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August 2, 2006

The Honorable Henry M. Paulson, Jr.  
Secretary of the Treasury  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Dear Secretary Paulson:

Fighting terrorism is everyone's job, and America's banks have been major partners with law enforcement agencies in the efforts to choke off financial resources to terrorists. We believe more can be done and that tools can be improved and made even more effective in this crucial task.

Recent legislation authorizes the Treasury Secretary to evaluate the desirability and feasibility of a new reporting regime for cross-border electronic transmittal (CBET) of funds. The American Bankers Association (ABA) on April 21, 2006, wrote to express our deep concerns with both the desirability and feasibility of such a new regime; we believe that it will waste resources that can be better used and will distract our focus from the genuine risks to our financial system and our nation. Since ABA filed its initial response to the Financial Crime Enforcement Network's (FinCEN) survey of financial institution views, further events have come to light that reinforce our views.

#### Summary

First, published reports and public comments by Treasury officials concerning the Terrorist Finance Tracking Program<sup>1</sup> (TFIP) demonstrate that there currently exists a well-practiced and successful means of obtaining cross-border wire data on a targeted basis that is effective and that affords controls to guard against a costly and disruptive mass gathering of data on legal transactions of law-abiding people—all of which appears superior to a public, universal and unchecked CBET reporting requirement.

Second, the recent Department of the Treasury's Office of the Inspector General report entitled, "Terrorist Financing/Money Laundering: FinCEN Has Taken Steps to Better Analyze Bank Secrecy Act Data But Challenges Remain,"<sup>2</sup> demonstrates

<sup>1</sup> The Terrorist Finance Tracking Program is described in testimony of Undersecretary of the Treasury Stuart Levey before the House Financial Services Subcommittee on Oversight and Investigations July 11, 2006 available at <http://www.treas.gov/press/releases/hp05.htm>

<sup>2</sup> Office of the Inspector General, Department of the Treasury, Audit Report entitled, "TERRORIST FINANCING/MONEY LAUNDERING: FinCEN Has Taken Steps to Better Analyze Bank Secrecy Act Data But Challenges Remain", (IG Audit Report) issued May 18, 2006, <http://www.treasury.gov/inspector-general/audit-reports/2006/OIG06030.pdf>.

that FinCEN is far from prepared to manage and protect its existing information flows let alone take on the flood of data that would inundate it from a new CBET reporting regime.

Third, the responsible, but lamented, decision to pull the plug on the BSA Direct Retrieval and Sharing project<sup>3</sup> illustrates that FinCEN does not yet have the information processing systems in place to manage and transmit in a secure, versatile, and timely manner its store of data for the use of the range of law enforcement representatives that can benefit from it—and has nothing on the horizon to enable it to do so. The continued dramatic increase in data flows from existing programs—the number of Suspicious Activity Reports will approach one million this year—could very well frustrate attempts to develop a successful information processing system. Adding to the existing report overload a new regime for the half-billion wire transfers that cross our borders each year not only puts in serious doubt any feasible program for using the data for law enforcement but could even threaten to crush existing programs.

### Cross Border Data Collection Feasibility

Section 6302 of the Intelligence Reform and Terrorism Prevention Act of 2004 directs the Secretary of the Treasury to study the feasibility of “requiring such financial institutions as the Secretary determines to be appropriate to report to the Financial Crimes Enforcement Network certain cross-border electronic transmittals of funds, **if the Secretary determines that reporting of such transmittals is reasonably necessary** to conduct the efforts of the Secretary against money laundering and terrorist financing.” [Emphasis added.] The Act requires the Secretary to issue these regulations by December of 2007. Prior to any such regulations taking effect, the Act requires that the Secretary certify that the technical capability to receive, store, analyze, and disseminate the information is in place. The Act also requires that, in preparation for implementing the regulation and data collection system, the Treasury must study and report to Congress on the feasibility of implementing such regulations.

In preparation of the Study and its Report, the Financial Crimes Enforcement Network undertook a survey to determine the impact of implementation of a CBET reporting program on the industry. The ABA, along with other trade associations, provided assistance to FinCEN in soliciting feedback from member banks on the survey developed for the feasibility study, in an effort to gather industry information. By comment letter dated April 21, 2006, the ABA demonstrated that a universal CBET reporting program would impose significant burdens on the banking industry without achieving concomitant benefits for law enforcement.

After the close of the comment period on May 5, 2006, three events occurred that have significant relevance for the Secretary’s evaluation of the reasonableness of a CBET reporting requirement: disclosure of the Terrorist Finance Tracking Program, publication of the Inspector General’s Audit Report, and abandonment of the BSA Direct Program.

### Lessons from the Terrorist Finance Tracking Program

Under Secretary Levey’s testimony describing the Terrorist Finance Tracking Program contains several significant disclosures that have important implications for evaluating a CBET reporting requirement:

- The United States has more than adequate existing methods to obtain CBET.

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<sup>3</sup> See, FinCEN BSA Direct Retrieval and Sharing Project Assessment Report, July 10, 2006 available at [http://www.fincen.gov/bsa\\_direct\\_report\\_071306.pdf](http://www.fincen.gov/bsa_direct_report_071306.pdf)

- The subpoena process is a targeted means of obtaining highly relevant CBET data.
- Foreign CBET data repositories respond cooperatively to focused requests for information related to terrorist financing.
- The subpoena process provides inter-party checks-and-balances that ensure proper access and use of otherwise confidential CBET data.
- Selective use of investigative processes benefit from lack of transparency to terrorist targets.

Each of these elements of the TFTP accounts for its success and argues against a universal CBET reporting requirement. As former Secretary Snow observed, the TFTP is government at its best—using established law enforcement tools to execute a “harpoon” strike, as opposed to a fishing expedition, against those engaged in terrorism financing. Unlike a universal CBET reporting requirement that would capture hundreds of millions of innocent transactions annually, the TFTP is targeted on suspect subjects’ transactions. Unlike universal CBET reporting that would give government indiscriminate access to private business transactions, the TFTP controls access and use to financial data for investigating priority suspicious illegal activity. Unlike publicly visible universal CBET reporting, the TFTP employs an administrative subpoena process that keeps terror targets guessing about whether their transactions are subject to government disclosure.

Under the mandate of Section 6302, the Secretary must conclude that CBET reporting “is reasonably necessary to conduct the efforts of the Secretary against money laundering and terrorist financing.” Based on the TFTP track record and its continuing viability, the Secretary should decide that a universal CBET reporting requirement is not reasonably necessary to conduct his law enforcement responsibilities.

### Implications of Inspector General’s Audit Report Findings

The findings and recommendations noted in the IG Audit Report pertaining to the systems and resources available to FinCEN to gather, review and utilize information, have a significant impact on the decision to gather CBET data. The Inspector General found, in part, as follows:

- FinCEN’s case management system produces unreliable and inaccurate data that impairs the agency’s ability to manage analytical cases and products; and
- certain internal controls over BSA and law enforcement data were weak and could allow these data to be compromised.

The report raises the issue of the validity and reliability of the FinCEN database systems currently utilized as a case management tool. The report found that “FinCEN does not have reliable management information that can consistently represent status, completeness, and timeliness of its research, analytical, and informational services,” and concluded that, “FinCEN did not have adequate controls to prevent unauthorized deletion of cases.” This inability to leverage the data system to extract case management information supports the ABA’s contention that the extensive volume of CBET data would overburden a system which has inadequate capabilities for effectively handling and managing its current workload of data.

The IG Audit Report continues by observing, “FinCEN does not have a policy to address inappropriate browsing nor a methodology to monitor for this activity.” The report goes on to state, “After FinCEN increased the security level needed for contract employees, those who did not have the appropriate clearances were allowed to continue to access sensitive but unclassified BSA and law enforcement data.” In response to this concern, FinCEN raised the existing clearance level

of its contract employees to Top Secret and released those employees who had not obtained the appropriate clearance levels. However, none of these steps begin to approach the privacy controls in place under the TFTP.

Although FinCEN has taken and continues to take steps to address the Report's recommendations, there is no likelihood of having a sound, versatile and secure system in place by December 2007 to manage current BSA data, let alone the hundreds of millions of transactions generating billions of data elements by a prospective CBET reporting obligation. As FinCEN concedes, a compliant case management system will not be ready before 2010; and there is no proposal to develop truly independent controls for guarding against abuse of access to CBET data collected.

#### Meaning of BSA Direct R&S Demise

On July 13, FinCEN announced that it will permanently halt the BSA Direct Retrieval and Sharing Component project (BSA Direct). After the project's cost over-runs and missed milestones, Director Werner concluded that further pursuit of the project would not achieve the goal of improving authorized users' ability to analyze and access BSA data through sophisticated data warehousing in an integrated, secure web-based environment affording advanced business intelligence and other analytical tools. Among the unrealized objectives was the expectation that BSA Direct would increase FinCEN's ability to network agencies with overlapping interests and to augment the agency's ability to audit and assess the usage of BSA data.

This setback leaves FinCEN well short of any reasonable likelihood of having the data warehousing and analytical capabilities necessary for making integrated use of CBET data. At the time that the Intelligence Reform and Terrorism Prevention Act of 2004 was passed, the BSA Direct project was a year in progress and was expected to deliver on its promises by the end of 2005. That fundamental legislative predicate has been abandoned, and there is no chance for many years to come that FinCEN will be in a position to certify it has the technical capability to receive, store, analyze, and disseminate—and protect—data under a new CBET reporting regime.

#### Conclusion

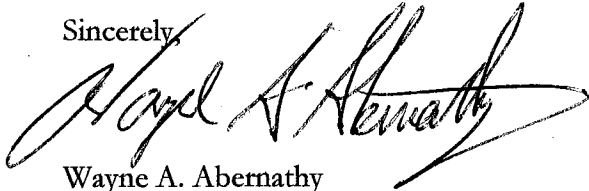
In evaluating the desirability and feasibility of a new regime for collecting CBET data, Treasury should consider not only the additional data extraction and submission burdens financial institutions would face as evident in feasibility survey responses and feedback previously provided, but should also consider FinCEN's limitations in receiving and utilizing the information in an efficient and secure manner. Moreover, such evaluation should be conducted in light of the demonstrated viability of the alternative administrative subpoena process with its focused method of capturing highly relevant and prima facie suspicious transaction activity.

In view of the pre-eminent importance of data management and security in both the public and private sectors, now is not the time to expose hundreds of millions of routine wire transactions involving the innocent activity of American citizens, their families and legitimate businesses to the broad sweep of a new government financial surveillance program. This is especially the case where a more targeted approach has demonstrated its value, where the administrative subpoena process affords checks-and-balances that protect financial privacy interests, and when the data management capacity of the receiving agency has yet to demonstrate its analytical virtuosity, security or reliability.

Consequently, ABA urges the Secretary of the Treasury to conclude that mandating cross-border wire transfer reporting is neither feasible from a public or private sector systems standpoint, nor

reasonably necessary to conduct his law enforcement responsibilities within the meaning of the Intelligence Reform and Terrorism Prevention Act of 2004.

Sincerely,

A handwritten signature in black ink, appearing to read "Wayne A. Abernathy". The signature is fluid and cursive, with a long horizontal stroke at the end.

Wayne A. Abernathy  
Executive Director  
Financial Institutions Policy  
And Regulatory Affairs