
FinCEN Issues Proposed Rule Expanding Reporting Requirements for International Wire Transfers

2010-09-30

On September 27, 2010, the Financial Crimes Enforcement Network (FinCEN) issued a Notice of Proposed Rulemaking (Proposed Rule) that would dramatically increase the reporting requirements, and the costs, for international wire transfers by banks and money transmitters. Currently, financial institutions are only required to report wire transfers if deemed suspicious and retain records for transfers of at least \$3,000. Under the Proposed Rule, "[Cross-Border Electronic Transmittals of Funds](#)," FinCEN would for the first time require banks transacting directly with foreign financial institutions in sending or receiving international wire transfers to submit the related money transmittal orders or the equivalent information to FinCEN; similarly situated money transmitters would be required to submit transmittal orders or the equivalent information for international wire transfers of at least \$1,000. Moreover, the Proposed Rule also would require all banks to transmit to FinCEN an annual report listing the account number and accountholder's tax identification number (TIN) for all accounts used to send or receive international wire transfers; reporting money transmitters must submit this information for transfers of at least \$3,000.

FinCEN states that the proposed comprehensive reporting requirement is necessary to close frequently used loopholes in the wire transfer rules, which are exploited for money laundering, terrorist financing, and tax evasion purposes. For example, criminals will send funds in increments just below the current recordkeeping thresholds, using multiple financial institutions or wire transmitters to avoid detection as a suspicious activity. The Proposed Rule would allow FinCEN to collect the reports in a centralized database of cross-border fund transmittal information and link that data with other financial intelligence. FinCEN could use this database to detect patterns of suspicious money transfers and to monitor investigation subjects more effectively. FinCEN also believes the reporting requirements would help detect and combat tax evasion, which often does not fit the traditional money laundering patterns covered by existing wire transfer reporting and recordkeeping rules.

On the other hand, the Proposed Rule has raised both effectiveness and privacy concerns. The proposed reporting requirements would flood FinCEN with a massive amount of wire transfer data, an estimated 750 million records a year compared to the approximately 14 million transaction

reports it collects under current regulations. FinCEN acknowledges that receiving, analyzing, and disseminating this information would be a "daunting task," and banks and money transmitters should be prepared for significant compliance costs of their own. Moreover, FinCEN would now have identification and transmittal information for every individual who transmits or receives funds via international money transfers, possibly creating significant privacy and security challenges.

Background

The Proposed Rule is FinCEN's long-awaited rulemaking that meets the requirements of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). Section 6302 of the IRTPA (31 U.S.C. § 5318(n)) required the Treasury Department to study the feasibility of requiring financial institutions to report certain Cross-Border Electronic Transmittals of Funds (CBETFs) to FinCEN. If such reporting was deemed "reasonably necessary" to combat money laundering and terrorist financing, IRTPA directed the Treasury Department to issue regulations requiring this reporting by three years after the IRTPA's enactment in 2004. The Treasury Department completed the required feasibility report under IRTPA in January 2007, which recommended among other things a phased implementation of CBETF data rules. FinCEN then conducted an in-depth study of the proposed first step of implementation, and has now released its proposed regulations based on the findings in these two studies.

The Proposed Rule is also authorized by the Bank Secrecy Act (BSA), which directs the Treasury Department to require reports on monetary instrument transactions if the reports would have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311(b). Notably, the Proposed Rule emphasizes tax evasion as a rationale for the new reporting requirements. The previous fund transfer regulations, however, have focused on fighting money laundering and terrorist financing, rather than tax crimes. By contrast, the Preamble of the Proposed Rule frequently cites combating tax evasion as a goal, and it states that the purpose of the annual TIN filing "is to enhance the usefulness of the funds transfer data to better detect, investigate, and prosecute money laundering and terrorist financing to the extent such crimes also may involve tax evasion." This tax focus may indicate an increased emphasis by FinCEN on using the BSA to stem tax evasion and other tax crimes.

Details of the Proposed Reporting Requirements

The Proposed Rule would amend the BSA regulations to require reporting by certain banks of CBETFs, and to require reporting by certain money transmitters of all such transfers of at least \$1,000. The Proposed Rule would apply to a "reporting financial institution," which would be defined as any "bank" or "money transmitter," as currently defined by the BSA regulations, that would qualify as a "first-in" or "last-out" financial institution. A "first-in financial institution" (FIFI) would be one that received a transmittal order or advice for a CBETF from a foreign financial institution. A "last-out financial institution" (LOFI) would be one that sent a CBETF transmittal order or advice to a foreign financial institution. Through these definitions, the Proposed Rule would exempt from CBETF reporting requirements smaller banks and money transmitters that do not serve in a correspondent

role for CBETFs.

Under the Proposed Rule, reporting financial institutions would have to file a report for every CBETF, defined as "a transmittal of funds where either the transmittal order or the advice is: (i) communicated by electronic means; and (ii) sent or received by either a first-in or last-out financial institution." Based on the current definition of a "transmittal of funds" in the BSA regulations, funds transfers governed by the Electronic Fund Transfer Act of 1978, as well as any other funds transfers that are made through an automated clearinghouse, an automated teller machine, or a point-of-sale system would be excluded from the Proposed Rule. Also excluded by the Proposed Rule would be debit notifications that cover the CBETF to foreign financial institution accounts held at the FIF; retransmissions for authentication purposes; or notifications to a third party that originates or is the beneficiary of the transmittal. However, a CBETF would include notifications to a foreign financial institution of a credit to its correspondent account, when the notification is used by that institution as the operative instrument for CBETF payment to the beneficiary. Reports would also have to be filed for CBETF transmittal orders even when actual payment of the order had not occurred. CBETFs between banks with no third-party customers would be exempt from both CBETF reporting and annual TIN reporting, as would be CBETFs communicated solely through a bank's own proprietary systems, such as interbranch transfers.

The Proposed Rule would require that reporting banks file reports for all CBETFs, but reporting money transmitters would have to file reports only for CBETFs exceeding \$1,000. FinCEN determined that requiring reports for all bank CBETFs would lower bank compliance costs because banks would not have to segregate CBETFs based on amount, and because inadvertent reporting of below-threshold transmissions might implicate privacy laws. FinCEN proposed setting a \$1,000 threshold for money transmitters because it determined that many money transmitters with global businesses have adopted recordkeeping requirements relating to funds transfers at or above the \$1,000 level (which is the threshold recommended by the Financial Action Task Force).

Reporting financial institutions would be able to fulfill CBETF reporting requirements by submitting copies of certain standard format transmittal orders, such as Society for Worldwide Interbank Financial Telecommunication (SWIFT) messages, and they could direct SWIFT or other third-party carriers to report CBETF information on their behalf. Responsibility for compliance with the proposed reporting requirements would remain with the reporting financial institution. If a reporting financial institution could not use a standardized reporting format or employ a third party, it would be required to submit to FinCEN information currently required to be kept under the Funds Transfer Rule and the Travel Rule, which apply to transmittals of funds of \$3,000 or more. 31 C.F.R. § 103.33(e)-(g). In addition, the reporting institutions would also have to submit a unique transaction identifier number, if available. All reports would have to be filed within five business days of sending or receiving the transmittal order and sent discretely or in batches; aggregation would not be permitted.

As a separate requirement, all banks, even those not subject to the CBETF reporting requirement, would have to file annually with FinCEN a list of TINs of accountholders who transmitted or received

a CBETF, along with the account number that was credited or debited for that transaction. This report would have to be submitted by April 15 of the year following the CBETF transaction date. FinCEN would then attempt to link the CBETF reporting information with the data contained in the annual TIN reports using the US transmitter's or receiver's account number. Similarly, money transmitters reporting a transaction of at least \$3,000 would have to include the US taxpayer or alien identification number of the transmitter or recipient in their CBETF report. FinCEN understands that banks and reporting money transmitters can rely on existing automated systems to detect evidence of CBETF activity in a customer account and provide the annual reports, though FinCEN is seeking public comment on whether this understanding is correct.

Public Comments Solicited

FinCEN is seeking public comment on numerous aspects of the Proposed Rule, including: effects on customer privacy; cost and impact on affected financial institutions; potential third-party carriers other than SWIFT; use of payment or settlement systems to provide the required information; message standards; costs and benefits of reporting CBETFs processed solely through bank proprietary systems; potential for duplicate message reporting; effect on cross-border remittances; possible reporting formats; report frequency; potential for alternate CBETF channels to avoid the new requirements; and effect of TIN reporting on the banking and money transmitter industries. Written comments must be submitted within 90 days of the Proposed Rule's publication in the Federal Register.

FinCEN does not anticipate issuing a final rule until 2012 because, prior to that point, it would not be able to meet the IRTPA requirement that it have the necessary technology in place to accept required reports before it prescribes reporting regulations. 12 U.S.C. § 5318(n)(5)(B). FinCEN then expects to delay the compliance date of the final rule to allow reporting financial institutions sufficient time to adjust their technology systems for compliance.

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