BAFT-IFSA

ONE VOICE FOR THE INTERNATIONAL BANKING COMMUNITY

December 28, 2010

James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Attention: Cross-Border Electronic Transmittals of Funds

Re: Cross-Border Electronic Transmittals of Funds – RIN 1506-AB01

Dear Mr. Freis:

BAFT-IFSA is an international financial services trade association whose membership includes a broad range of financial institutions throughout the global financial community. As a worldwide forum for analysis, discussion, and advocacy in international financial services, BAFT-IFSA member banks have a high interest in preserving the safety and soundness of the global financial system.

BAFT-IFSA welcomes the opportunity to comment on the Financial Crimes Enforcement Network (FinCEN) proposal to issue regulations that would require certain banks and money transmitters to report to FinCEN transmittal orders associated with certain cross-border electronic transmittals of funds (CBETFs) and FinCEN's proposal to require an annual filing by all banks of a list of taxpayer identification numbers (TIN) of accountholders who transmitted or received a CBETF. Our comments outlined to FinCEN are limited to issues in Cross-Border Electronic Transmittals of Funds – RIN 1506-AB01 related to the banking industry.

Introduction:

BAFT-IFSA strongly supports FinCEN's ongoing work of combating money laundering and terrorist financing in a way that accommodates the needs of the markets for an efficient funds-transfer system. We believe that a thoughtful and coordinated approach by both the public and private sector will further reduce the use of funds-transfer systems by money launderers and terrorist entities.

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BAFT-IFSA is concerned, however, with some aspects of the proposed rulemaking. Our comments on the two reporting requirements raise concerns, request clarifications, and respond to questions raised in the Notice of Proposed Rule Making (NPRM)[1]. BAFT-IFSA looks forward to working with FinCEN to resolve areas of concern in order to make CBETF reporting and the annual TIN filing effective tools. Specifically, financial institutions require sufficient time to plan, resource, and implement the CBETF reporting and the annual TIN reporting described in the NPRM.

BAFT-IFSA believes that the initial phase of reporting should be restricted to SWIFT MT103 and SWIFT MT202COV messages, as the level of complexity increases dramatically when additional payment networks and message types are added. We support a phased-in approach for CBETF reporting and strongly recommend the creation of an industry working group under the Bank Secrecy Act Advisory Group (BSAAG) to develop that approach. Once FinCEN issues the final rule, we believe sufficient time (18-24 months) will be required by financial institutions to develop the necessary systems and processes to ensure compliance, as there is a substantial technology prerequisite needed to meet the requirements. Furthermore, the banking industry needs to be assured of a regulatory 'safe-harbor' should a financial institution choose, as described in the NPRM, to report copies of certain standard format transmittal orders as these transmittal orders are likely to contain more than the required ten data elements. Expanded definitions for some terms in the rulemaking would also be beneficial to ensure clear implementation of the requirements.

Additionally, we believe a feasibility study is needed to fully assess the production of the annual TIN report and to ensure that its proposed requirements do not duplicate or overlap with other measures to counter tax evasion, such as pending Fair and Accurate Credit Transactions Act (FATCA) and existing US Treasury Foreign Bank and Financial Accounts (FBAR) requirements.

<u>Issues:</u>

1. **CBETF Reporting**

BAFT-IFSA supports a phased-in approach to implementation of CBETF reporting. Reporting on the SWIFT MT103 and SWIFT MT202COV messages is clear for the initial phase and we believe it is practical to limit it to these two message types in the beginning to ensure the process is functioning effectively. FinCEN should also verify which message types are excluded during this phase-in period.

[1] *Supra* IV. Sec. I Protection of Private Personal Financial Information

In addition, we respectfully provide observations on the following topics that we believe require further examination by an industry working group before the final rule is issued:

Financial Privacy Regulations

Financial privacy laws vary from country to country, and place different restrictions on the release of customer or transactional data, absent a subpoena or similar specific law enforcement request. A financial institution possessing charters in both the US and a non-US jurisdiction could encounter legal risk where reports required under the proposed rule run counter to privacy laws of other jurisdictions.

Duplicate Transmittal Orders

As currently constructed, the rule has potential to lead to the accumulation of *true duplicates* (those where an advice and a transmittal order match cover the same transaction), *logical duplicates* (where an original transmittal order is amended prior to settlement and both records would be in the FinCEN CBETF repository) and *transactional duplicates* (two different first-in organizations receive a SWIFT MT103 and its associated SWIFT MT202COV, respectively.) Because of the balance achieved by FinCEN with respect to data collection under the Rule and the rights to financial privacy, it may not be possible to resolve duplicates.

Transmittal Orders Never Settled

The reasons that a transmittal order may not result in a payment range from a lack of funds to a case where a transmittal order involves an OFAC-listed entity. This will result in the accumulation of CBETF records representing payments that not only were not made, but could not have been made. In addition, transmittal orders can be amended prior to settlement, and the current NPRM excludes these amendment messages from reporting. Between these two conditions, the CBETF database will accumulate a number of transmittal orders that either 1) were not settled, 2) could not have been settled, or 3) were settled with different payment data than recorded. Any query by law enforcement will result in a set of transmittal orders that were settled, transmittal orders that were not settled, duplicate transmittal orders and transmittal orders that were settled, but with different details. Unless law enforcement is capable of distinguishing among these results for themselves, financial institutions may be called upon to provide that clarification under the proposed rulemaking.

Implementation Time Frame

Changes of a similar scale to the NPRM (SWIFT MT202COV payment message formats, IAT (International ACH Transaction) message formats, and the Fedwire Extended

Remittance Information enhancement) have generally taken 18 to 24 months to implement from the time their respective specifications were finalized. Given these recent experiences, the banking industry believes that a similar period of 18 to 24 months will likely be needed to ensure compliance.

Estimated Cost

Based on input from BAFT-IFSA member institutions, the annual cost for a large first-in/last-out institution to provide this data is greater than the estimate in the NPRM. Whether a financial institution contracts with a designated third party, such as SWIFT, to provide CBETF data, or it creates its own reports, the financial institution will have to develop additional systems and databases to provide required record retention support to legal order processing or research staff to facilitate responses to law enforcement inquiries.

2. CBETF Terminology

BAFT-IFSA believes that greater clarity is needed for definitions referenced in the NPRM. We offer the following observations and suggestions for these specific definitions.

Advice

The terms “transmittal order” and “advice” have specific and distinct meanings within the payments industry. This distinction is not evident in the NPRM. A transmittal order is a message which instructs the receiver of the transmittal order to transfer funds, i.e., debit or credit a depository account. An advice is a message that confirms or provides information regarding a particular transfer such as payments received, funds transferred, services performed, or payments made. A clear distinction would ensure greater clarity in the rulemaking process.

Exclusion of Telex, Email, Telephone and Facsimile Transmission from Reporting

Email, telephone and facsimile systems are not the same as the formal transmittal orders that are the focus of CBETF reporting. Telex transmissions serve as an entry point to payment messaging networks like SWIFT. BAFT-IFSA requests that FinCEN confirm transactions exchanged by telex, email, telephone and facsimile will be excluded from reporting requirements.

Data Security

Recognizing that financial institutions and third party carriers like SWIFT contribute to the security and protection of data reported under the proposed rule, a clarification of FinCEN’s role in this process would be beneficial. We question whether the same population of domestic and international law enforcement officials that can use the existing 314(a) request process will have access to the CBETF database. Additionally, greater clarity is needed regarding whether the CBETF database will be categorized under the Department of the Treasury Security Classification Guidelines (December 2010).

Record Retention Requirements

BAFT-IFSA believes the definition of record retention requirements related to this reporting requires clarification. Specifically, we believe an articulation of whether reporting institutions will be required to retain records different from established retention thresholds is needed.

3. **US Dollar Payment Migration**

BAFT-IFSA agrees that there is a potential for CBETFs to migrate to other CBETF channels. Over the past decade offshore USD clearing centers have come into existence, along with offshore commercial clearing centers in local currencies. The existence of these readily available, alternative US Dollar clearing channels may lead to volume shifting to them. The result would be transactions not subject to US regulatory overview, and costs to the US financial services industry as a result of lost revenue.

4. **Annual TIN Reporting**

The Annual TIN Reporting proposal presents challenges for the last bank to identify the origin of a payment. As FinCEN notes in footnote 56 of the NPRM, an institution at the end of a normal payment chain, where a transmittal order has been translated from one payment system to another, and passed through intermediary institutions, data points critical to identifying an incoming CBETF may now not be readily available in the systems. To ensure accurate reporting, substantive changes to the payment systems will be required.

BAFT-IFSA believes that benefit could be derived from a feasibility study for the Annual TIN report. Such an effort would help resolve questions left open in the NPRM. Banks maintain their records in very different ways and we believe that the information technology systems will require more resources than suggested in the NPRM.

Additionally, a more complete discussion of the statutory basis for the annual TIN Report would be beneficial. The NPRM makes reference to Section 6302 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), but the provision of an annual listing of account numbers and TINs does not seem directly related to the task of building a centralized database of cross-border funds transfer details. As described in the NPRM, the listing would not contain transaction details or summaries (the transaction details are gathered via the CBETF reporting function), and the account numbers duplicate data found in the CBETF reports. BAFT-IFSA respectfully requests that FinCEN confirm that the building of this database is supported by IRTPA.

Lastly, the rulemaking would benefit from further clarity on a number of definitions and topics concerning the annual TIN Report:

Data Points

The NPRM mentions the requirement of two data points; account numbers and the associated TIN. BAFT-IFSA respectfully requests confirmation that no other data is required.

Report or File Format

BAFT-IFSA believes a more explicit definition is required for report and file formats. This will have a direct bearing on the requirements needed for building the report, and the ongoing production of the annual reports.

Account

BAFT-IFSA believes the definition for Account provided in the NPRM is broad and would, *inter alia*, encompass brokerage accounts, loan accounts, foreign exchange settlement accounts, certificates of deposit and demand deposit accounts. Based on the stated goals of this report, we believe the effective focus should be on demand deposit accounts only.

Non-Account Holder Transactions

BAFT-IFSA respectfully requests greater clarity on what data, if any, should be reported for non-account holders or parties without TINs.

Data Retention Requirements

BAFT-IFSA believes that greater clarity regarding the statutory basis for the Annual TIN Report would help define the appropriate record retention threshold.

Financial Privacy Impact

BAFT-IFSA believes that an annual report linking account numbers to TINs would intersect with privacy issues related to individually identifiable financial data. An assessment on the Annual TIN report which determines how the new requirement intersects with evolving privacy concerns would be beneficial.

Cost to Provide the Annual TIN Report

BAFT-IFSA believes that the estimated cost to provide the Annual TIN Report suggested in the NPRM underestimates the effort and cost. The analogy to 1099 reporting is inapt. It is practical to expect a financial institution's accounting systems to report on total debits and credits to a demand deposit account quickly and efficiently. However, restricting the debits and credits to only those resulting from a CBETF not processed on a proprietary system would require significantly greater effort, and greater cost. Over the broad population of financial institutions required to provide Annual TIN reports under the proposed rule, it is reasonable to assume that both vendor and in-house systems will require modification.

Conclusion:

BAFT-IFSA is broadly supportive of the proposal as outlined in the Cross-Border Electronic Transmittals of Funds rulemaking. However, some of the proposals outlined give rise to concern for the banking industry.

BAFT-IFSA respectfully recommends that FinCEN form a working group with the banking industry and payment messaging networks to further study and address these issues and concerns.

We very much appreciate the opportunity to comment on the consultative document and look forward to further dialogue with FinCEN on these issues going forward. If you have any questions, please feel free to contact me at (202) 663-5531 or joe.pawelczyk@baft-ifsa.com.

Very truly yours,

Joseph Pawelczyk
Vice President, Payment Products