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March 5, 2007

The Honorable Henry M. Paulson, Jr.
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Joint Response to FinCEN CBEFT Feasibility Study

Dear Secretary Paulson:

The American Bankers Association (ABA), the Financial Services Roundtable (FSR), and The Clearing House Association L.L.C. (TCH) join to offer our comments on the recent study by the Financial Crime Enforcement Network (FinCEN), entitled, *Feasibility of a Cross-Border Electronic Funds Transfer Reporting System Under the Bank Secrecy Act* (Study).

As we will explain in our discussion, despite the good faith and diligence of its authors, the Study fails to meet the burden established by the mandate of Section 6302 of the Intelligence Reform and Terrorism Prevention Act of 2004, admits a series of practical barriers to implementing a realistic cross-border electronic funds transfer (CBEFT) reporting regime, and promotes an incremental approach to further development, which we believe would be better not to begin. Even if, as the Study admits, "it can be stopped at any time," the momentum of a project once begun can give it a life of its own. Indeed, we believe that the Study does a fair job of demonstrating why the burden of the legislation has not been met, and that any finding in favor of feasibility is at odds with the information in the Study itself. Not only does the Study fail to show that there would be any kind of adequate return for the significant identified costs (let alone the even larger costs pointed to but not quantified in the Study), it raises the very likely possibility that this program could harm our nation's efforts to fight financial crime.

The House of Representatives has now three times passed legislation to reduce the millions of unnecessary currency transaction reports filed each year. Opening up a new program for half a billion more annual anti-money laundering (AML) reports goes in the wrong direction. We recommend that rather than create another mass data gathering project Treasury redouble efforts to build upon the more targeted and focused approaches that have been far more

successful in terms of illicit funds blocked, meaningful investigations begun, indictments obtained, and convictions achieved.

Discussion

Section 6302 of the Intelligence Reform and Terrorism Prevention Act of 2004 charges the Secretary with making two fundamental judgments: Determining whether a CBEFT reporting system is reasonably necessary to conduct his anti-money laundering or counter terrorist financing efforts, and whether such a system is feasible. Ultimately, the Study fails to provide a foundation for answering either of these questions in the affirmative. Instead, it presents strong evidence that the answer is “no” to each question.

The Study declares that no reporting system is currently feasible.

The Study makes several concessions that should be considered fatal to pursuing the proposal for implementing a CBEFT reporting system. The study concedes that—

- It is not feasible to have a CBEFT reporting system in place by December 2007, the date the statute calls for regulations to be issued, if warranted.
- No steps have yet been taken to develop law enforcement’s use requirements for the proposed data.
- There has been no demonstration of how to extract useful information from reported CBEFT data and inter-relate it to other forms of Bank Secrecy Act (BSA) data.
- Three-and-a-half years and \$32.6 million is simply the estimate for government costs for *building* a system for accepting and validating data submissions—it does *not* include the costs of being ready to conduct any analysis of the reported data.
- The costs for reporting institutions are unknown but extensive, and the impact on the reputation and the day-to-day operation of the U.S. payment systems is undetermined, but threatening. Indeed, estimating the pervasive nature of the costs proved understandably daunting to the authors of the Study.

While the Study predicates its conclusions about the value of reporting CBEFT on a projected but not yet realized program of “link analysis,” the program is in practicality lacking in credible methods for distributing its data feeds to law enforcement in a timely, usable, and secure form. The task, and its potential for distracting resources from more productive BSA efforts, should not be underestimated.

More obstacles exist to implementing a CBEFT reporting system.

Closer inspection reveals further difficulties in the approach envisioned by the Study. For example the Study notes, but either underestimates or fails to address, the impact of—

- Assembling data from transfers flowing through a minimum of three different inter-bank transaction systems, each with its own structures and formats;
- Unsolved challenges presented by transfers conducted by money services businesses operating through or around the banking system;
- The unidentified costs for FinCEN to acquire the sophisticated data analysis capabilities which are needed to make the whole program valuable;

- The dramatic build up needed in FinCEN staff and budget to perform on a day-to-day basis the analytical tasks anticipated by the Study, and the consequences of such a major shift in FinCEN resources to this new data management challenge;
- The unfunded demands on law enforcement manpower and resources to use future state-of-the-art software that has not yet been developed to make effective use of the unprecedented volume of new reports predicted by the Study; and
- Expanding access to this massive amount of personally sensitive and detailed financial data by myriad law enforcement agencies of varying sophistication and training and by the private companies contracted with by the government to manage or mine the data, especially with regard to the adequacy of information system security and privacy controls.

We believe that each of these open issues underscores that neither FinCEN, the Treasury Department, law enforcement, nor the financial services industry are capable of, let alone prepared to undertake, the proposed CBEFT mass data reporting regime in any cost effective, useful fashion.

The prospect of substantial injury to U.S. financial competitiveness, without concomitant security value, should weigh conclusively against this undertaking.

Perhaps most troubling is the admission in the Study that the potential effect of the contemplated reporting scheme on the dollar-based payment system could be manifested as (1) a shift away from the U.S. dollar toward other currencies as the basis for international financial transactions; (2) the creation of mechanisms and facilities for clearing dollar-based transactions outside the United States; and (3) interference with the operation of the central payments systems. The risk of any one of these should be enough to abandon this project. At a time of increased concern over our eroding international financial competitiveness—tied in significant part to adverse competitive consequences of the American regulatory system—public entertainment of a massive new financial reporting scheme by the Treasury introduces a troubling, discordant theme.

The reality of these concerns is underscored by cautions from the Federal Reserve, calling attention to the impact that the proposed reporting regime may have on the ability of U.S. firms to develop or participate in innovations in the payments industry and whether such a regime will diminish the ability of U.S. institutions to remain competitive in the global market through the development of new products, message standards, and technology. As the Federal Reserve's Operations and Payment Systems' staff warns, "Any decrease in competitiveness of the U.S. payment system could in turn decrease the role of the U.S. dollar as the preferred global currency for international business and trade."

We fear that these adverse competitive consequences risk much to achieve very marginal law enforcement benefits.

There is no reason to begin a journey down a road that risks so much for so little.

We believe that these serious deficiencies in the ambitious proposal argue strongly against embarking along the incremental path suggested by the Study. The Study has already demonstrated the project's lack of feasibility and failed to make a case for practical utility. Why spend more money, and divert resources better applied elsewhere, to develop this further?

The virtually universal reporting obligation proposed to be saddled on the banking industry far exceeds the mandate of Section 6302, that instructs the Secretary to identify the information “that may be found in particular cases to be reasonably necessary...” and to describe criteria to be used “to select the situations in which reporting ... may be required.” In other words, developing realistic *targeted* reporting, not comprehensive, universal reporting, was the charge Congress gave the Secretary. Consequently, investing even the first dollar in further development of the FinCEN recommendation is to divert scarce resources from more pressing needs and to consume them in an unnecessary course of action that fundamentally departs from the Congressional mandate that sparked the Study to begin with.

The Study’s substance, if not its inharmonious conclusions, have fulfilled the congressional mandate by demonstrating that the conditions for this new regulatory program cannot be met as outlined in the law. The statute would not seem to authorize going down this road any further.

Conclusion

U.S. banks are experienced and dedicated partners in the fight against money laundering and terrorism financing. Banks have been responsive to the full range of established law enforcement requests for CBEFT data enabling the Secretary and others charged with our national security to identify, investigate, and apprehend terrorists, block their incipient schemes or interdict the funding thereof. These successes are the result of using such tools as the USA PATRIOT Act in a measured fashion to strike our enemies in a targeted manner. We believe that diverting resources to a universal CBEFT reporting regime that would cast an indiscriminate net and ensnare hundreds of millions of innocent transfers is wasteful to government and industry efforts at the least and potentially harmful to the integrity and vitality of our payment system. Accordingly, we pledge to continue our work with the Secretary to focus resources on improving the use and management of our existing capabilities. We urge that we not be distracted by the siren call for unlimited data from an infeasible, unnecessary and potentially economically harmful universal reporting regime. We ask that you reject further development of the proposed CBEFT mass data reporting program.

Respectfully yours,

American Bankers Association



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