



November 29, 2010

### **FinCEN Proposes Rule that will Significantly Increase Reporting Requirements on Certain Financial Institutions**

The U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) is proposing a rule that will significantly increase reporting requirements on certain financial institutions and require them to report to FinCEN certain cross-border electronic transmittals of funds in order to better detect terrorist financing. FinCEN has found that electronic funds transfers feature prominently in the layering stage of money laundering activity. Currently, the U.S. government has no ability on a national scale to target financial crimes that are being conducted through wire transfers. Specifically, the current Bank Secrecy Act reporting regime requires financial institutions to file Currency Transaction Reports (CTR) when a person conducts certain types of large currency transactions such as deposits, withdrawals, exchanges, or other transfers of more than \$10,000 by, through, or to the financial institution. Wire transfers, however, are not included in CTR reporting requirements. Additionally, individuals and corporations must file Currency and Monetary Instrument Reports (CMIR) when travelers enter the United States with more than \$10,000 in currency. Like the CTR, wire transfers are not included in CMIR reporting requirements.

For more information, contact:

**Jeffrey Telep**  
+1 202 626 2390  
jtelep@kslaw.com

**Pulina Whitaker**  
+44 20 7551 7586  
pwhitaker@kslaw.com

**Julia Sorrentino**  
+1 202 626 2939  
jsorrentino@kslaw.com

**King & Spalding**  
**Washington, D.C.**  
1700 Pennsylvania Avenue, NW  
Washington, D.C. 20006-4707  
Tel: +1 202 737 0500  
Fax: +1 202 626 3737

[www.kslaw.com](http://www.kslaw.com)

**The Proposed Rule:** The proposed rule would require (1) certain banks and money transmitters to file periodic reports with respect to certain cross-border electronic transmittal of funds (CBETF) and (2) all banks to file an annual report for certain CBETFs with the account number that was credited or debited to originate or receive a CBETF and the accountholder's U.S. tax identification number. The definition of CBETF would not cover any debit card type of transmittals, point-of-sale (POS) systems, transactions conducted through an Automated Clearing House (ACH) process, or Automated Teller Machine (ATM).

Reporting banks would be required to file periodic CBETF reports on transactions of any amount (zero threshold), while reporting money transmitters would be required to file periodic CBETF reports on transactions for amounts equal to or greater than \$1,000



## International Trade & Litigation Practice Group

or its equivalent in any other currency. Banks will be able to report by either (1) submitting the complete copy of the transmittal order that it sends or receives or (2) by submitting ten specific data points outlined in the proposed rule (*e.g.*, name and address of transmitter, name and address of recipient, amount and currency of the transmittal of funds). FinCEN expects that banks will use third-party carriers of the transmittal orders (*e.g.*, SWIFT) to submit the copy on behalf of the bank.

**Exemptions:** The following CBETF are not subject to the reporting requirements: (1) cross-border electronic transmittals of funds where either the transmitter is a bank and the recipient is a foreign (not within the United States) bank, or the transmitter is a foreign bank and the recipient is a bank, and, in each case, there is no third-party customer to the transaction or (2) the transmittal order and advice of the transmittal order are communicated solely through systems proprietary to the bank.

**Effect on Data Protection and Data Privacy:** The issue of data protection and data privacy is a specific concern of the financial industry. Specifically, FinCEN solicited input from the financial industry and contracted with an experienced survey contractor to gather data from sectors of the industry that could be affected by the reporting requirement. Key findings from the survey of financial industry entities include, in part:

- Respondents consider data protection and data privacy a significant concern.
- Respondents noted that the security and uses of CBETF data are also a significant concern for financial institutions, especially the perceived ease of accessibility of the data to law enforcement.

In many jurisdictions outside the U.S., particularly in Europe, individuals have significant data privacy and data protection rights particularly regarding the use of their identifiable data and the transfer of this data to the U.S. Financial industries have to find lawful means to transfer and process this data in the U.S. as the transfer of “personal data” (from which an individual can be identified) is prohibited unless for a permissible reason. Examples of permissible reasons are the explicit consent of the individual, where the transfer of personal data is necessary to complete the transaction or where the transfer of personal data is necessary to comply with the financial institution’s legal obligations. As data protection regulators and financial services regulators have powers to impose fines against companies in breach of their data protection or privacy obligations, the financial services industry will have legitimate concerns regarding these additional CBETF reporting requirements. Compliance with U.S. legal requirements alone may not be sufficient.

**Recordkeeping rules:** At this time, FinCEN is not proposing any amendments to the recordkeeping rule affecting banks or nonbank financial institutions.

**Compliance date:** FinCEN does not anticipate issuing a final rule requiring institutions to report on transmittals of funds until **after January 1, 2012**.



## International Trade & Litigation Practice Group

**FinCEN is seeking comments on all aspects of the proposed rule and in particular on the following:**

- (1) Third-party carriers:** Using third-party carriers (e.g., SWIFT) of the transmittal orders to submit copies of the CBETF transmittal orders that it sends or receives on behalf of the bank.
- (2) Frequency of reports:** The frequency that reports are required to be provided, including the feasibility of requiring daily reporting.
- (3) Effects of the proposed rule on customer privacy:** The impact of this information collection on customer privacy and on the ability of banks and money services businesses to continue to fulfill their obligations to preserve their customers' privacy while implementing the provisions of this rule.

Comments on the NPRM are due to be filed with FinCEN **on or before December 29, 2010**. The NPRM is available by clicking <http://edocket.access.gpo.gov/2010/pdf/2010-24417.pdf>.

You may submit comments by either of the following methods:

- Via the Internet at: <http://www.regulations.gov/search/index.jsp> with the caption in the body of the text, "Attention: Cross-Border Electronic Transmittals of Funds."
- Via written mail to: Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, VA 22183, Attention: Cross-Border Electronic Transmittals of Funds.

If you require assistance with comments or more information, please contact Jeffrey Telep at +1 202 626 2390, Pulina Whitaker at +44 20 7551 7586, or Julia Sorrentino at +1 202 626 2939.

*Celebrating 125 years of service, King & Spalding is an international law firm with more than 800 lawyers in Abu Dhabi, Atlanta, Austin, Charlotte, Dubai, Frankfurt, Geneva, Houston, London, New York, Paris, Riyadh (affiliated office), San Francisco, Silicon Valley, Singapore and Washington, D.C.. The firm represents half of the Fortune 100 and, according to a Corporate Counsel survey in August 2009, ranks fifth in its total number of representations of those companies. For additional information, visit [www.kslaw.com](http://www.kslaw.com).*

*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*