

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA86

FEDERAL RESERVE SYSTEM

12 CFR Part 219

[Regulation S, Docket No. R-1258]

Threshold for the Requirement to Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds

AGENCIES: Financial Crimes Enforcement Network, Department of the Treasury; Board of Governors of the Federal Reserve System.

ACTION: Joint advance notice of proposed rulemaking (Advance Notice).

SUMMARY: The Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury (Treasury) and the Board of Governors of the Federal Reserve System (Board) are reviewing the threshold in the rule requiring banks and nonbank financial institutions to collect and retain information on funds transfers and transmittals of funds. FinCEN is reviewing the threshold in the rule requiring banks and nonbank financial institutions to transmit information on funds transfers and transmittals of funds. The requirement to collect, retain, and transmit information on funds transfers and transmittals of funds applies only to funds transfers and transmittals of funds in amounts of \$3,000 or more. FinCEN and the Board (collectively, the Agencies) request comment from the public, including law enforcement and financial institutions, to assess whether the potential benefit to law enforcement of a lower threshold outweighs the potential burden to financial institutions.

DATES: Written comments on this Advance Notice may be submitted on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES:

FinCEN: You may submit comments, identified by Regulatory Identification Number (RIN) 1506-AA86, by any of the following methods:

- Federal E-rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506-AA86 in the submission.
- E-mail: regcomments@fincen.treas.gov. Include 1506-AA86 in the subject line of the message.

- Mail: FinCEN, P.O. Box 39, Vienna, VA 22183. Include 1506-AA86 in the body of the text.

All comments received will be posted without change to <http://www.fincen.gov>. Your comments will not be edited to remove identifying, contact, or other personal information. Comments may be inspected in the FinCEN reading room between 10:00 a.m. and 4:00 p.m. in Washington, D.C. Persons wishing to inspect comments must request an appointment by telephone at (202) 354-6400 (not a toll-free number).

Board: You may submit comments, identified by Docket No. R-1258, by any of the following methods:

- Agency web site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.
- Federal E-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov.
- Fax: (202) 452-3819 or (202) 452-3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments are available from the Board's web site at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm, as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT:

FinCEN: Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, (800) 949-2732.

Board: James K. Owens, Manager, (202) 728-5848, Division of Reserve Bank Operations and Payment Systems, Suzanne L. Williams, Manager, (202) 452-3513, Division of Banking Supervision and Regulation, or Christopher W. Clubb, Senior Counsel, (202) 452-3904, Legal Division. For the hearing impaired only: Telecommunications Device for the Deaf, (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory and Regulatory Background

The Bank Secrecy Act (BSA) (Pub. L. 91-508, codified at 12 U.S.C. 1829b and 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332) authorizes the Secretary of the Treasury (Secretary) to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in intelligence or counterintelligence matters to protect against terrorism. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN. The BSA was amended by the Annunzio-Wylie Anti-Money Laundering Act of 1992 (Pub. L. 102-550) (Annunzio-Wylie). Annunzio-Wylie authorizes the Secretary and the Board to jointly issue regulations requiring insured depository institutions to maintain records of domestic funds transfers.¹ In addition, Annunzio-Wylie authorizes the Secretary and the Board to jointly issue regulations requiring insured depository institutions and certain nonbank financial institutions to maintain records of international funds transfers and transmittals of funds.² Annunzio-Wylie requires the Secretary and the Board, in issuing regulations for international funds transfers and transmittals of funds, to consider the usefulness of the records in criminal, tax, or regulatory investigations or proceedings, and the effect of the regulations on the cost and efficiency of the payments system.³

On January 3, 1995, the Agencies jointly issued a recordkeeping rule that requires banks and nonbank financial institutions to collect and retain information on funds transfers and transmittals of funds in amounts of \$3,000 and more.⁴ At the same time, FinCEN issued a rule – the travel rule – that requires banks and nonbank financial institutions to transmit information on funds transfers and transmittals of funds to other banks or nonbank financial institutions.⁵ The recordkeeping rule is codified at 31 CFR 103.33(e) and (f),⁶ and the travel rule is codified at 31 CFR 103.33(g).⁷

B. Overview of the Recordkeeping and Travel Rules

The recordkeeping and travel rules in 31 CFR 103.33 require banks and nonbank financial institutions to collect, retain, and transmit information on funds transfers and transmittals of funds in amounts of \$3,000 and more.

¹12 U.S.C. 1829b(b)(2). The Treasury – and not the Board – is authorized to issue regulations requiring nonbank financial institutions to maintain records of domestic transmittals of funds.

²12 U.S.C. 1829b(b)(3). The terms “funds transfer,” “originator,” “beneficiary,” and “payment order” apply only in the context of banks. The term “transmittal of funds” includes a funds transfer and its counterpart in the context of nonbank financial institutions. See 31 CFR 103.11(jj). Transmitters, recipients, and transmittal orders in the context of nonbank financial institutions play the same role as originators, beneficiaries, and payment orders in the context of banks.

³12 U.S.C. 1829b(b)(3).

⁴60 FR 220-01 Jan. 3, 1995.

⁵60 FR 234-01 Jan. 3, 1995. The Bank Secrecy Act authorizes the Treasury to issue regulations requiring financial institutions to implement procedures for complying with the Bank Secrecy Act and to guard against money laundering. FinCEN issued the travel rule pursuant to this authority.

⁶Through a separate rulemaking, the Board added on January 3, 1995 a new subpart B to 12 CFR Part 219, which cross-references the requirements of 31 CFR 103.33(e) and (f). See 60 FR 231-01 Jan. 3, 1995.

⁷Recordkeeping requirements for banks are set forth in 31 CFR 103.33(e). Recordkeeping requirements for nonbank financial institutions are set forth in 31 CFR 103.33(f). The travel rule – codified at 31 CFR 103.33(g) – applies by its terms to both bank and nonbank financial institutions.

Under the recordkeeping rule, the originator's bank or transmitter's financial institution must collect and retain the following information : (a) name and address of the originator or transmitter; (b) the amount of the payment or transmittal order; (c) the execution date of the payment or transmittal order; (d) any payment instructions received from the originator or transmitter with the payment or transmittal order; and (e) the identity of the beneficiary's bank or recipient's financial institution. In addition, the originator's bank or transmitter's financial institution must retain as much of the following information as the bank or nonbank financial institution receives with the payment or transmittal order: (1) name and address of the beneficiary or recipient; (2) account number of the beneficiary or recipient; and (3) any other specific identifier of the beneficiary or recipient. The originator's bank or transmitter's financial institution is required to verify the identity of the person placing a payment or transmittal order if the order is made in person and the person placing the order is not an established customer.⁸ Similarly, should the beneficiary's bank or recipient's financial institution deliver the proceeds to the beneficiary or recipient in person, the bank or nonbank financial institution must verify the identity of the beneficiary or recipient – and collect and retain various items of information identifying the beneficiary or recipient – if the beneficiary or recipient is not an established customer. Finally, an intermediary bank or intermediary financial institution – and the beneficiary's bank or recipient's financial institution – must retain originals or copies of payment or transmittal orders.

Under the travel rule, the originator's bank or transmitter's financial institution is required to include information, including all information required under the recordkeeping rule, in a payment or transmittal order sent by the bank or nonbank financial institution to another bank or nonbank financial institution in the payment chain. An intermediary bank or intermediary financial institution is also required to transmit information to other banks or nonbank financial institutions in the payment chain, to the extent the information is received by the intermediary bank or intermediary financial institution.

II. Issues for Comment

The requirement in 31 CFR 103.33 to collect, retain, and transmit information on funds transfers and transmittals of funds applies only to funds transfers and transmittals of funds in amounts of \$3,000 or more. This Advance Notice requests comment on the potential effect of lowering the threshold – or eliminating the threshold altogether – as a means of combating terrorism, money laundering, and other illicit activity and protecting the U.S. financial system from these threats. Money launderers and terrorist financiers have become increasingly sophisticated in their use of funds transfers and transmittals of funds. In addition, the operating environment for banks and other financial institutions has evolved since the issuance of the recordkeeping and travel rules for funds transfers and transmittals of funds.

In October 2001, the Financial Action Task Force issued “Special Recommendations on Terrorist Financing.”⁹ Special Recommendation VII aims to ensure that basic

⁸The term “established customer” is defined at 31 CFR 103.11(l).

⁹ See Nine Special Recommendations on Terrorist Financing (October 22, 2004). The document was amended on October 22, 2004 – with the addition of Special Recommendation IX on cash couriers. The Financial Action

information pertaining to the originator or transmitter in a funds transfer or transmittal of funds is collected, retained, and transmitted to banks or other financial institutions in the payment chain.¹⁰ The Financial Action Task Force recommends a de minimis threshold no higher than \$1,000 with the interest of identifying low value originators or transmitters without driving legitimate transactions underground and below regulatory review. The Agencies are considering the recommendation and assessing its appropriateness for the financial system in the United States.

A. Benefit to Law Enforcement

This Advance Notice requests comment on the benefit to law enforcement of reducing or eliminating the threshold for the requirement to collect, retain, and transmit information on funds transfers and transmittals of funds.

Funds transfers and transmittals of funds are fast and efficient methods of moving funds anywhere in the world. Criminals have used funds transfers and transmittals of funds to facilitate or commit financial and other crimes. Representatives from the United States Drug Enforcement Administration, the State of Arizona, the Puerto Rico High Intensity Financial Crime Area, the Office of the New York State Attorney General, and the civil and criminal investigatory functions of the Internal Revenue Service have all indicated that the additional information collected as a result of lowering or eliminating the threshold would prove beneficial to investigations of money laundering, terrorist financing, and other financial crime. These representatives of law enforcement have indicated that lowering or eliminating the threshold would promote the disruption of illegal activity and make illegal activity more expensive for perpetrators by forcing them to use costlier alternative means of transferring funds to avoid higher risks of detection for funds transfers and transmittals of funds beneath the current threshold.

Law enforcement has stated that criminals are aware of the current threshold and conduct transactions in amounts under the threshold to avoid providing identification. One agency, for instance, indicated that transactions in a money laundering and drug case involved amounts between \$2,600 to \$2,900. Another agency pointed to a money laundering incident – with a total value of over \$1 million in laundered funds – that involved human trafficking and forced labor. All of the transactions in the money laundering incident involved amounts less than \$3,000. One agency observed that the laundering of illegal proceeds from human smuggling involves transactions in amounts that average approximately \$1,800. The agency also observed that money launderers have started to structure these amounts, using multiple transactions in amounts that range from \$500 to \$1,000. The same agency analyzed data it collected – on nearly 100,000 transactions in amounts of \$750 or more – and determined that 97 percent involved amounts less than \$3,000.

The Agencies are interested in empirical support from law enforcement to document the degree of usefulness of a lower threshold in criminal, tax, or regulatory investigations or proceedings, or intelligence or counterintelligence matters. In this regard, the Agencies request responses from law enforcement to the following questions:

Task Force is an international, inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

¹⁰ See Revised Interpretative Note to Special Recommendation VII: Wire Transfers (June 10, 2005).

- (1) To what extent have funds transfers or transmittals of funds under the \$3,000 threshold been important to law enforcement investigations and proceedings? Please explain.
- (2) To what extent have law enforcement investigations or proceedings been hindered by the \$3,000 threshold? What is law enforcement's experience in being able to obtain records of transactions under the \$3,000 threshold pursuant to subpoenas or search warrants? How frequently has law enforcement encountered financial institutions that do not retain records of the transactions under the \$3,000 threshold and what types of institutions are involved?
- (3) How frequently has law enforcement identified cases where persons have structured funds transfers or transmittals of funds to be under the \$3,000 threshold in order to evade the recordkeeping requirement? How might structuring behavior change if the threshold was lowered to \$2,000? To \$1,000?
- (4) Inasmuch as information regarding international transmittals of funds can be obtained by law enforcement without a judicial order or other similar process, how often has currently available information been accessed, and how useful was it?

B. Burden to the Financial System

This Advance Notice requests comment on the burden to the financial system, if any, that would result from lowering or eliminating the threshold for the requirement to collect, retain, and transmit information on funds transfers and transmittals of funds. Concurrent with this Advance Notice, the Treasury is evaluating the burden to financial institutions and usefulness to law enforcement of a reporting requirement for certain cross-border funds transfers and transmittals of funds.¹¹ If the current \$3,000 threshold for the requirement to collect, retain, and transmit information on funds transfers and transmittals of funds is lowered or eliminated, the reporting requirement currently being considered could similarly include cross-border funds transfers or transmittals of funds in amounts less than \$3,000. Accordingly, in commenting on the burden to collect, retain, and transmit information on funds transfers and transmittals of funds resulting from lowering or eliminating the current threshold, commenters may also wish to comment on whether the extent or nature of the burden would be affected by promulgation of a requirement to report cross-border funds transfers and transmittals of funds below the \$3,000 threshold.

In deciding on a threshold of \$3,000 in 1995, the Agencies balanced the value of data on funds transfers and transmittals of funds with the burden to the financial system. The Agencies established the current threshold in response to concerns by financial institutions that imposing requirements to collect, retain, and transmit information on funds transfers and transmittals of funds could result in significant implementation and ongoing costs. The expansion of requirements under the Bank Secrecy Act and advancing technology, however, may have reduced the incremental cost of obtaining, retaining, and transmitting information on funds transfers and transmittals of funds in amounts below the current threshold.

¹¹ Section 6302 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458) authorizes the Secretary of the Treasury to prescribe regulations, if feasible, to require the reporting to FinCEN of certain cross-border funds transfers if such reporting is reasonably necessary to conduct the efforts of the Treasury against money laundering and terrorist financing.

In general, the responsibilities of financial institutions under the Bank Secrecy Act have expanded over time. For example, a money services business must now report suspicious transactions¹² and implement programs for ensuring compliance with the Bank Secrecy Act.¹³ Money services businesses may collect and retain information on transmittals of funds as a means of ensuring compliance with the requirement to report suspicious transactions. The requirement on the part of money services businesses to report suspicious transactions may mean that reducing or eliminating the threshold would impose less of an incremental cost. If this is not the case, the Agencies welcome comments from money services businesses.

In addition, technology has advanced since the issuance of the recordkeeping and travel rules for funds transfers and transmittals of funds. Banks and other financial institutions may use less expensive or more efficient means of electronic storage and retrieval.

The Agencies are gathering information on financial institutions' practices and procedures to measure the compliance burden of lowering the threshold. The Agencies request responses from financial institutions to the following questions:

- (1) What proportion of funds transfers or transmittals of funds that your financial institution processes as an originator's bank or transmitter's financial institution involves amounts less than \$3,000? What proportion involves amounts less than \$2,000? What proportion involves amounts less than \$1,000?
- (2) For each category of funds transfer or transmittal of funds – those involving amounts less than \$3,000, less than \$2,000, and less than \$1,000 – what proportion does your financial institution process as an originator's bank or transmitter's financial institution for originators or transmitters who fail to qualify as “established customers”? What proportion does your financial institution process as a beneficiary's bank or recipient's financial institution for beneficiaries or recipients who fail to qualify as “established customers”? Do the recordkeeping practices of your financial institution for these transactions – and the practices of your financial institution in verifying the identities of persons who fail to qualify as “established customers” – differ based on whether the funds transfer or transmittal of funds involves an amount above or below the current threshold of \$3,000? If so, please describe the differences.
- (3) Do the recordkeeping practices of your financial institution for funds transfers or transmittals of funds involving amounts below the current threshold of \$3,000 differ from those for funds transfers or transmittals of funds involving amounts above the threshold? If so, please describe the differences.
- (4) Does the information that your financial institution includes in payment or transmittal orders for funds transfers or transmittals of funds involving amounts below the current threshold of \$3,000 differ from the information that your financial institution includes in payment or transmittal orders for funds transfers or transmittals of funds involving amounts above the threshold? If so, please describe the differences.

¹² See 31 CFR 103.20. The requirement applies to transactions occurring after December 31, 2001. The threshold for the requirement to report suspicious transactions is \$2,000.

¹³ See 31 CFR 103.125. A money services business must implement the program on or before the later of July 24, 2002 and the end of the ninety-day period beginning on the day following the date the business is established.

- (5) How would reducing or eliminating the threshold affect the price and type of the services that your financial institution provides in connection with domestic and cross-border funds transfers or transmittals of funds? To the extent possible, discuss the effect based on reductions of the threshold in increments of \$1,000, or explain at which point lowering the threshold would substantially impact the price and type of services provided by your financial institution.
- (6) How would reducing or eliminating the threshold affect the cost and efficiency of payment operations at your financial institution and the payments system in general? To the extent possible, discuss the effect based on reductions of the threshold in increments of \$1,000, or explain at which point lowering the threshold would substantially impact the cost and efficiency of payment operations at your financial institution or the payments system in general.

C. Burden to the Public

Finally, the Agencies are gathering information on consumer practices and procedures to measure the effect of lowering the threshold. The Agencies request responses from the public to the following questions:

- (1) Would increases in the price of funds transfers or transmittals of funds result in the use of alternative methods of sending funds, such as sending a money order by post or courier?
- (2) Would a requirement for originator information below the current threshold result in the use of alternative methods of sending funds, such as sending a money order by post or courier?
- (3) Are there certain types of transactions that permit the use of alternative methods more than others? For transactions that allow for alternative methods, please explain how you would decide between the various methods of sending funds.
- (4) Do you engage in different behavior when making funds transfers and transmittal of funds above and below \$3,000 because of the current threshold? Please explain.

III. Conclusion

With this Advance Notice, the Agencies request comment on the potential effect of lowering or eliminating the threshold for the requirement in 31 CFR 103.33 to collect, retain, and transmit information on funds transfers and transmittals of funds. Comments on all aspects of the Advance Notice are welcome, and the Agencies encourage all interested parties to provide their views.

IV. Executive Order 12866

The Agencies do not know whether regulations under the Bank Secrecy Act will be amended, or the nature of any amendment. Consequently, the Agencies do not know whether the potential regulatory action would constitute a significant regulatory action under Executive Order 12866. This Advance Notice neither establishes nor proposes any regulatory requirements. Accordingly, the Agencies solicit comment, information, and data on the potential effects of any potential regulation.

In concurrence:

By the Department of the Treasury, June 9, 2006.

Robert W. Werner (signed)
Robert W. Werner
Director,
Financial Crimes Enforcement Network

[THIS SIGNATURE PAGE RELATES TO THE JOINT ADVANCE NOTICE OF PROPOSED RULEMAKING ON THE THRESHOLD FOR THE REQUIREMENT TO COLLECT, RETAIN, AND TRANSMIT INFORMATION ON FUNDS TRANSFERS AND TRANSMITTALS OF FUNDS]

By order of the Board of Governors of the Federal Reserve System, June 15, 2006.

Jennifer J. Johnson (signed)
Jennifer J. Johnson

Secretary of the Board