEY LAUNDERING ALERT, Sept. 1993, No.12 at 6; *New Wire Regs Bring With Them Large Costs, Little Time to Comply*, 3 PRIVATE PLACEMENT REPORTER, Aug. 30, No. 32 at Money Laundering Laws 1 [hereinafter *New Wire Regs*].

257. *New Wire Regs*, *supra* note 256, at 1; *Fed and Treasury Draft New Rules For International Wire Transfers; Enhanced Record Keeping Requirements Are Set to Take Effect Dec. 31*, 5 THOMSON'S INTERNATIONAL BANKING REGULATOR, Aug. 30, 1993, No. 32, at 1 [hereinafter *International Wire Transfers*].

258. *Wire Transfer Regs Look OK to Bankers at First Glance*, XVII BANK LETTER, Aug. 30, 1993, No. 34, at 4.

259. *Long-Awaited Wire Transfer Rules Announced By Government*, 4 MONEY LAUNDERING ALERT, Sept. 1993, No. 12, at 1.

260. 58 Fed. Reg. 46,024 (Aug. 31, 1993) (to be codified at 12 C.F.R. part 219, subpart B); 58 Fed. Reg. 46,614 (Aug. 31, 1993) (to be codified at 31 C.F.R. part 103); *New Wire Regs*, *supra* note 256, at 1; *New Wire Transfer Regs Receive Lukewarm Welcome*, *supra* note 256, at 6.

261. *New Wire Transfer Regs Receive Lukewarm Welcome*, *supra* note 256, at 6; *New Wire Regs*, *supra* note 256.

keeping requirements.²⁶² The President of Atchley Systems Inc., a Dallas based firm dealing with automated bank processing systems, estimated that the total cost of putting together a computer system capable of handling the massive amounts of information required to be retained by a large bank under the proposed regulations would cost at least \$50,000.²⁶³ He further projected that many of the smaller banks would lack the resources needed to install an automated computer system and would therefore be required to manually compile the required information.²⁶⁴ In the words of another commentator, banks would be required to "spend millions for information that may be used by law enforcement five times a year."²⁶⁵ Along this line, John Byrne commented that although the ABA "believe[s] these regs represent a seemingly reasonable approach, that's not to say there won't be costs and operational problems for larger institutions."²⁶⁶

With respect to non-bank financial institutions, a former Deputy Assistant Secretary of the Department of Treasury warned that the enhanced recordkeeping requirements would "have a devastating effect . . . unless some dollar threshold is set."²⁶⁷ A Western Union spokesperson noted that its system would require a "complete overhaul" in order to comply with the proposed regulations.²⁶⁸ To the contrary, the Florida Check Cashers Association President, commented that he did not believe the new regulations would have effect on his industry given the industry's low volume and current practice of keeping required records.²⁶⁹

According to the Secretary and the Board's estimates, approximately 60,000 financial institutions would be affected by the joint proposal, requiring approximately 8.5 million additional employee hours per year to comply with the enhanced recordkeeping requirements.²⁷⁰ These additional costs would be more than offset by the facilitation of law enforcement efforts in tracing,

262. *New Wire Regs*, *supra* note 256, at 1; *International Wire Transfers*, *supra* note 257.

263. *New Wire Regs*, *supra* note 256.

264. *Id.*

265. *New Wire Transfer Regs Receive Lukewarm Welcome*, *supra* note 256, at 6.

266. *New Wire Regs*, *supra* note 256.

267. *New Wire Transfer Regs Receive Lukewarm Welcome*, *supra* note 256, at 6.

268. *Compliance with Wire Regs Will Cost Millions of Dollars*, 4 MONEY LAUNDERING ALERT, Sept., 1993, No. 12, at 6.

269. *Id.*

270. *Id.*

identifying, and prosecuting persons engaged in money laundering activities, through the creation of a more complete and standardized paper trail.²⁷¹

VIII. Conclusion

It is important to recall that the United States awoke late to the reality of world organized crime and political destabilization. However, in 1970, the United States finally recognized the usefulness of imposing recordkeeping and reporting requirement upon certain financial institutions.²⁷² Through the preservation of an evidentiary paper trail and the highlighting of highly suspicious financial transactions, the government facilitated law enforcement efforts of preserving the integrity of the nation's financial institutions.²⁷³ The predicate established in 1970 is now available for realistic wire transfer controls. In the absence of wire transfer recordkeeping and transmittal requirements, law enforcement would be faced with the daunting task of unraveling the launderer's web. The shakiest leg of law enforcement's stool is regulating the banking industry itself — policing its operations and, above all, the beneficial sources of its deposits.²⁷⁴ Yet, this is the only leg that would seem to deny the international banking system to the drug traffickers.²⁷⁵

The new rules, required under the 1992 Annunzio-Wylie Anti-Money Laundering Statute, represent a massive extension of the current requirement to report cash transactions of \$10,000 or more.²⁷⁶ There are problems. The President of the Morely Group stated that "Congress thought that, we'll keep more records, so we'll detect more. But a trillion dollars a day [go] through New York. We already have nine million cash transaction reports a year that no one looks at."²⁷⁷ Searching for patterns in the giant new database, he added, would be "like looking for needles in hay-

271. *Regs Benefit Enforcement Agencies*, 4 MONEY LAUNDERING ALERT, Sept., 1993, No. 12, at 6; Meredith, *supra* note 256, at 14; *Three Proposals*, *supra* note 256, at 372.

272. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970).

273. See *Regs Benefit Enforcement Agencies*, *supra* note 272, at 6; Robyn Meredith, *Wire Transfer Rules Drawing Rave Reviews*, THE AM. BANKER, Aug. 26, 1993, at 14; *Three Proposals*, *supra* note 256, at 372.

274. Andelman, *supra* note 28.

275. *Id.*

276. See *Feds Weigh Tough Wire-Transfer Reporting Rules*, 19 CORPORATE EFT REPORT, Oct. 5, 1994.

277. *Id.*

stacks.”²⁷⁸ In the view of John Byrne, Senior Legislative Counsel to the ABA, anti-money laundering initiatives should be directed at the gateway to financial institutions as opposed to the streets in which the funds travel inside:

[w]e’ve never believed wire transfer regulations were the solution for money laundering. It is just the way the money moves once someone has let their guard down and allowed the money to enter the system In my opinion, the regulations won’t be a major tool for law enforcement.²⁷⁹

Conceptually, Byrne’s perspective may very well be the better one. After all, the money launderer’s goal of obscuring the source of illegitimate proceeds is furthered through the consummation of a series of financial transactions within the financial institution. A rational conclusion suggests that law enforcement efforts should concentrate on preventing access to financial institutions, the tools of the launderers’ trade, as opposed to tracing the illegitimate proceeds once they have been commingled with otherwise legitimate proceeds. After all, most persons would agree that it is easier to separate “East Coast Sand” from “West Coast Sand” when the respective types of sand are separated into their respective sand boxes than after they have been combined in the same box.

The pragmatist, although agreeing in principle, would contend that Byrne’s perspective is all well and good if only current anti-money laundering initiatives were effective. However, just as law enforcement efforts have been unable to prevent the back street drug deals, they have also been unable to prevent the laundering of illegitimate drug proceeds through legitimate United States financial institutions. Thus, the pragmatist, perhaps correctly, would argue that the realities of the situation necessitate the implementation of additional enforcement mechanisms, e.g. the proposed wire transfer regulations.

The ease at which launderers access United States financial institutions, coupled with the speed and efficiency in which they instantaneously move illegitimate funds from account to account, within and among international financial institutions, through domestic and international wire transfers, led at least one commentator to conclude that wire transfers “have emerged as the primary

278. *Id.*

279. *Compliance With Wire Regs Will Cost Millions of Dollars*, 4 MONEY LAUNDERING ALERT, Sept. 1993, No.12, at 6.

method by which high-volume money launderers ply their trade."²⁸⁰ In the absence of wire transfer recordkeeping and transmittal requirements, law enforcement will be faced with the daunting task of unraveling the launderer's web.

The Department of Treasury and the Federal Reserve System have taken the position that the information required to be retained under the joint proposal would facilitate law enforcement efforts in tracing, identifying, and prosecuting persons engaged in money laundering activities.²⁸¹ Ronald Noble, Treasury's Assistant Secretary for Enforcement asserted that "the proposals reflect Treasury's commitment to serv[ing] the needs of law enforcement without imposing unnecessary burdens on the financial service industry."²⁸² While the Secretary and Board's goals are certainly laudable, their cost-benefit estimates are somewhat suspect, perhaps the product of mere speculation and desperation. Nevertheless, such proposed recordkeeping and travel requirements should be implemented, as only through such implementation, will their true cost-benefits be realized.²⁸³

Once the raw data is accumulated, how can it be transformed into a format usable by law enforcement? A 'smart' software would identify suspicious transactions using very little information.²⁸⁴ Software used in medical diagnosis to certify theories and identify patterns from data appears to have promise.²⁸⁵ A further complication, however: the software must also be able to adapt to changing patterns.²⁸⁶ Laundering patterns change as, or before, they are detected.²⁸⁷

With reporting requirements on the verge of becoming streamlined, information should be more usable, enforcement should be greater, and increased pressure on non-banks should also occur. But, there still remain three key questions which the government must consider: (1) Can the war on money laundering ever be won as long as there is a demand for illegal goods and services? (2) Can the war on money laundering ever be won

280. Wyrsh, *supra* note 23, at 522.

281. *Regs Benefit Enforcement Agencies*, *supra* note 272, at 6; Meredith, *supra* note 256, at 14; *Three Proposals*, *supra* note 256, at 372.

282. *Banking, Treasury and Fed Publish Joint Proposals on BSA Requirements*, DAILY REP. FOR EXECUTIVES, Sept. 1, 1993, § A, at 168.

283. Meredith, *supra* note 256, at 9.

284. *Wire Transfer Rules May Benefit From Medical Technology*, *supra* note 43.

285. *Id.*

286. *Id.*

287. *Id.*

without the full cooperation of the nation's financial institutions? (3) If full cooperation is forthcoming, will the institutions suffer as a large percentage of currency detours around the system? To date, sadly, the flow of illicit funds into and out of the United States continues unabated despite all of the best efforts of concerned banks, non-bank financial institutions, and world-wide law enforcement.