Center for Financial Privacy and Human Rights

Free markets are a necessary condition of liberty, prosperity and tolerance.

August 21, 2006

Robert W. Werner, Director
regcomments@fincen.treas.gov
FinCEN
P.O. Box 39
Vienna, VA 22183
Attn: Regulatory Identification Number (RIN) 1506-AA86

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551
Attn: Regulation S, Docket No. R-1258

Re: Comments of the Center for Financial Privacy and Human Rights on Regulatory Identification Number (RIN) 1506-AA86 and Docket No. R-1258 concerning the Threshold for the Requirement to Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds

To Whom It May Concern:

The Center for Financial Privacy and Human Rights is a public interest research center in Washington, D.C. Established in 2005, CFPHR is part of the Liberty and Privacy Network, a 501(c)(3) organization, and focuses on privacy, civil liberties and human rights including economic rights.

We submit the comments below on the review by the Financial Crimes Enforcement Network (FinCEN) and the Federal Reserve to determine whether to lower or eliminate the threshold for collecting and retaining information on funds transfers and transmittals of funds. Currently, the threshold is $3,000, but FinCEN and the Federal Reserve are considering decreasing that amount to $1,000 or less.

The lowering or elimination of the reporting threshold must meet the "high degree of usefulness" standard set out by the Bank Secrecy Act. This proposal outlines no metrics to justify the presumption that it meets that standard. CFPHR suggests that proposal must explain the metrics used to determine how, or if, the proposal would meet the high degree of usefulness standard.[1] Explicit benchmarks must be established, and that the proposal should be abandoned within a predetermined time period if those benchmarks were not realized.

Additionally, the proposal provides insufficient information about the usefulness of the current reporting system. How many reports initiate law enforcement or regulatory investigations? What percentage of the reports are used in criminal convictions, etc.? What successes can be identified by the ten years of wire transfer reporting requirements? The lack of basic usefulness information renders impossible an analysis and recommendations of the considered marginal benefits of lowering or eliminating the reporting threshold compared to the marginal costs.

Given that the current $3,000 reporting threshold was established ten years ago and never adjusted for inflation, there has already been a substantial reduction in the real value reporting threshold. What marginal benefits--and marginal costs--have already been realized over the course of the decade? The dearth of information itself to justify the high degree of usefulness standard of the Bank Secrecy Act requires that the proposal be resubmitted for public comment with appropriate information to evaluate the proposal.

A great deal of personally-identifiable information is collected, retained and transmitted to third parties of law-abiding customers going about their legal financial transactions. Given the legitimate concerns of identity fraud, the selling and sharing of information without their true informed consent and other issues, efforts should be made to minimize the required amount of information collected, retained and transmitted--not to increase it unjustifiably.

CFPHR shares the view of the Independent Community Bankers of America (and that of most financial institutions and most other observers) that the unintended consequences of the regulation would add an increased incentive for potential customers of the formal financial sector covered by this rule to migrate their business to the informal sector (which would suffer not suffer the increased intrusiveness or regulatory burden).[2] In truth, lowering--or worse eliminating--the reporting threshold would jeopardize access to financial services to those with the fewest options since they are

---

[1] See "Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis," by Daniel J. Mitchell, Qbdf !Mbx !Sf wjf x - Vol. 25, (2005)- www.library.law.pace.edu/PLR/25-2/Mitchell.pdf.

[2] 2 "ICBA Cautions Against Lowering Threshold for Wire Transfers," August 10, 2006, http://www.icba.org/files/ICBASites/PDFs/cl081006.pdf.

usually the least profitable customers. [3] Thus, in this way, law enforcement would be relatively worse off than under the current reporting regime if more transactions took place in the informal sector without reporting regimes.

The increased reporting requirements would dramatically increase the problems associated with law enforcement complaints of the current "defensive filing" problem of the Suspicious Activity Report requirements.[4] Making the haystack bigger makes the needle harder to find. The increase in reports would, nearly certainly, increase the delay of the input of the information from all of the reports thus postponing the potential benefits to law enforcement of the possibly time-sensitive information.

Other ways could (and should) be employed to address important law enforcement concerns without the negative unintended consequences of this proposal. Such efforts should stem from clearly--and narrowly--identified law enforcement concerns. How to address those concerns should be left to the individual financial institutions covered by the rule as much as possible in order to avoid the "fatal conceit" explained by Nobel laureate economist F.A. Hayek.[5]

Eliminating the reports altogether should be considered. Substituting different reports tailored to the specific needs of law enforcement might provide a win, win, win situation for law enforcement, financial institutions and consumers. Consider having covered financial institutions report only aggregate capital flow information coupled with expanded safe harbor to report violations of specified important laws or suspicious

---

[3] See also the Brookings Institution report "From Poverty, Opportunity: Putting the Market to work for Lower Income Families" which would characterize the proposal as increasing the "ghetto tax" on the poor (July 2006), http://www.brookings.edu/metro/pubs/20060718_PovOp.htm, and "Financial Access for Immigrants: Lessons from Diverse Perspectives" (May 2006), http://www.brookings.edu/metro/pubs/20060504_financialaccess.pdf.

[4] Then-FinCEN Director William J. Fox spoke to the American Bankers Association and American Bar Association in October 2004 and addressed defensive filing of SARs: "We all know this phenomenon is occurring – we have both empirical and anecdotal evidence we can cite. We have seen financial institutions file reports in ever increasing numbers – often upon the recommendation of their lawyers or risk management teams – when the facts as presented do not meet this standard. I suspect that this over compliance is occurring for a reason. It is occurring because financial institutions are – justifiably in my view – unwilling to accept the regulatory or reputational risk associated with an action by the government that would make it appear that the institution is soft on anti-money laundering or, even worse, on terrorist financing."

[5] "The Fatal Conceit Always Fails" by Ralph Reiland explains, "In The Fatal Conceit, the Nobel laureate economist F.A. Hayek writes of the key ideological conflict in economics. On the one hand are 'the advocates of the spontaneous extended human order created by a competitive market,' and on the other hand, 'those who demand a deliberate arrangement of human interaction by central authority based on collective command over available resources.' What has failed is the latter, collectivism--the 'fatal conceit' that says that a single mind, a single committee, can somehow do things better than the spontaneous, unstructured, complex, and creative forces of the market," http://www.taemag.com/issues/articleID.17894/article_detail.asp.

transactions. The aggregated capital flow reports would offer law enforcement the information used to track marginal changes in capital flows useful for investigations such the Colombian Black Market Peso Exchange case. At the same time, it would better protect sensitive consumer financial privacy concerns. This proposal would reduce the regulatory burden on covered institutions and likely increase the share of transactions in the formal banking sector reporting information useful to law enforcement. Reporting of aggregate capital flow information would ameliorate the concerns of law enforcement that money launderers and terrorist financiers of their "structuring" transactions to avoid reporting requirements.

Again, CPFHR shares the view outlined by the Independent Community Bankers of America concerning the burden to the public. Some geographic and other populations would be disproportionately adversely affected by the lowering, or elimination, of the reporting threshold.

The "unbanked," who are disproportionately poor, minority and immigrant, would likely suffer most by this proposed change. Such harms contradict other public policy concerns.[6] The marginal effect of increasing the cost of sending remittances abroad increases the marginal benefit of bringing family along for immigrants (legal or otherwise) working in this country.[7]

Conclusion

The negative effects to law enforcement, the increased cost of the regulatory burden, and the increased loss of consumer financial privacy and access to formal financial services for the unbanked would likely outweigh any alleged benefit to law enforcement by lowering, or eliminating, the reporting requirement threshold. The termination of the BSA Direct Retrieval and Sharing Project by FinCEN for exceeding costs and failing to meet expectations augurs well for a long-overdue consideration by the regulatory agencies of the "high degree of usefulness" standard mandated by the Bank Secrecy Act.[8]

---

[6] For one example, please see U.S. House Judiciary Committee Report, "FINANCIAL SERVICES REGULATORY RELIEF ACT OF 2005," http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr356p2.109.pdf.

[7] See the United States Government Accountability Office Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate "INTERNATIONAL REMITTANCES: Information on Products, Costs, and Consumer Disclosures," (November 2005) www.gao.gov/new.items/d06204.pdf.

[8] "FinCEN Halts BSA Direct Retrieval and Sharing Project," July 13, 2006, http://www.fincen.gov/bsa_direct_nr.html.

The regulatory agencies cannot legitimately consider the alleged marginal benefits of lowering, or eliminating, the wire transfer reporting threshold without first outlining the means of evaluating the current requirements and analyzing its costs and benefits. The failures of the current system at the root of the concern for this proposal indicate that scraping and replacing the failed system with one designed to address current needs, concerns and capabilities would be better.

The current system was designed to stop illegal drug use, among other things, but has failed: no one believes it is now impossible to obtain illicit drugs nearly everywhere in this country. The current reporting requirements were designed to report "bad money" such as profits from illegal drug sales. Instead of expanding the reporting regime to find legitimate money that may in the future be used for bad purposes (such as terrorism financing), we should design a system for current goals balanced with current expectations of regulatory burden and consumer issues including financial privacy and access to financial services--especially for the unbanked. In short, the Center for Financial Privacy and Human Rights opposes lowering or eliminating the threshold for reporting wire transfers.

Thank you for the opportunity to comment. If you have any questions or need additional information, please do not hesitate to contact me at 202-742-5949 ext. 101 or by email at bjansen@financialprivacy.org.

Respectfully submitted,

s/
J. Bradley Jansen, Director
Center for Financial Privacy and Human Rights