More Flies with Honey: Encouraging Formal Channel Remittances to Combat Money Laundering*

> "An effective [anti-money laundering] program requires sound risk management," a point which I wholeheartedly agree with, but we must also be cautious that in our pursuit of A&L compliance, we do not use such a heavy hand that we end up pushing currently monitored transactions underground into a shadowy world of illicit transactions.[1]

I. Introduction

For thirteen years, Cheng Chui-ping ran a small restaurant and clothing store in New York's Chinatown.[2] Her restaurant on 47 East Broadway was located "directly across the street from a branch of the Bank of China."[3] Outwardly, Ping lived a simple life—"[d]uring lunch hours she would chop vegetables, wash dishes and wait on tables . . . . Occasionally she could be seen tottering down the street struggling with bales of clothes, dragging them into her general-merchandise store."[4] Despite her plain appearance, Ping was one of the world's most notorious snakeheads—the head of a gang that specializes in trafficking Chinese people.[5] But for many people, Ping is a saint—not a criminal. Over the course of her career, she helped smuggle thousands of immigrants into the United States—giving them a new start in a new country. Ping's restaurant also became a major competitor to the Bank of China—she used her connections in mainland China to send money from those she smuggled to their families back home.[6] A woman who used Ping's services explained: "The Bank of China took three weeks, charged a bad foreign-exchange rate and delivered the cash in yuan. Sister Ping delivered the money in hours, charged less and paid in American dollars. It was a better service."[7] According to Steven Wong, an anti-snakehead activist, "things became so bad that the [Bank of China] began offering color

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1. *Regulation of Money Service Businesses: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 111th Cong. 2 (2010) [hereinafter *Regulation Hearing*] (statement of Rep. Hensarling, Member, H. Subcomm. on Fin. Insts. & Consumer Credit).
2. Edward Barnes, *Two-Faced Woman*, TIME, July 31, 2000, at 48, 48.
3. *Id.* at 49.
4. *Id.* at 48.
5. *Id.*
6. *Id.* at 49.
7. *Id.* (internal quotation marks omitted).

televisions and prizes to those who used them to transfer money."[8] But people still preferred Ping's restaurant.

This story illustrates a basic truth about the money transfer business—many consumers, especially immigrants, opt to send money through institutions like Ping's restaurant rather than with banks or Western Union-style money transmitters.[9] And for good reason. As Ping's restaurant illustrates, these businesses, known as "informal value transfer systems" (IVTS), often provide excellent service. IVTS tend to be cheaper, quicker, and provide greater anonymity than formal channels.[10] But IVTS may also have a darker side—the anonymity they provide make them susceptible to abuse by criminals trying to hide drug money and other illicit funds.[11] Since the 9/11 terrorist attacks, IVTS have received special attention[12] because policy makers have come to believe that terrorists use IVTS to covertly move the funds that finance their activities around the globe.[13]

Crafting an appropriate response to IVTS is no simple matter. Too weak a response would give criminals carte blanche to exploit IVTS for illicit purposes. But burdensome regulatory regimes drive money services underground and tend to lead to the proliferation, rather than the reduction, of IVTS and other underground banking systems.[14] Flight away from regulated channels is no small concern—the philosophy behind U.S. anti-money laundering (AML) laws is that financial institutions are in the best

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8. *Id.*

9. *See* R. Barry Johnston, *Work of the IMF in Informal Funds Transfer Systems*, *in* REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 1, 3 (2005) ("[R]emittances are very important to migrant workers who send money home and [informal funds transfer] systems represent an important source of income for some countries.").

10. *See id.* at 2 (discussing the anonymity that is a characteristic of IVTS); Adil Anwar Daudi, Note, *The Invisible Bank: Regulating the* Hawala *System in India, Pakistan and the United Arab Emirates*, 15 IND. INT'L & COMP. L. REV. 619, 627–29 (2005) (characterizing *hawala* systems as providing higher quality service and charging lower fees than traditional banks).

11. *See* Johnston, *supra* note 9, at 2 (discussing how the anonymity component of IVTS leaves them susceptible to use by criminals).

12. *See, e.g.*, Amos N. Guiora & Brian J. Field, *Using and Abusing the Financial Markets: Money Laundering as the Achilles' Heel of Terrorism*, 29 U. PA. J. INT'L L. 59, 62–63 (2007) (discussing the role of IVTS within the context of money laundering by terrorists); Daudi, *supra* note 10, at 619–21 (chronicling the increased attention IVTS received after the 9/11 terrorist attacks); Walter Perkel, Note, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 188 (2004) (arguing for an incentive-based strategy to encourage IVTS dealers to comply with registration requirements); Matthew J. Rosenbaum, Note, *A Paper Chase in a Paperless World: Regulating Informal Value Transfer Systems*, 50 COLUM. J. TRANSNAT'L L. 169, 215 (2011) (proposing the implementation of legislation and an incentive-based scheme to reduce the likelihood of terrorists benefiting from IVTS). *See generally* Smriti S. Nakhasi, Comment, *Western Unionizing the* Hawala*?: The Privitization of* Hawalas *and Lender Liability*, 27 NW. J. INT'L L. & BUS. 475 (2007) (discussing the Middle Eastern IVTS and ways to address their capacity to be used to funnel illicit funds).

13. *See* Guiora & Field, *supra* note 12, at 76–77 (explaining that, in part, American scrutiny of IVTS increased in response to the fact that two of the 9/11 hijackers received over $120,000 in funds from a country known for its robust IVTS).

14. *See infra* notes 110–13.

position to detect money laundering.[15] To that end, policy makers charge private actors with implementing policies that deter money laundering, maintaining records that law enforcement can use to catch criminals, and reporting suspicious transactions to the authorities.[16] Patronage of underground banking services undermines this scheme because these businesses rarely keep adequate records for the purposes of an investigation, and it leads to the commingling of legitimate and illegitimate funds, making criminally derived funds harder to track.[17] Our current sanction-based regime seeks to elicit compliance with AML laws through the imposition of penalties.[18] But this approach has serious deficiencies—simply put, detecting IVTS, much less collecting enough evidence to prosecute the individuals that committed the underlying crime that generated the funds, is extremely difficult.[19] But these sanctions and the climate they create can disrupt the flow of legitimate transactions, in particular remittances, sent home by immigrants.[20] The current sanction-based regime has done little to deter terrorists and other criminals, but may have succeeded in harming legitimate consumers.[21]

This Note seeks to address these problems, particularly in the remittance context, by proposing that policy makers focus on encouraging consumers to use formal, transparent money transfer channels. Reducing legitimate demand for underground services would decrease the popularity of underground firms and thus the opportunity for criminals to exploit them. Further, if consumers have viable alternative options to underground firms, vigorous enforcement becomes far less problematic. Ultimately resolving the challenges that these channels present is only possible if formal channels can compete with underground firms; otherwise, the demand for underground services will continue to undermine the U.S. AML scheme. This Note argues that the best approach to money laundering is making compliance easier and cheaper. I propose the United States simplify its current regulatory regime through the enactment of a national scheme that seeks to make formal channels more competitive.[22]

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15. *See infra* note 86.

16. *See infra* notes 89–94 and accompanying text.

17. *See* PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 102 (2004) (stating that "[t]he larger the flow of legitimate funds through unregulated channels, the harder it is to find money laundering through the same mechanisms"); Kevin West, *The Money Laundering Regulatory Challenge Facing Somali Remittance Companies*, *in* REMITTANCES AND ECONOMIC DEVELOPMENT IN SOMALIA: AN OVERVIEW 33, 36 (Samuel Munzele Maimbo ed., 2006) (explaining that the "cost of compliance clashes directly with the business model of the Somali Remittance Companies").

18. *See infra* subpart III(A).

19. *See infra* Part IV.

20. *See infra* subpart IV(A).

21. *See infra* section IV(A)(3).

22. Other commentators have rejected enforcement as a viable long-term solution to underground firms. For proposals that argue for greater use of microfinance, see Charles B.

II. Remittances

This Part discusses what remittances are, why the reader should care about them, and how they work.

A. What Are Remittances and Why Are They Important?

Remittances are traditionally defined as cross-border payments of relatively low value sent by a worker living abroad to her family or friends in her country of origin.[23] They are (and will likely continue to be) important to the global economy. First, remittances are significant because of their sheer volume. The World Bank estimates that migrants sent home more than $440 billion in 2010.[24] Remitters in the United States alone sent $48.3 billion abroad in 2009, making it the top remittance-sending country in the world.[25] To put those numbers in perspective, the volume of remittances sent from the United States dwarfs what the nation contributes in official foreign development aid.[26]

Remittances have increasingly drawn attention from scholars and economists because of their potential to benefit developing countries.[27] The consensus among scholars is that remittances help developing countries by reducing poverty and encouraging development, although there is frequent disagreement over the magnitude of these positive effects.[28] Remittances provide significant value as a poverty-reduction tool because they help poorer households purchase basic necessities.[29] A study by the Inter-

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Bowers, *Hawala, Money Laundering, and Terrorism Finance: Micro-Lending as an End to Illicit Remittance*, 37 DENV. J. INT'L L. & POL'Y 379 (2009); Darren Keyes, *Protecting the Peace While Profiting the Poor: Microfinance and Terrorist Financing Regulation*, 12 LAW & BUS. REV. AMS. 545 (2006). For a proposal that operators of IVTS be induced to comply with regulations, see Perkel, *supra* note 12, at 207–11.

23. *See* Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 3 (2008) (defining remittances as "the money that migrants send home to their families" (footnote omitted) (internal quotation marks omitted)).

24. WORLD BANK, MIGRATION AND REMITTANCES FACTBOOK 2011 x (2d ed. 2011), *available at* http://siteresources.worldbank.org/INTLAC/Resources/Factbook2011-Ebook.pdf. The World Bank believes the $440 billion figure would be "significantly larger" if unrecorded flows through informal channels were included. *Id.*

25. *Id.* at 15.

26. *See* Carol Adelman, *Global Philanthropy and Remittances: Reinventing Foreign Aid*, 15 BROWN J. WORLD AFF. 23, 23–24 (2009) (estimating that the volume of U.S. remittances is three and a half times the amount of public foreign aid it contributes).

27. *See* Guiora & Field, *supra* note 12, at 81 n.82 (documenting multiple works written on the role of remittances in developing countries).

28. *See, e.g.*, Adelman, *supra* note 26, at 23 ("Regarding remittances, the World Bank and other studies are clear that the funds sent back by migrants to their families and to community development projects are one of the strongest poverty reduction forces in poor countries."). *But see* Richard H. Adams, Jr. & John Page, *Do International Migration and Remittances Reduce Poverty in Developing Countries?*, 33 WORLD DEV. 1645, 1646 (2005) (exploring scholarly debate regarding how costs associated with migration may decrease the positive effects of remittances).

29. Rosser, *supra* note 23, at 13 (explaining that remitters are motivated by family maintenance and that remittances are used for basic needs such as food, medicine, and shelter); *see* Adams &

American Development Bank found that a substantial portion of remittance-receiving families in Mexico spent their funds on food, shelter, health care services, and education.[30] Another study estimates that extreme poverty is 35% less likely in remittance-receiving households compared to nonreceiving households.[31] Scholars also champion remittances as a potential development tool. Studies have concluded that remittances have at least a modest positive effect on a country's GDP.[32] Remittance flows are also associated with greater engagement in the financial sector, savings, and investment by a population that traditionally eschews formal banking services.[33] Some scholars even theorize that remittances confer broader economic benefits on the receiving country by improving its creditworthiness and expanding its access to capital.[34] But scholars also recognize that calculating the precise macroeconomic effects of remittance flows is a complex endeavor and that the impact of remittances will frequently vary from country to country. For example, the World Bank has concluded that poorer recipients tend to use remittances on necessities while relatively wealthier recipients use more of their funds for investments and savings.[35] While commentators may disagree on the extent that remittances positively affect a developing country's economy, there is a broad consensus that remittances do benefit developing countries and that policy makers should

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Page, *supra* note 28, at 1660 (finding that every 10% increase in per capita remittances sent to a developing country leads to a 3.5% reduction in extreme poverty, defined as living on less than $1 a day). *But see* PABLO FAJNZYLBER & J. HUMBERTO LÓPEZ, CLOSE TO HOME: THE DEVELOPMENT IMPACT OF REMITTANCES IN LATIN AMERICA 12–15, 58 (2007) (arguing that the effects of remittances on poverty will vary depending on the socioeconomic status of the remitter's family and what kind of economic opportunities the migrant lost by leaving her country of origin).

30. The study found that 78% of remittances were spent on household goods, 8% went to savings, 7% went to education, and 6% went to the purchase of luxury goods, real estate, or for investment purposes. INTER-AM. DEV. BANK, SENDING MONEY HOME: REMITTANCE TO LATIN AMERICA AND THE CARIBBEAN 23 (2004).

31. FAJNZYLBER & LÓPEZ, *supra* note 29, at 13.

32. *Id.* at 18 (finding only a modest 0.27% growth in per capita GDP associated with an increased remittance volume).

33. *Id.* at 57.

34. Remittances can improve a country's creditworthiness if they are included in a country's goods and services debt-to-export ratio, a factor used to calculate a country's indebtedness. WORLD BANK, GLOBAL ECONOMIC PROSPECTS: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION 100–01 (2006), *available at* http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B663ad211-f951-de11-afac-001cc477ec70%7D.pdf. Remittances can also affect a country's ability to borrow through arrangements that securitize loans with future remittance flows. *Id.* at 101–03.

35. FAJNZYLBER & LÓPEZ, *supra* note 29, at 24. Fajnzylber and López found "significant heterogeneity" in their study of Latin American countries. *Id.* at 58. This suggests the effects of remittances will vary from country to country and that generalizations about their impact should be taken with a grain of salt. For a nuanced discussion of the economic effects of remitting, see Rosser, *supra* note 23, at 11–27.

therefore promote remitting behavior.[36] Thus, this Note proceeds on the assumption that remittances provide a social good and should be encouraged.

B. How Do Remittances Work?

While scholars have dedicated substantial attention to the economic effects of remittances, the ways that these funds actually travel across borders have received less attention. For example, how does money travel from the hands of a migrant worker in New York to her family in China? Our hypothetical remitter faces a wide array of choices—anything from having the money delivered by hand, to sending the funds by international wire at her local bank, to using PayPal. The remainder of this Part will discuss some of the more common remittance-transfer mechanisms.

1. MSBs.—Historically, money service businesses (MSBs), nonbank firms that specialize in money transfer services rather than the provision of traditional financial products, have dominated the U.S. remittance market.[37] They typically operate through a network of agents that operate out of brick-and-mortar businesses, such as grocery or convenience stores.[38] MSB-initiated transfers typically involve the agent receiving the consumer's cash (and a transaction fee), after which the agent transmits the funds to one of the MSB's partner institutions, with which the MSB will have a contractual relationship,[39] located in the destination country.[40]

As a remittance-transfer mechanism, MSBs have several notable characteristics: Relative to banks or credit unions, they make funds available quickly,[41] and they appeal to recent immigrants because they provide an alternative to using more formal financial institutions.[42] But, one distinct

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36. *See* FAJNZYLBER & LÓPEZ, *supra* note 29, at 46 (observing that studies involving remittances usually conclude by advising policy makers to facilitate and increase remittance flows); Adams & Page, *supra* note 28, at 1660 (urging policy makers "to take efforts to reduce the current high transaction costs of remitting" to "increase the poverty-reducing impact of international remittances").

37. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE USE OF THE AUTOMATED CLEARINGHOUSE SYSTEM FOR REMITTANCE TRANSFERS TO FOREIGN COUNTRIES 4 (2011) (observing that "[h]istorically, consumers have largely chosen to send remittance transfers through money transmitters").

38. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6195 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005).

39. Thus, MSBs are in contractual privity with all of the institutions that handle money, which allows the firm to exert control over the transaction from its start to finish. *Id.* at 6195–96; *see also* State v. W. Union Fin. Servs., Inc., 208 P.3d 218, 219 (Ariz. 2009) (describing the MSB–customer relationship of a typical Western Union wire money transfer).

40. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6196.

41. *See id.* ("Funds sent through a money transmitter are generally available in one to three business days, although same day delivery may be available, often for a higher fee.").

42. *Remittances: Access, Transparency, and Market Efficiency—A Progress Report: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade, & Tech. of the H. Comm. on Fin. Servs.*, 110th Cong. 35 (2007) (testimony of Tom Haider, Vice President and Chief Compliance Officer, MoneyGram International, Inc.) (testifying that "[u]n-banked consumers who

disadvantage of MSBs are their costs—the fees imposed by providers and exchange-rate markups[43] are often substantial relative to the size of the transfer.[44] But commentators have recently observed that increased competition and new technology have led to a decline in the cost of remitting through MSBs, ameliorating some of these problems.[45]

Technological innovations deserve special mention. Recently, a new breed of MSB that utilizes Internet and mobile phone technology has emerged. Services like PayPal and Xoom allow consumers to send funds directly to "online wallets" or bank accounts and some even offer cash pickup.[46] These services are convenient, fast, and cheap relative to traditional MSBs.[47] Perhaps an even more promising trend is offering mobile-based remittances. For example, M-PESA, a Kenyan service, "allows users to deposit money into an account stored on their cell phones, to send balances using SMS technology to other users (including sellers of

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are new to the U.S. generally are not quick to open a bank account, but rather tend to move towards a banking relationship over time" and that "[i]n the meantime, those individuals still need the services of a money transmitter").

43. *See In re* Mex. Money Transfer Litig., 267 F.3d 743, 745 (7th Cir. 2001) (explaining that money transfer companies profit from buying pesos at the interbank exchange rate while customers pay a higher rate); Plamen Nikolov, Results from a Survey of New York State Licensed Money Transmitters 12 (July 2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924428 (finding that nine out of ten MSBs operating out of New York State apply an exchange rate markup).

44. *See* Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6196 (identifying two components of the cost of a money transfer—fees and the exchange rate applied to the transfer); MANUEL OROZCO, ATTRACTING REMITTANCES: PRACTICES TO REDUCE COSTS AND ENABLE A MONEY TRANSFER ENVIRONMENT 10–11 (2002) (noting that "[t]ransfer costs incurred by customers continue to be significant" and that "[e]xchange rate mark-ups and speculation continues"); DILIP RATHA & JAN RIEDBERG, WORLD BANK, ON REDUCING REMITTANCE COSTS 17 (2005) (arguing that, with the exception of a few well-established remittance corridors, there is little competition in the remittance industry, meaning providers have free reign to charge high prices for their services). For remitters sending small sums of money, the costs of transmitting through an MSB "can be prohibitively high due to a minimum fee charged by most service providers." Caroline Freund & Nikola Spatafora, *Remittances: Transaction Costs, Determinants, and Informal Flows* 5 (World Bank, Policy Research Working Paper No. 3704, 2005).

45. *See* MANUEL OROZCO, THE REMITTANCE MARKETPLACE: PRICES, POLICY AND FINANCIAL INSTITUTIONS 2 (2004), *available at* http://www.pewhispanic.org/files/reports/28.pdf (explaining that the costs of remitting $200 to Mexico had fallen from 15% of the amount sent to around 7% since the late 1990s); Lenora Suki, Competition and Remittances in Latin America: Lower Prices and More Efficient Markets ¶ 46 graph 5, ¶ 49 (Feb. 2007) (unpublished manuscript), *available at* http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38821426.pdf (observing that "the differential between maximum and minimum prices of money transfer among cities" has shrunk but that the costs of sending funds stills varies considerably).

46. *Transfer Money with PayPal*, PAYPAL, https://www.paypal.com/cgi-bin/webscr?cmd=xpt/Marketing_CommandDriven/general/International_Money_Transfer-outside; *see also International Money Remittance Service—Xoom Quick Remit Payments*, XOOM, https://www.xoom.com/remittance (offering home delivery, bank deposit, and traditional cash pickup services).

47. For example, Xoom makes money available for cash pick up in Mexico almost instantly for around $5. *Mexico Fee Calculator*, XOOM, https://www.xoom.com/mexico/fees?currencyCode=MXN#.

goods and services), and to redeem deposits for regular money."[48] Mobile phone use is exploding in many countries, and it is quickly becoming easier to obtain a cell phone than a bank account in the developing world.[49] The convenience, ubiquity, and cost of mobile-phone-based transfers give them the potential to revolutionize the way people send remittances. While Internet- and mobile-phone-based remittances show significant promise, remitters in the United States do not yet widely use these services.[50] A likely explanation for this lack of enthusiasm is that recent immigrants are much less likely to use the Internet than the average American, and the mobile-phone-based money transfer services currently available in the United States require access to bank accounts and a nontrivial degree of familiarity with technology.[51]

2. Depository Institutions.—Consumers can also use banks and credit unions to send remittances. These depository institutions can send money abroad in two ways—wire transfers or Automated Clearing House (ACH) transactions.[52] Both involve the transmittal of electronic instruction messages between institutions (or chains of institutions)[53] that "cause the institutions to make the required bookkeeping entries and make the funds available" to the recipient.[54] Depository-institution-initiated transfers differ from MSB-initiated transactions in two significant ways: by sending money through chains of banks with correspondent relationships, funds can reach

48. William Jack & Tavneet Suri, The Economics of M-PESA 5 (Aug. 2010) (unpublished manuscript) *available at* http://www.mit.edu/~tavneet/M-PESA.pdf.

49. *See* KAS KALBA, THE GLOBAL ADOPTION AND DIFFUSION OF MOBILE PHONES 28 (2008) (observing that most countries in Africa have enjoyed an annual increase in the number of mobile phone subscriptions of over 100% since 2000); Supriya Singh, *Mobile Remittances: Design for Financial Inclusion*, 5623 LECTURE NOTES COMPUTER SCI. 515, 516 (2009) (explaining that mobile-phone-based remittances "will particularly suit receivers in rural unbanked area[s] [that] lack . . . access to bank accounts").

50. *See* MANUEL OROZCO ET AL., IS THERE A MATCH AMONG MIGRANTS, REMITTANCES AND TECHNOLOGY? 3 (2010) (concluding that "limited advances have been made in increasing migrant use of technology in the last four years").

51. *Id.* at 14 (lamenting the fact that PayPal Mobile, Amazon's TextPayMe, and Obopay all market themselves to a tech-savvy and financially literate Generation X and Y audience).

52. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6196–98 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005). The main difference between wires and ACH transactions is that the sending bank can initiate a wire instantly while ACH transactions are sent in batches at predetermined times of the day. *Intro to the ACH Network*, NACHA, https://www.nacha.org/Intro2ACH.

53. Electronic funds transfers can be quite complex and involve many credits, debits, and settlements between multiple depository institutions. *See* FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, FEASIBILITY OF A CROSS-BORDER ELECTRONIC FUNDS TRANSFER REPORTING SYSTEM UNDER THE BANK SECRECY ACT 55–57 (2006) [hereinafter FEASIBILITY OF A CROSS-BORDER ELECTRONIC FUNDS TRANSFER REPORTING SYSTEM] (explaining the fundamentals of the funds-transfer process and the increased complication in cross-border transfers, which often require the originator and beneficiary banks to form "correspondent" relationships with at least one go-between bank).

54. *Id.* at 55.

almost any bank in the world, and bank-initiated transactions will often involve money moving through institutions with which the originating bank has no contractual relationship.[55]

From a consumer's perspective, other notable aspects of banks as a remittance mechanism include their cost, security, and formality. As with MSBs, fees and exchange rates comprise the main costs of transferring the funds; however, the intermediary and beneficiary institutions may also charge "lifting fees" for handling the money.[56] Additionally, banks typically charge flat fees for transactions, and because remittance transfers usually involve small sums of money, those fees are often relatively large compared to the size of the transfer.[57] Wire transfers benefit consumers because they provide a secure means of sending money abroad because banks deposit the funds directly into the recipient's bank account rather than requiring the recipient to handle cash.[58] But, consumers may be hesitant to remit through banks or credit unions because of a lack of familiarity with the formal banking system or out of fear of drawing attention to their immigration status.[59] As such, banks and credit unions make up only a small part of the remittance market.[60]

A promising alternative to traditional bank offerings are services offered by the Federal Reserve that are targeted at immigrants. Directo a México is a collaboration between the Federal Reserve and the Banco de México.[61] The program allows U.S. financial institutions to pre-open accounts for the

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55. *See id.* at 55–57 (explaining that banks' correspondent relationships "expedite the transfer of funds across international borders" and noting that "banks that do not have a correspondent relationship can still transfer funds if they can establish a chain of banks that do have such a relationship").

56. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6197.

57. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 37, at 4 ("Wire transfer fees are usually flat fees that may vary based on the destination country but not usually by the amount of the transfer."); Robert Suro & Sergio Bendixen, *The Remittance Process and the Unbanked*, *in* BILLIONS IN MOTION: LATINO IMMIGRANTS, REMITTANCES AND BANKING 5, 13 (2002) (explaining that remitters that used bank accounts to remit expressed dissatisfaction with the costs and that some consumers lacked an understanding that "numerous small transactions can prove expensive when flat fees are charged for each transaction").

58. Suro & Bendixen, *supra* note 57, at 12 (discussing an interview where a remitter explained that, "[i]n my country, when you send money it's very dangerous because everyone knows the places where people pick up the money. They rob people and steal their money. But if I send it . . . from bank to bank, I don't think that anything would happen to them").

59. *See* APPLESEED, BANKING IMMIGRANT COMMUNITIES: A TOOLKIT FOR BANKS AND CREDIT UNIONS (2006) (citing immigration status and lack of familiarity with formal banking systems as barriers to the use of banks for remittance services).

60. The Federal Reserve estimates that no more than 3% of remittances sent to Latin America travel through banks or credit unions. *Directo A México Frequently Asked Questions*, FED. RES. BANK SERVICES, http://www.frbservices.org/files/help/pdf/DirectoMexicoFAQ.pdf. *But see* Laura Sonderup, *The Business of Immigrant Markets: Providing Access to Financial Services*, 60 CONSUMER FIN. L. Q. REP. 503, 503 (2006) (claiming that "at least fifteen percent of immigrants in the U.S. send money home using financial institutions and that market share appears to be increasing").

61. *Directo A México Frequently Asked Questions*, *supra* note 60.

recipient at any Mexican bank affiliated with Bansefi, a government-run bank dedicated to providing financial services to low-income individuals.[62] Further, sending funds through Directo a México is a low-cost option for remitting—the Federal Reserve charges the originating financial institution a mere $0.67 per transaction.[63] It also recently introduced its FedGlobal Latin America service, which, unlike traditional account-to-account-based services, allows funds to be sent to trusted third parties in the recipient's country.[64] The flexibility to send funds to nonbank institutions or open bank accounts for the recipients is important because many potential recipients in Latin America lack access to traditional banking services.[65] These services are also appealing to consumers because of their relatively low cost.[66]

3. IVTS.—Remitters can also use IVTS—money transfer firms that operate in place of or alongside the formal banking system.[67] While these systems are known by a variety of names,[68] they serve the same basic function as formal channels—transferring currency from an individual in one country to another. The most well-known IVTS is *hawala*, a money-transfer mechanism that originated in India hundreds of years ago.[69] In a typical *hawala* transaction:

> Clients hand in their cash and request an equivalent amount to be delivered in local or, more rarely, another specified currency.

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62. *Directo a México and Beneficiary Account Registration Frequently Asked Questions*, FED. RES. BANK SERVICES, http://www.frbservices.org/help/directo_a_mexico.html. The "Cuenta con Tu Gente" accounts are entry-level savings accounts with no fees. *Id.* They require the account holder to maintain a minimum balance of 50 pesos (about $5) and pay interest. *Id.*

63. *Federal Reserve's Key Policies for the Provision of Financial Services*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/paymentsystems/pfs_feeschedules.htm (last updated Aug. 10, 2012). Transactions sent through Directo a México also benefit recipients because the recipient receives pesos based on the wholesale exchange rate, regardless of the size of the transaction. *Directo a México and Beneficiary Account Registration Frequently Asked Questions*, *supra* note 62.

64. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 37, at 10.

65. *See* FAJNZYLBER & LÓPEZ, *supra* note 29, at 37 (citing data showing that Latin America has the lowest number of bank branches per area, which presumably contributes to the inaccessibility of traditional banking services).

66. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 37, at 14 (noting that the FedGlobal Mexican Service was created to provide a lower-cost means for making remittance payments).

67. LEONIDES BUENCAMINO & SERGEI GORBUNOV, INFORMAL MONEY TRANSFER SYSTEMS: OPPORTUNITIES AND CHALLENGES FOR DEVELOPMENT FINANCE 1 (2002). IVTS are not necessarily black-market transactions—in many countries, IVTS operate alongside the formal money transfer industry. *See, e.g.*, Gusmao v. GMT Group, Inc., No. 06 Civ. 5113, 2009 WL 1174741, at *23 (S.D.N.Y. May 1, 2009) ("[A]t all relevant times, every money transmitter in Brazil except Western Union operated in the parallel market. Unlike a true black market, the parallel exchange market was highly visible, with rates routinely being quoted on Brazilian television and published in newspapers and other government publications." (citation omitted)).

68. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, INFORMAL VALUE TRANSFER SYSTEMS 1 (2003) [hereinafter INFORMAL VALUE TRANSFER SYSTEMS].

69. BUENCAMINO & GORBUNOV, *supra* note 67, at 1.

> Hawaladars (hawala operators) and those acting as their agents accept cash on their premises—usually some other business, such as a corner store . . . . In most cases, no fees are discussed. Rather, the transaction cost is factored into the quoted exchange rate or the amount that will be delivered overseas in local currency for their U.S. dollars, pounds, dirhams, riyals, etc.
>
> At the end of each day, hawaladars consolidate all deals into ledgers for each agent and counterpart they do business with, including a running balance. The funds transfer requests are organized into payment instruction sheets—containing the amounts and the name, address, and telephone number of the recipient—and faxed to counterparts in other parts of the world. . . .
>
> . . . Each hawaladar keeps a pool of cash, which enables payments as soon as instructions arrive. Thus, local cash is typically used for payments on behalf of overseas clients. In this way, actual fund transfers are minimized . . . .[70]

The preceding is merely an example of *hawala*, one type of IVTS. But the term IVTS is expansive and can include many types of transactions, including everything from simple hand delivery of funds to exotic transactions involving the structuring of the precious metal trade.[71]

So why do consumers bother with IVTS? Why not just send money through banks or MSBs? Scholars and economists have largely concluded that consumers choose IVTS because of deficiencies in the formal sector. The most likely explanation is that, in many cases, IVTS are simply the cheapest way to send money abroad.[72] High fees, dual exchange rates, and lack of competition in many corridors make IVTS cheaper than formal channels.[73] IVTS operations can also pass on significant savings to their customers because they often avoid the bureaucracy, burdens, and costs of

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70. Nikos Passas, *Formalizing the Informal? Problems in the National and International Regulation of Hawala*, *in* REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS, *supra* note 9, at 8–9.

71. NIKOS PASSAS, INFORMAL VALUE TRANSFER SYSTEMS, TERRORISM AND MONEY LAUNDERING 25–27 (2003). For a more in-depth discussion of the various types of IVTS mechanisms, see SEC'Y OF THE U.S. DEP'T OF THE TREASURY, A REPORT TO THE CONGRESS IN ACCORDANCE WITH SECTION 359 OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT) 19–22 (2002) [hereinafter REPORT TO CONGRESS].

72. MOHAMMED EL QORCHI ET AL., THE INT'L MONETARY FUND & THE WORLD BANK, INFORMAL FUNDS TRANSFER SYSTEMS: AN ANALYSIS OF THE INFORMAL HAWALA SYSTEM 16 (2003) (finding that the costs of transferring money in a *hawala* system is about 2%–5% of the total transfer); Suki, *supra* note 45, ¶ 39 (estimating that formal sector remittances would be increased by 50%–100% if the costs of using formal sectors approximated that of the informal sector); Passas, *supra* note 70, at 9–10, tbls.2.1 & 2.2 (analyzing data collected from the U.A.E. and concluding that *hawala* is the cheapest option for sending money).

73. Suki, *supra* note 45, ¶ 40–41.

complying with U.S. regulations.[74] Another plausible explanation is that formal channels present certain logistical deficiencies IVTS can overcome.[75] Many countries lack the ability to physically distribute money, and, when such institutions do exist, they are concentrated in cities, making it difficult for rural recipients to physically obtain their money.[76] In extreme cases, IVTS may be the only realistic way to send money abroad.[77] Socioeconomic and cultural factors may also explain the demand for IVTS. Financial illiteracy, cultural and language barriers, and bad experiences with financial services can all lead to distrust of formal channels.[78] Immigrants may work long or odd hours, making banks an inconvenient method of transmitting money; remitters might also fear using depository institutions because of their immigration status.[79] By contrast, IVTS often come recommended by other members of the remitter's community and the operator likely shares the language and culture of the sender.[80]

Despite the many advantages they provide for individual consumers, widespread use of IVTS may come with significant costs. Most importantly, depending on how they are structured, IVTS can obscure the global movement of funds and serve as a vehicle for money laundering that can be exploited by terrorists, drug dealers, tax evaders, arms dealers, and other criminals.[81] The anonymity these systems provide makes them susceptible to

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74. *See* OLE E. ANDREASSEN, REMITTANCE SERVICE PROVIDERS IN THE UNITED STATES: HOW REMITTANCE FIRMS OPERATE AND HOW THEY PERCEIVE THEIR BUSINESS ENVIRONMENT 9 (2006) (explaining that for remittance firms, "[t]he four largest obstacles to doing business are related to the regulatory regime in the U.S.").

75. *See* Suki, *supra* note 45, ¶ 98 (commenting on logistical difficulties facing formal financial institutions in developing countries).

76. *See id.* ¶ 17 ("Receivers in rural areas often have poor access to distribution points associated with lower cost options. They may pay high transportation costs to collect their transfers in the most convenient, albeit not the least costly, fashion.").

77. For example, the Somali banking infrastructure and political system presently lack the capacity to safeguard transmitted funds, making the use of formal channels a practical impossibility for remitters seeking to transfer funds to Somalia. *See* Sibel Kulaksiz & Andrea Purdekova, *Somali Remittance Sector: A Macroeconomic Perspective*, *in* REMITTANCES AND ECONOMIC DEVELOPMENT IN SOMALIA, *supra* note 17, at 5, 5–8 (explaining that Somalia lacks a functioning central government, much less a commercial banking system capable of handling money transfers); EL QORCHI ET AL., *supra* note 72, at 21 (noting that even international aid organizations use *hawalas* to send money to countries like Somalia and Afghanistan).

78. Suki, *supra* note 45, ¶ 40; *see also* Rosenbaum, *supra* note 12, at 179 (explaining that IVTS may be appealing to consumers because they are often based on trust and a shared language and culture).

79. ANDREASSEN, *supra* note 74, at 2.

80. *See* EL QORCHI ET AL., *supra* note 72, at 16–17 (arguing that "[l]anguage barriers, trust among community members, solidarity amongst migrants facing the same situation, and cultural considerations enhance the development of informal networks").

81. *See* Daudi, *supra* note 10, at 632 (explaining that proceeds generated from *hawalas* are difficult to detect and that, because they are built on trust, *hawala* transactions generate few records, meaning that law enforcement has little or no paper trail to follow in a money laundering investigation); Perkel, *supra* note 12, at 202 (citing the canceling of debts as an example of ways IVTS dealers can effectively cloak their operations).

abuse. In the aftermath of the 9/11, commentators have singled out IVTS as especially vulnerable to being used as a vehicle for terrorist financing.[82]

III. Anti-Money Laundering Laws and IVTS

This Part addresses the money laundering threat IVTS pose. More specifically, it briefly surveys current U.S. AML law and discusses the ways that IVTS interact with that scheme.

A. Current U.S. AML Law

The 9/11 attacks led to a renewed interest in regulating the transfer of money for law enforcement and national security purposes.[83] This new focus stems from the theory that one of the most effective ways governments can combat terrorism is by depriving individuals of the money they need to fund their operations.[84] But lawmakers came to the conclusion that pre-9/11 criminal financing laws were too weak to stop the cross-border flow of money that supports terrorism.[85] To that end, policy makers revised federal AML laws and directed law enforcement to place new emphasis on enforcement.

The core philosophy behind U.S. AML law has always been that financial institutions are better positioned than the government to detect money laundering and other financial crimes.[86] Congress's initial foray into the regulation of criminal financing, which at bottom adopted a private-sector-oriented approach and remains the centerpiece of U.S. AML law today, was the Bank Secrecy Act of 1970 (BSA).[87] Congress passed the BSA primarily to help law enforcement identify tax evaders, but in the following years, Congress expanded the Act to address money laundering

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82. *See infra* notes 83–85, 100 and accompanying text.

83. *See Examining Treasury's Role in Combating Terrorist Financing Five Years After 9/11: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 109th Cong. 3 (2006) (statement of Daniel L. Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury) ("[O]ver the last 5 years, we have witnessed a revolution in the role the finance ministries can play in international security affairs.").

84. *See id.* at 1 (opening statement of Sen. Richard Shelby, Chairman, S. Comm. on Banking, Hous., & Urban Affairs) (explaining that one of the most important aspects of the national anti-terrorism strategy is constricting "the means by which terrorist organizations and their supporters raise[] and move[] the money required to carry out their attacks").

85. *See* JOHN ROTH ET AL., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 3 (2004) (observing that money laundering controls in place before 9/11 were largely focused on drug trafficking and large-scale financial fraud and were not adequate to detect or prevent terrorist financing).

86. *Id.* at 54; *see also* Richard K. Gordon, *Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing*, 21 DUKE J. COMP. & INT'L L. 503, 511–12 (2011) (explaining that the private sector's role is screening potential criminal customers out of the financial institution, providing information to law enforcement, and reporting suspicious transactions to law enforcement).

87. Pub. L. No. 91-508, 84 Stat. 1114–36 (codified as amended in scattered sections of 12 & 15 U.S.C.).

activities.[88] The BSA combats money laundering activity by imposing various requirements on financial institutions, including MSBs.[89] First, financial institutions must develop an AML program that includes internal policies, procedures, and controls.[90] To ensure that these institutions have the information they need to effectively detect money laundering, BSA regulations require financial institutions to "know" their customers so the institution can understand what sorts of transactions its customers typically make.[91] With this knowledge, financial institutions should have the capacity to detect suspicious transactions. When an institution does notice unusual activity, it must submit a Suspicious Activity Report (SAR) to the Financial Crimes Enforcement Network (FinCEN).[92] The BSA also requires financial institutions to maintain records of certain transactions and submit currency reports when customers initiate transactions involving over $10,000.[93] Policy makers imposed these recordkeeping requirements on institutions so that, if a suspicious transaction does occur, law enforcement officials will have a paper trail to follow.[94] This model of AML regulation is best suited to detecting attempts at laundering drug proceeds or other crimes that involve large amounts of cash because such schemes give financial institutions many chances at detecting irregularities, especially through the use of specialized software that tracks anomalous patterns.[95]

The U.S. AML regime attempts to elicit compliance with these requirements through the imposition of civil and criminal penalties. By the late 1980s, the BSA had begun to push money launderers out of banks, but policy makers increasingly feared that criminals were turning to MSBs for

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88. REPORT TO CONGRESS, *supra* note 71, at 6–9.

89. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-212, BANK SECRECY ACT: FINCEN AND IRS NEED TO IMPROVE AND BETTER COORDINATE COMPLIANCE AND DATA MANAGEMENT EFFORTS 6 (2006) [hereinafter BANK SECRECY ACT: FINCEN AND IRS] (characterizing the BSA's framework as imposing "record keeping and reporting requirements [in order] to create a paper trail of financial transactions that federal agencies can trace to deter illegal activity and apprehend criminals").

90. 31 U.S.C. § 5318(a)(2) (2006); 31 C.F.R. § 1022.210 (2011).

91. For example, it would not be suspicious for a Walmart-sized business to regularly make large cash deposits, but it would be suspicious for an individual on a fixed income to suddenly make a similar deposit. ROTH ET AL., *supra* note 85, at 55.

92. 31 C.F.R. § 1022.320.

93. Transfer and Reorganization of Bank Secrecy Act Regulations, 75 Fed. Reg. 65,812, 65,817 (Oct. 26, 2010) (to be codified at 31 C.F.R. § 1010.311); REPORT TO CONGRESS, *supra* note 71, at 7–8.

94. *See* 31 C.F.R. § 1010.410(e) (detailing the substantial records a nonbank financial institution must keep about transmittors or recipients when involved in a transmission of $3,000 or more); REPORT TO CONGRESS, *supra* note 71, at 16–17 (concluding that improving compliance with current reporting requirements would substantially alleviate problems investigators face when tracking suspicious transactions).

95. *See* ROTH ET AL., *supra* note 85, at 56 (observing that, "[a]s a result of the BSA regime, most money launderers, drug dealers, and high-level fraudsters understand that trying to pump massive amounts of cash through a U.S. bank is fraught with peril").

their money laundering needs.[96] In response to this threat, Congress enacted two *malum prohibita* crimes—running an MSB that does not comply with state licensing laws and failing to participate in a newly enacted federal registry of MSBs.[97] Both laws came with criminal penalties and possible jail time.[98] However, Congress included a stringent scienter requirement in 18 U.S.C. § 1960, the statute containing these new regulatory offenses, making prosecutions difficult.[99]

The 9/11 attacks ended the era of lax enforcement of these laws. In the aftermath of the attacks, policy makers focused special attention on IVTS because of their perceived susceptibility to abuse by terrorists.[100] Congress strengthened § 1960 to provide prosecutors with better tools for convicting IVTS operators that do not comply with the BSA. While it had been a crime to run an unlicensed or unregistered MSB since the mid-1990s, the USA PATRIOT Act removed the *mens rea* requirements from § 1960, making noncompliance with the state licensing and federal registration requirements strict liability offenses.[101] All but four states require MSBs to obtain licenses, meaning that the licensing requirement applies to virtually every MSB.[102]

Section 1960 also criminalizes failure to comply with a complicated federal registration requirement.[103] The registration scheme requires MSB principals to provide information about their business and to register in a public database. The registration scheme has been characterized as relatively complex because it imposes slightly different requirements on businesses that provide similar services.[104] Further, the registration scheme requires only

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96. *See* S. REP. NO. 101-460, at 13–15 (1990) (explaining the growing trend of criminals using MSBs to launder funds); Stephen Labaton, *Unassuming Storefronts Believed to Launder Drug Dealers' Profits*, N.Y. TIMES, Sept. 25, 1989, at A1 (discussing "small inner-city businesses through which recent immigrants send money to relatives" being used to send "billions of dollars to drug dealers in South America and Asia").

97. Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 1512, 106 Stat. 3672, 4057–58 (codified as amended at 18 U.S.C. § 1960 (2006)); Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 408(c), 108 Stat. 2160, 2252 (codified as amended at 18 U.S.C. § 1960(b)(1) (2006)).

98. 18 U.S.C. § 1960(a) (2006).

99. *See, e.g.*, United States v. Velastegui, 199 F.3d 590, 593 (2d Cir. 1999) (observing that § 1960 "makes it a federal crime to *knowingly* operate a money transmitting business in violation of state law" (emphasis added)).

100. *See* INFORMAL VALUE TRANSFER SYSTEMS, *supra* note 68, at 3 ("Because IVTS provides security, anonymity, and versatility to the user, the systems can be very attractive for misuse by criminals.").

101. 18 U.S.C. § 1960(b)(1)(A)–(B).

102. *See infra* Table 1 and note 193 (listing Montana, New Mexico, South Carolina, and Utah as states that do not require MSBs to obtain licenses).

103. 18 U.S.C. § 1960(b)(1)(B).

104. BANK SECRECY ACT: FINCEN AND IRS, *supra* note 89, at 12–13. The registration requirement only applies to firms that provide less than $1,000 in money services per day. *Id.* This condition is extremely difficult to verify, making it difficult to know whether a given business must register or not. *Id.*

principals, not agents, to register.[105] In practice, the distinction between these two types of entities is often unclear.[106]

B. Interaction Between AML Laws and IVTS

This subpart addresses two ways that IVTS interact with the U.S. regulatory regime—IVTS tend to undermine AML regulations, and operators and consumers can use them to avoid burdensome government regulations. These considerations should play a role in crafting a money laundering policy.

As discussed above, private sector cooperation is crucial to the success of the U.S. AML regulatory scheme.[107] IVTS that comply with AML laws can provide a valuable source of information for law enforcement.[108] On the other hand, noncompliant firms undermine the U.S. regulatory scheme because they do not take the steps necessary to provide law enforcement with the information it needs to successfully trace criminals.[109] The more money that flows through compliant, transparent institutions, the easier it is for law enforcement to track criminals. So, for the U.S. system to be effective, remittance firms must be encouraged (or coerced) into compliance.

The second observation is that overregulation of formal remittance channels stands in the way of broad compliance with AML laws. The regulation of the remittance industry requires a delicate balancing because the high compliance costs and reduced efficiency created by overregulation cause consumers and operators to move away from formal channels and towards "underground" remittance providers.[110] Experimentation with strict regulation in other countries has largely shown that if policy makers create a burdensome regulatory regime, sending money through formal channels

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105. 31 C.F.R. § 1022.380 (2011).

106. BANK SECRECY ACT: FINCEN AND IRS, *supra* note 89, at 12.

107. *See supra* note 86 and accompanying text.

108. *See* REPORT TO CONGRESS, *supra* note 71, at 15 (discouraging the outlawing of IVTS because it would "deprive[] law enforcement of potentially valuable information"); Passas, *supra* note 70, at 14 (warning that unsuccessful regulation of IVTS can shift demand towards "less well known informal value transfer methods and thus less transparency and traceability of transactions").

109. *See supra* note 94.

110. *See Regulation Hearing*, *supra* note 1, at 2 (cautioning against the use of "such a heavy hand that we end up pushing currently monitored transactions underground into a shadowy world of illicit transactions"); Abdusalam Omer & Gina El Koury, *Regulation and Supervision in a Vacuum: The Story of the Somali Remittance Sector*, *in* REMITTANCES: DEVELOPMENT IMPACT AND FUTURE PROSPECTS 227, 240 n.6 (Samuel Munzele Maimbo & Dilip Ratha eds., 2005) (arguing that overregulation could "force some smaller companies that are financially incapable of compliance underground, and therefore farther away from the monitoring and enforcement efforts of the host country regulators"); West, *supra* note 17, at 34 ("Over-regulation could result in remittance companies going underground to conduct their business, while under-regulation will provide an avenue for criminals to utilize the remittance system to move their illicitly obtained proceeds, or to finance criminal activity.").

becomes too expensive and consumers flock to underground services.[111] Flight away from compliant institutions undermines the U.S. AML regime because it means that fewer funds travel through transparent channels and produce the information that law enforcement needs.[112] Further, the more consumers use IVTS and commingle their funds with those derived from crimes, the more complex and burdensome an investigation becomes.[113] Thus, when regulating the remittance industry, policy makers must remember that a regulatory regime can go too far and actually become counterproductive if it causes businesses and consumers to stop using formal channels. This observation applies to jurisdictions that regulate remittances for consumer protection or other purposes—compliance with these regulations necessarily includes expenses that will increase the cost of doing business and can ultimately lead to a flight from formal channels.[114]

IV. Problems with the Current AML Regime and Other Regulations

This Part argues that the current AML regime does not effectively coerce compliance. The implication of this failing is that IVTS provide a viable alternative to regulated channels, which undermines U.S. AML law. Worse, the current system not only fails to coerce compliance with AML laws, but it also imposes costs on remittance providers—costs that make formal channels less competitive, further encouraging the use of IVTS. This Part also addresses other regulations affecting money transfer and notes that those laws also impose unnecessary costs on remittance providers, further harming the competitiveness of the formal sector.

A. Failure of the Current AML Scheme

In theory, the U.S. system coerces compliance with AML laws through sanctions.[115] Well-publicized investigations and prosecutions should "send shockwaves throughout the [IVTS] community, coercing compliance with fairly meager reporting requirements."[116] But the current U.S. approach—

111. *See e.g.*, Raúl Hernández-Coss, *Comparing Mature and Nascent Remittance Corridors: U.S.-Mexico and Canada-Vietnam*, *in* REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS, *supra* note 9, at 17, 26 ("[T]he behavior and policies of the Vietnamese government and regulations also play a critical role in influencing whether senders transmit funds formally or informally.").

112. *See* REUTER & TRUMAN, *supra* note 17, at 102 (worrying that "increased regulation in the formal economy is likely to increase reliance on the informal economy" and that excluding those consumers from formal channels "makes tracing money that much more difficult").

113. *See id.* ("The larger the flow of legitimate funds through unregulated channels, the harder it is to find money laundering through the same mechanisms.").

114. *See id.* at 101 ("Notwithstanding the economic and social benefits of the AML regime, the general public incurs costs from the increased regulation in the form of reduced efficiency and higher charges.").

115. *See supra* subpart III(A).

116. Guiora & Field, *supra* note 12, at 89.

imposing sanctions on firms that fail to comply with the BSA[117]—both fails to induce compliance and imposes unnecessary costs on legitimate businesses. Thus, current AML law does not effectively encourage compliance with AML laws and may actually discourage compliance by imposing unnecessary costs on compliant firms, making them less competitive relative to IVTS.

1. IVTS Are Difficult to Find.—Before a noncompliant institution can be sanctioned, it must be identified. Unfortunately, finding IVTS is a difficult task. The "nearly infinite number of variations in IVTS transactions" means that there is rarely a common pattern or set of facts that indicate the presence of an IVTS operation.[118] Further, many of the transfer mechanisms used in IVTS make avoiding law enforcement scrutiny relatively easy.[119] Investigators also have difficulty identifying IVTS because operators frequently provide money transfer services out of another legitimate business, which further shields their money transfer activities from outside scrutiny.[120] In addition, the existence of IVTS is rarely publicized outside of operators' communities, further sheltering them from government-imposed sanctions.[121] Safe from oversight, these firms have little incentive to saddle themselves with the expense of complying with U.S. AML or consumer-protection regulations.[122] The relative ease with which IVTS can avoid prosecution explains why policy makers should be concerned with firms moving underground in response to an overly burdensome regulatory regime—IVTS can easily avoid detection, and thus criminal sanctions do little to induce compliance.

2. Investigations of Noncompliant Firms Rarely Provide Useful Information.—Even when law enforcement manages to identify noncompliant IVTS, they face challenges during investigations. The government's investigation of al-Barakaat typifies this difficulty. Al-Barakaat, an international remittance network, transferred money through a hybrid form of *hawala*, which involved the use of banks to conduct parts of its activities.[123] The FBI had been aware of the organization's existence as

117. *See supra* notes 87–99 and accompanying text.

118. Perkel, *supra* note 12, at 202.

119. *See id.* (observing that "[i]nflating or deflating invoice prices for legitimate export/import businesses" can hide IVTS transactions).

120. *See* Guiora & Field, *supra* note 12, at 63 (noting that IVTS are difficult to locate and monitor because operators frequently engage in many other legitimate business ventures).

121. Alan Lambert, *Organized Crime, Terrorism, and Money Laundering in the Americas: Underground Banking and Financing of Terrorism*, 15 FLA. J. INT'L L. 9, 15 (2002).

122. *See* Rosenbaum, *supra* note 12, at 188–89 (explaining that FinCEN has registered "only a small fraction" of the existing IVTS brokers (internal quotation marks omitted)); *cf.* Perkel, *supra* note 12, at 206–07 (expressing the belief that only an incentive-based approach can lead to IVTS compliance with AML regulations).

123. ROTH ET AL., *supra* note 85, at 67–69.

early as 1996 because banks the organization used had been filing SARs documenting its activities.[124] After raiding al-Barakaat offices around the country, law enforcement officers seized records and froze nearly $1.1 million in assets.[125] A lengthy investigation ensued. However, summarizing the results of the investigation, the 9/11 Commission explained that, "notwithstanding the unprecedented cooperation by the UAE, significant FBI interviews of the principal players involved in al-Barakaat (including its founder), and complete and unfettered access to al-Barakaat's financial records, the FBI could not substantiate any links between al-Barakaat and terrorism."[126]

First, the al-Barakaat raids illustrate how much easier it is to trace money that flows through formal channels. Federal agents became aware of al-Barakaat's activities long before 9/11 because the banks it used had filed SARs alerting law enforcement to the fact that it was conducting suspicious activities.[127] On the other hand, the investigation of al-Barakaat was enormously complicated and time-consuming, yet found no evidence of criminal activities, in part because of the complexity of the investigation.[128] Investigators rarely succeed in gleaning useful information from the noncompliant firms they investigate. Investigations are difficult because noncompliant firms have no uniform standard for record keeping, so records may lack the details investigators need to trace the transactions, and operators may not keep records period.[129] Further, operators may keep records in foreign languages or codes that investigators cannot understand.[130] Even when IVTS operators keep sufficiently detailed records, IVTS are often complex and can take many different forms, meaning that officers often have difficulty tracing the flow of money without the exhaustion of significant resources.[131] The complexity of the al-Barakaat network made the investigation time-consuming and resource intensive; it involved an analysis of over 2 million pages of records, several trips to the U.A.E., and many interviews.[132]

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124. *Id.* Al-Barakaat members used U.S. banks to wire batches of money to the United Arab Emirates. *Id.*

125. *Id.* at 80.

126. *Id.* at 84.

127. *Id.* at 69.

128. *See id.* at 82 (noting that constraints on time and resources precluded a full audit of al-Barakaat's records).

129. *See* REPORT TO CONGRESS, *supra* note 71, at 10 (explaining that "ledgers are often insubstantial and in idiosyncratic shorthand" and that records can be useless because they reveal "nothing about transactions, amounts, time, and names of people or organizations"). The Report goes on to explain that, in cases where "hawaladars know that their clients are breaking the law, no notes or records are kept at all." *Id.* at 11. Hawaladars may make it a general policy not to ask questions about their customers and, as such, may have no useful information for law enforcement. *Id.*

130. *Id.* at 11–12.

131. *Id.* at 11.

132. ROTH ET AL., *supra* note 85, at 81–82.

In fact, such investigations "can take years before investigators understand the intricate financial transactions involved."[133] Investigations of IVTS are complicated, time intensive, and difficult, largely because investigators have no familiarity with the business under investigation. The system works far better when a financial institution that possesses an intimate familiarity with its transactions, business, and customers can direct law enforcement to suspicious transactions. As such, voluntary compliance produces far better results than investigations.

3. Are the Costs of a Sanctions-Based System Reasonable?—Finally, compliance with AML regulations takes time and money—costs that businesses pass on to consumers. A 2006 study of seventy-three remittance providers from around the country revealed that firms report AML compliance as one of their primary expenses, with 50% of interviewed firms reporting that they hire outside contractors in order to meet AML standards.[134] And such significant expenditures are rational for MSB operators because even minor violations can lead to prosecution[135] due to the government's policy of "aggressively prosecut[ing] unlicensed money transmitters to deprive terrorists and other criminals a potential vehicle to facilitate their crimes."[136] Aggressive enforcement by the government can even involve the freezing of funds, harming remittance-sending consumers and their families and friends.[137]

Expecting businesses and consumers to bear those costs might be reasonable depending on the value society receives in return. But it is less than clear that our sanction-based system provides adequate returns. Commentators have called FinCEN's efforts at registering MSBs ineffective.[138] FinCEN estimates that there are between 160,000 and 200,000 MSBs currently operating around the country.[139] However, despite a host of prosecutions and fines, as of January 4, 2013, only 38,859 firms had

133. *Id.* at 82.

134. *See* ANDREASSEN, *supra* note 74, at 10 (stating that among surveyed firms, 40% reported that AML was "one of their main expenses," and 50% reported that "they hire outside expertise in order to meet their AML standards").

135. *See, e.g.*, United States v. Habbal, No. 01:05CR083, 2005 WL 2674999, at *5–6 (E.D. Va. Oct. 17, 2005) (sentencing a *hawala* operator to prison time for failure to comply with state licensing requirements, despite the fact that he had complied with the federal registration scheme).

136. *Virginian Pleads Guilty to Illegal Fund Service*, WASH. TIMES, July 8, 2005, http://www.washingtontimes.com/news/2005/jul/8/20050708-114803-4452r/.

137. *See* ROTH ET AL., *supra* note 85, at 100–01 (discussing the possibility that freezing assets may harm innocent parties).

138. *See* Courtney J. Linn, *One-Hour Money Laundering: Prosecuting Unlicensed Money Transmitting Businesses Under 18 U.S.C. § 1960*, 8 U.C. DAVIS BUS. L.J. 137, 150 (2007) (stating that FinCEN's effort to register MSBs has identified only "a small fraction of even the most conservative estimates of the total number of such businesses"); Rosenbaum, *supra* note 12, at 188–89 (calling registration requirements part of a "systemic problem" in the regulatory framework).

139. Linn, *supra* note 138, at 150.

registered with FinCEN.[140] These low numbers may suggest that sanctions do little to coerce compliance.[141] Without that broad compliance, the BSA is unlikely to be effective.

Even when working as intended, our current AML laws may do little to stop terrorists from moving money. The U.S. AML model excels at identifying attempts at laundering large volumes of money—for example, proceeds from drug sales.[142] Unfortunately, much smaller sums of money can finance terrorist attacks.[143] Further, transactions that finance terrorists look almost identical to consumer transactions, meaning that financial institutions have no useful guidance for distinguishing between terrorist-initiated and legitimate transactions.[144] Considering this evidence of the limited efficacy of AML law, it becomes doubly important to weigh the returns a sanction-based system provides relative to the costs it imposes on legitimate firms.

4. Unbanking MSBs.—AML regulatory scrutiny and corresponding sanctions imposed on banks have created a collateral problem—the unbanking of MSBs. On May 13, 2004, FinCEN fined Riggs Bank $25 million, in part for its weak oversight of high-risk transactions, including "check cashers and money remitters."[145] That fine began an era of bank regulators pressuring banks to monitor remittance firms for compliance with the BSA.[146] This pressure was applied because banks, like other financial institutions, are themselves subject to the BSA and are required to monitor

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140. *MSB Registrant Search Web Page*, FINCEN, www.fincen.gov/financial_institutions/msb/msbstateselector.html (last updated January 4, 2013).

141. *Cf.* REPORT TO CONGRESS, *supra* note 71, at 10 (cataloging various obstacles law enforcement faces in the investigation of IVTS); Gordon, *supra* note 86, at 537–38 (arguing that sanctions do not provide enough incentive for financial institutions to do a good job of implementing AML regulations); Perkel, *supra* note 12, at 200–06 (discussing the limited efficacy of enforcement and prosecution when it comes to the use of illicit IVTS).

142. *See supra* note 95 and accompanying text.

143. *See, e.g.*, ROTH ET AL., *supra* note 85, at 52 (noting that the bombings of the U.S. embassy in East Africa cost around $10,000 and the 9/11 attacks cost $400,000–$500,000).

144. *Id.* at 56–57. FinCEN has determined that looking at the sender's national origin, race, religion, and other similar factors can help identify transactions intended for terrorist use. *Id.* at 57. But permitting financial institutions to use those types of factors would basically legitimize racial profiling, which would be an objectionable, if not unconstitutional, solution.

145. *In re* Riggs Bank, N.A., No. 2004-01, at 2–3, 8 (Dep't of Treasury, Fin. Crimes Enforcement Network May 13, 2004), *available at* http://www.fincen.gov/news_room/ea/files/riggsassessment3.pdf. The same action involved punishing Riggs for laundering funds for Chilean dictator Augusto Pinochet. *See* Press Release, U.S. Dep't of Justice, Riggs Bank Enters Guilty Plea and Will Pay $16 Million Fine for Criminal Failure to Report Numerous Suspicious Transactions (Jan. 27, 2005), *available at* http://www.justice.gov/tax/usaopress/2005/txdv050530.html ("The guilty plea is in connection with Riggs' repeated and systemic failure accurately to report suspicious monetary transactions associated with bank accounts owned and controlled by Augusto Pinochet . . . .").

146. *See* Aaron R. Hutman et al., *Money Laundering Enforcement and Policy*, 39 INT'L LAW. 649, 653–64 (2005) (noting that after the enforcement action against Riggs Bank banks are more inclined to file SARs).

their customers for money laundering activities by applying a level of scrutiny commensurate with the level of money laundering risk each customer presents.[147] Regulators have determined that MSBs almost universally present a heightened money laundering risk. For example, the Office of the Comptroller of the Currency requires depository institutions to verify that MSBs have met their registration and licensing requirements and even suggests that banks visit MSBs at their places of business to ensure they have implemented adequate AML programs.[148] Thus, banks must apply heightened scrutiny to their MSB accounts. This has led to charges that banks are being "forced to act as de facto regulators" of MSBs.[149]

An added wrinkle is the fact that not all MSBs have registered with FinCEN and that agents are not required to register, meaning that banks do not always have an easy way of knowing whether a business is an MSB.[150] The complex definition of MSB under FinCEN regulations makes verification of the fact that a firm is an MSB almost impossible without an on-site inspection of the business.[151] Thus, verifying that a firm is an MSB, much less its money laundering risk, requires significant bank resources. This puts depository institutions in a difficult position—they must either endure the costs of supervising MSBs and risk regulatory scrutiny or they can simply stop serving MSBs. Many banks have chosen the latter.[152] But this decision in turn places stress on MSBs, who now have substantial difficulty obtaining banking services, making their services more expensive.

A recent controversy over the closure of Minnesota-based *hawalas* demonstrates that this problem is alive and well. Minnesota is home to the largest Somali-American population in the country.[153] Until recently, the local *hawalas* provided remittance services for the Somali immigrants.[154] In

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147. FIN. CRIMES ENFORCEMENT NETWORK ET AL., INTERAGENCY INTERPRETIVE GUIDANCE ON PROVIDING BANKING SERVICES TO MONEY SERVICES BUSINESSES OPERATING IN THE UNITED STATES 6 (2005).

148. OFFICE OF THE COMPTROLLER OF THE CURRENCY, AL 2004-7, BANK SECRECY ACT/ANTI-MONEY LAUNDERING: GUIDANCE ON MONEY SERVICES BUSINESS CUSTOMERS (2004).

149. *See Regulation Hearing*, *supra* note 1, at 3 (statement of Rep. Bachus, Member, H. Comm. on Fin. Servs.) (bemoaning the lack of an effective MSB regulatory regime).

150. BANK SECRECY ACT: FINCEN AND IRS, *supra* note 89, at 12.

151. *Id.* at 12–13.

152. *See An Update on Money Services Businesses Under Bank Secrecy and USA PATRIOT Regulation: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 109th Cong. 9 (2005) (statement of William J. Fox, Director, Financial Crimes Enforcement Network) ("[M]oney services businesses of all types and sizes are losing their bank accounts at an alarming rate."); FIN. CRIMES ENFORCEMENT NETWORK, GUIDANCE TO MONEY SERVICES BUSINESSES ON OBTAINING AND MAINTAINING BANKING SERVICES 3–5 (2005) (discussing steps money service businesses can take to obtain bank accounts); Linn, *supra* note 138, at 150–51 ("Faced with regulatory and law enforcement pressures—and the banking community's inability to identify money transmitting businesses—banks have begun to terminate banking relations with their money transmitting business customers.").

153. Allie Shah, *Cash-to-Africa Services Frozen*, STARTRIBUNE, Dec. 29, 2011, http://www.startribune.com/local/minneapolis/136396028.html.

154. *Id.*

December 2011, the *hawalas* closed because the last bank that had kept them as customers closed their accounts.[155] Without the use of banking services, the *hawalas* were unable to send funds to Africa. More problematic is the fact that the *hawalas* had been in compliance with all relevant state and federal laws.[156] Nevertheless, the community development bank that had made banking services available to the *hawalas* determined that it lacked the capacity to ensure that funds wired by the bank did not end up in the hands of terrorists.[157] The fear of liability by a bank that believed it could not screen its customers to the satisfaction of regulators thus led to the canceling of a service that some believe was preventing "a humanitarian crisis in East Africa."[158] This saga illustrates the unintentional effects that sanctions and regulatory oversight can have on the remittance marketplace.

Nor is this phenomenon isolated to Minnesota or *hawalas*. A 2006 study of licensed MSBs in New York state found that nearly two-thirds of firms surveyed had to switch banks within the last year because their bank accounts had been closed.[159] Even MoneyGram, one of the largest MSBs in the country, recently had its accounts closed by Bank of America.[160] The sanction-based system of compliance has led to banks rejecting MSBs and IVTS as customers, making it far more difficult for these companies to provide service to their customers.[161] This in turn harms the federal AML scheme by disincentivizing the use of, or in the case of the Minnesota *hawalas*, eliminating the use of, a transparent, formal means of transferring money.[162]

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155. *Id.*

156. Press Release, SAMSA USA, Vital Lifeline to Millions of Somalis Could Be Cut Off by December 30, 2011 (Dec. 27, 2011) http://www.samsausa.org/index.php?option=com_content&view=article&id=61&Itemid=72 (asserting that members of the Somali American Money Services Association "are fully compliant with all applicable state and federal laws and regulations including all relevant provisions of the Bank Secrecy Act and the USA Patriot Act").

157. *See* Rupa Shenoy, *Bank to End Wire Transfers to Hawalas; Somali Community Scrambles*, MINN. PUB. RADIO (Dec. 2, 2011), http://minnesota.publicradio.org/display/web/2011/12/02/hawala-shutdown/ (explaining that the bank discovered a vulnerability that "could allow someone to use the bank to send funds that end up supporting terrorism").

158. *Id.*

159. Nikolov, *supra* note 43, at 23.

160. *See Bank Secrecy Act's Impact on Money Services Businesses: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 109th Cong. 37 (2006) (statement of Philip W. Milne, President and CEO, MoneyGram International, Inc.) (explaining that Bank of America had ended its "global banking relationship that generated millions of dollars in fees annually" with MoneyGram two months earlier because of its status as a money transmitter).

161. *See id.* (explaining that MoneyGram agents have lost bank accounts and that MoneyGram has had to negotiate special accounts at banks and even hire armored cars, increasing its operating costs).

162. *Id.* at 43 (statement of David Landsman, Executive Director, National Money Transmitters Association, Inc.) ("[A]ttempts to protect the banking system from the risk [licensed remittance companies] pose have backfired badly by threatening to destroy the best ally law enforcement has in the fight against money laundering.").

In conclusion, the current system does not effectively coerce compliance with federal law. But there is another way to ensure firms comply with federal AML law. Currently, consumers choose IVTS because they are cheaper and often provide a better service than formal channels. But this need not be the case. If compliant firms provide an equally cheap and effective service, consumers would not need to resort to IVTS for their remittance needs. This Note thus proposes that the best way to fight money laundering is not by trying to coerce compliance, but by making certain that consumers use formal, transparent channels of remitting by ensuring that services provide a service that competes with IVTS.[163] The best first step towards ensuring that formal channels are competitive is ensuring that our regulatory system does not impose unnecessary costs on remittance providers.[164] Remedying the problems and costs imposed by current AML law is an important first step towards making formal channels more competitive, but there are also other regulations affecting remittance providers that prevent formal remittance providers from being competitive. Those laws are discussed below.

B. Other Regulations Impacting Remittance Providers

As discussed in subpart IV(A), federal AML law can place an onerous burden on remittance providers in exchange for a questionable return. But remittance providers are also subject to a wide array of state (and now federal) consumer protection and safety-and-soundness laws. This subpart briefly surveys those laws and argues that, while they generally serve useful functions, lack of coordination and uniformity imposes additional unnecessary burdens on remittance providers.

1. Dodd-Frank 1073 and Consumer Protection.—Until recently, "[t]here have been limited federal consumer protections for remittance senders."[165] Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[166] contains the first attempt at such a scheme. Congress enacted § 1073 to protect consumers from being "overcharged or

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163. *See Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 111th Cong. 10 (2010) (statement of Daniel L. Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury) ("Frankly, the broader solution to the issue is more of a systemic, almost generational solution of making sure that there is affordable financial services provided to all communities throughout the world."); Nakhasi, *supra* note 12, at 495–96 (arguing that the *hawala* should be integrated into a more transparent system rather than assaulted on the front or back end of transactions).

164. *See supra* notes 110–14 and accompanying text.

165. Richard Cordray, *Making a Difference in the Lives of Immigrants and Others Who Send Money Abroad*, CONSUMER FIN. PROTECTION BUREAU (Feb. 14, 2012), http://www.consumerfinance.gov/blog/making-a-difference-in-the-lives-of-immigrants-and-others-who-send-money-abroad/.

166. Pub. L. No. 111-203, § 1073, 124 Stat. 1376, 2060–67 (2010).

not having the[ir] funds reach intended recipients."[167] To that end, Dodd-Frank modifies the Electronic Fund Transfer Act in order to implement several consumer protections.[168] First, the law requires operators of remittance firms[169] to disclose all of the costs that will affect the consumer's transaction, even those that will occur outside the country or those that are beyond the provider's control (for example, a tax imposed by a foreign government).[170] Section 1073 also sets out procedures that require remittance providers to investigate and resolve errors.[171] The regulations implementing § 1073 also hold the provider strictly liable for the errors committed by its agents and for errors committed by third parties not under the provider's control.[172] After the transaction is complete, the provider must give the consumer a receipt that includes the same information and the date on which the funds will be available for pick up.[173] Finally, the regulations give consumers a thirty-minute window to cancel their transaction.[174]

The effect of § 1073 on the remittance marketplace is uncertain and may well be net neutral. This is because different aspects of the law may both enhance and restrict the competitiveness of the U.S. remittance market. On the one hand, the disclosure regime will help eliminate the practice of providing incomplete pricing information to remittance-sending consumers.[175] Upfront, uniform disclosure of the costs of remitting will benefit consumers because it facilitates informed decision making[176] and will make it easier for consumers to shop around, enhancing competition across

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167. S. REP. NO. 111-176, at 179 (2010).

168. Dodd-Frank Act § 1073.

169. Section 1073 adopts a broad definition of remittance and applies to almost all of the transactions discussed in Part II. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6207–10 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005). It excludes non-"electronic" transfers, as that term is defined in the E-Sign Act, and therefore excludes some of the IVTS-style transactions discussed in subpart II(C). For example, the regulations implementing § 1073 explicitly explain that the law does not cover the mailing of funds or hand delivery by a courier because neither transfer is "electronic." *Id.* at 6208. On the other hand, IVTS transactions that involve bank wires or prepaid cards probably do count as remittance transfers for the purpose of § 1073. *Id.*

170. *Id.* at 6219–26.

171. *See id.* at 6249–51 (defining error to include bookkeeping or computational mistakes, instances where the receiving institution makes anything less than the total disclosed to the sender available to the recipient, a failure to have the funds ready for pick up by the date disclosed to the sender, and even cases where the receiving institution allows funds to be fraudulently picked up).

172. *See id.* at 6265–66 (adopting strict liability for agent errors).

173. *Id.* at 6203.

174. *Id.* at 6194.

175. *See* Suro & Bendixen, *supra* note 57, at 9 (explaining that the institutions that receive remittances charge fees to convert dollars into the local currency and charge additional service fees, and that as a result, consumers are often "surprised that the amount of money delivered to their relatives [is] less than they had expected" and "unaware of the total costs prior to the transaction").

176. *See* Cordray, *supra* note 165 (arguing that "the clarity that can come from [the] disclosures will inform consumer decisions and instill confidence").

the entire remittance marketplace.[177] Further, disclosure of the date of the arrival of the funds effectively lowers the costs of transferring money for recipients because it helps eliminate uncertainty for the recipient.[178] Finally, the error-resolution and strict liability provisions help consumers because they place the costs of rectifying mistakes on remittance providers—the party who is in a better position to bear the costs of errors and has a better understanding of the transmission process, and therefore, has a better chance of fixing the problem.[179]

But complying with the new provisions will cost both time and money. The costs of providing disclosures and resolving errors will increase costs for all remittance providers.[180] Those costs may be especially high for banks and credit unions that use open-network systems.[181] Currently, depository institutions that use wire or ACH services have no way of knowing what intermediary institutions may handle the funds they send.[182] Because they lack relationships with the institutions that handle the funds, it may be difficult (if not outright impossible) for banks and credit unions to disclose

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177. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-204, INTERNATIONAL REMITTANCES: INFORMATION ON PRODUCTS, COSTS, AND CONSUMER DISCLOSURES 45 (2005) ("[W]ith the wide variety of remittance products and with information presented at different times and not always in the remitter's native language, it is difficult for the remitter to compare the different products and providers to determine the most convenient and cost-efficient method to send funds home."); Dilip Ratha, *Leveraging Remittances for Development*, *in* MIGRATION, TRADE, AND DEVELOPMENT 173, 183 (James F. Hollifield et al. eds., 2006) ("Requiring greater disclosure on fees from remittance service providers would help [consumers] make informed choices."); Raúl Hernández-Coss, *The U.S.–Mexico Remittance Corridor: Lessons on Shifting from Informal to Formal Transfer Systems* 41 (The World Bank, Working Paper No. 47, 2005), *available at* http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/US-Mexico_Remittance_Corridor_WP.pdf ("Measures to ensure transparent pricing help consumers to choose rationally among their remittance options and spur competition among service providers.").

178. *Cf.* ROSEMARY VARGAS-LUNDIUS & MARCELA VILLARREAL, INTERNATIONAL MIGRATION, REMITTANCES AND RURAL DEVELOPMENT 18 (2008) (explaining that the cost of remitting is higher for "receivers in rural areas because of the long distances they have to travel to collect the money").

179. *See* Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6249 ("[T]he Bureau believes that where neither a sender nor a remittance transfer provider are necessarily at fault, a provider generally is in a better position than a sender to identify, and possibly recover from, the party at fault.").

180. *Cf.* Letter from Dillon Shea, Assoc. Dir. for Regulatory Affairs, Nat'l Ass'n of Fed. Credit Unions, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 6 (July 22, 2011) (arguing that the proposed disclosures "will create considerable new administrative burdens and will likely prove quite costly").

181. *Id.* at 1 ("Virtually all of the proposed disclosures may be easy to provide in a closed system but will be exceedingly difficult for credit unions that rely on open network systems to provide.").

182. Letter from Michael S. Edwards, Senior Assistant Gen. Counsel, Credit Union Nat'l Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 4 (July 22, 2011) ("The originating credit union . . . has no way of knowing how many additional correspondent institutions will be involved in the transfer, . . . the 'lifting fees' those institutions charge, the taxes charged by other countries, or . . . any currency conversion that will occur . . . .").

the total costs of a transfer or how long it will take the funds to arrive.[183] In fact, smaller depository institutions have claimed that they will drop out of the remittance business altogether rather than attempt to comply with § 1073.[184] Congress anticipated this problem and included a five-year, temporary exception during which institutions that use open-network systems can provide good-faith estimates and still satisfy the disclosure requirement.[185] But it is less than clear whether it is technically possible (much less financially feasible) for (especially smaller) depository institutions to alter their business practices during this reprieve so that they can fully comply with § 1073. If the costs of complying with the disclosure requirement are significant or depository institutions drop out of the remittance business, the result will be decreased competitiveness.[186]

The error-resolution procedures and cancellation period are also important consumer protections. But forcing remittance firms to internalize the costs of their mistakes will likely lead to those costs being passed along to consumers, resulting in an overall more expensive product. Thus, the ultimate effect of § 1073 is unclear at best—the policy has the potential to help or hurt the overall competitiveness of the remittance industry.

2. State Safety-and-Soundness Laws.—State law also regulates the conduct of nonbank remittance providers, most commonly through licensing requirements. State licensing laws require remittance firms to demonstrate and guarantee their financial stability and thus serve a safety-and-soundness function. Because banking regulators already monitor depository institutions for safety and soundness, state laws typically do not require banks and credit unions to obtain MSB licenses.[187] To qualify for a license to operate as an MSB, a firm must first submit financial information for its state regulator to

183. *See* Letter from Robert G. Rowe, III, Vice President & Senior Counsel, Am. Bankers Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 3 (July 22, 2011) (arguing that it would be "virtually impossible" for banks using open network systems to provide the required disclosures and extremely difficult to investigate alleged errors).

184. *See id.* ("Instead of helping consumers, the proposed regulation would make it very difficult, if not impossible, for smaller banks to continue providing a service to customers that need it."); *Some CUs Could Be Forced Out of Remittances*, CUNA (Apr. 10, 2012), http://www.cuna.org/newsnow/12/wash040912-2.html ("[S]ome credit unions will be forced to stop offering remittances if they are required to comply with the disclosure requirements as stated in the final rule.").

185. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6241–42 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005).

186. *See, e.g.*, Press Release, Fed. Home Loan Bank of N.Y., FHLBNY to Stop Processing International Wire Transfers at Year-End (Nov. 20, 2012), *available at* http://www.fhlbny.com/news-events/press-releases/prior-releases/2012/press112012.aspx ("With the looming regulatory hurdles being placed on [processing international wires by § 1073], we have concluded that it is prudent for the Bank to no longer offer [international wires] at year-end." (internal quotation marks omitted)).

187. *E.g.*, WASH. REV. CODE ANN. § 19.230.020 (West 2007).

scrutinize.[188] The granting of a license is also typically contingent on the firm maintaining a minimum net worth and posting a bond or other security to guarantee its outstanding payments.[189] These requirements protect consumers from financially unstable companies and serve as a barrier to entry against firms with questionable business practices.[190] Much like the federal AML scheme discussed in Part III, state licensing laws attempt to coerce firms into compliance through sanctions; typically banking regulators can impose civil and criminal penalties on firms that operate without a license or that provide misleading or false information during the licensing process.[191]

Commentators frequently characterize state licensing regulations as an "uncoordinated patchwork."[192] This criticism is fair. Taken at a high level of generality, licensing laws have similar requirements and seek to achieve similar objectives. But a closer look reveals that almost every state imposes a slightly different set of hoops for an aspiring MSB to jump through. Below is a list of each state's bonding, licensing, and net worth requirements, the aspects of state law most likely to serve as a barrier to entry into the money transfer marketplace. Many states attempt to provide some flexibility by not requiring a fixed bonding or net worth requirement and instead provide for a range of fees. Unless otherwise noted, the states that list a range of fees vary their requirements based on the number of locations or outlets the MSB operates within the state.

188. *E.g.*, WYO. STAT. ANN. § 40-22-111 (2011) (requiring the firm to submit its "most recent audited consolidated annual financial statement" and the "number of payment instruments" the firm sold within the state in the last quarter).

189. *E.g.*, N.C. GEN. STAT. § 53-208.5, 53-208.8 (2011).

190. *See* UNIF. MONEY SERVS. ACT § 203 cmt. (2000) ("The bond and net worth requirements are safety and soundness measures designed to protect the public, but also to deter companies that have questionable solvency or business practices from entering the market.").

191. *E.g.*, N.C. GEN. STAT. § 53-208.24, 53-208.26 (2011).

192. Passas, *supra* note 70, at 12.

State	Bonding Requirement	Licensing Fee Requirement	Net Worth Requirement
Alabama	$10,000 to $50,000	$250 + $5/location to $500	$5,000
Alaska	$25,000 to $125,000	$500 + $100/location	$25,000
Arizona	$25,000 to $500,000	$1,500 + $25/location + $25/delegate to $4500	$100,000
Arkansas	$50,000 to $300,000	$750	$250,000
California	$250,000 to $7,000,000	$5,000	N/A
Colorado	$1,000,000 to $2,000,000	$7,500	$50,000 to $100,000
Connecticut	$300,000 to $1,000,000	$2,250	$100,000
Delaware	$25,000 to $250,000	$230 + $4.60/location	$100,000
D.C.	$50,000 to $250,000	$500 + $25/location to $2,500	$100,000 to $500,000
Florida	$50,000 to $2,000,000	$375 + $38/location	$100,000 to $2,000,000
Georgia	$50,000 to $250,000	$2,000	N/A
Hawaii	$1,000 to $500,000	$2,000 + $300/location to $15,000	$1,000
Idaho	$10,000 to $500,000	$100	$50,000 to $250,000
Illinois	$100,000 to $2,000,000	$100 + $10/location	$35,000 to $500,000
Indiana	†	$1,000	$100,000
Iowa	$50,000 to $300,000	$500 + $10/location to $5,000	$100,000 to $500,000
Kansas	$200,000 to $500,000	$100 + $10/agent	$250,000
Kentucky	$500,000 to $5,000,000	$250 to $500	$500,000
Louisiana	$25,000	$325 + $25/location	$100,000
Maine	$100,000	$500 to $2,500	$100,000 to $500,000
Maryland	$150,000 to $1,000,000	$4,000	$150,000 to $500,000
Massachusetts	§	Varies year to year	N/A
Michigan	$500,000 to $1,500,000	Varies year to year	$100,000 to $1,000,000
Minnesota	$25,000 to $250,000	$4,000	$25,000 to $500,000
Mississippi	$25,000 to $250,000	$750	$25,000 to $250,000
Missouri	$100,000	$100	*
Montana	N/A	N/A	N/A
Nebraska	$100,000 to $250,000	$1,000	$50,000
Nevada	$10,000 to $250,000	$200 to $400	$100,000
New Hampshire	$100,000	$500 to $5,000	††
New Jersey	$25,000 to $900,000	No more than $1,000	$50,000 to $400,000
New Mexico	N/A	N/A	N/A

State	Bonding Requirement	Licensing Fee Requirement	Net Worth Requirement
New York	$500,000	$3,000	N/A
North Carolina	$150,000 to $250,000	$1,000 + $10/location to $5,000	$100,000 to $500,000
North Dakota	$150,000 to $500,000	$400	$100,000
Ohio	$300,000 to $2,000,000	Varies year to year	$500,000
Oklahoma	$50,000 to $500,000	$5000 + $50/location	$275,000 to $3,000,000
Oregon	$25,0000 to $150,000	$1,000	$100,000 to $500,000
Pennsylvania	$1,000,000	$1,000	$500,000
Rhode Island	$50,000 to $150,000	$360	N/A
South Carolina	N/A	N/A	N/A
South Dakota	$100,000 to $500,000	No more than $1000	$100,000
Tennessee	$50,000 to $800,000	$250 to $500	$100,000 to $500,000
Texas	$300,000 to $2,000,000	$2,500	$100,000 to $500,000
Utah	N/A	N/A	N/A
Vermont	$100,000 to $500,000	$500 + $25/location	$100,000
Virginia	$25,000 to $1,000,000	$750	$200,000 to $1,000,000
Washington	$10,000 to $550,000	$1,000	$10,000 to $3,000,000
West Virginia	$300,000 to $1,000,000	$1,000 + $20/location to $10,000	$50,000 to $1,000,000
Wisconsin	$10,000 to $300,000	$500 + $5/location to $1,500	N/A
Wyoming	§§	$3,000	$25,000

Table 1. Bonding, Licensing Fee, and Net Worth Requirements.[193]

† The lesser of (a) the number of locations, minus one, multiplied by $10,000, plus $200,000, or (b) $300,000.

§ Twice the weekly amount transmitted, but no less than $50,000.

* Equal to all the unpaid funds.

†† Lesser of average daily outstanding money transmissions for the prior calendar year or $1,000,000.

§§ $10,000 or two-and-half times the total outstanding payments, up to $500,000.

193. ALA. CODE §§ 8-7-7, 8-7-9 (2002); ALASKA STAT. §§ 06.55.104, 06.55.107 (2010); ALASKA ADMIN. CODE tit. 3, § 13.840 (2012); ARIZ. REV. STAT. ANN. §§ 6-126(30), 6-1205, 6-1205.01 (2007); ARK. CODE ANN. §§ 23-55-202, 23-55-204, 23-55-207 (2012); CAL. FIN. CODE §§ 2032, 2037 (West Supp. 2013); COLO. REV. STAT. ANN. §§ 12-52-107 to -109 (West 2010); COLO. CODE REGS. § 701-7:MO4 (2012) CONN. GEN. STAT. ANN. §§ 36a-599, 36a-602, 36a-604 (West 2004 & Supp. 2012); DEL. CODE ANN. tit. 5, §§ 2305, 2309–10 (2001); D.C. CODE §§ 26-1004, 26-1007–08 (2001); FLA. STAT. ANN. §§ 560.143, 560.209 (West 2012); GA. CODE ANN. § 7-1-683 (Supp. 2012); GA. COMP. R. & REGS. 80-5-1.02 (2011); HAW. REV. STAT. ANN. §§ 489D-6–7, 489D-10 (LexisNexis 2009); IDAHO CODE ANN. §§ 26-2905, 26-2908–09 (2000); 205 ILL. COMP. STAT. ANN. 657/20, 657/30, 657/45 (West 2007); IND. CODE ANN. §§ 28-8-4-24, 28-8-4-27, 28-8-4-32 (West 2010); IOWA CODE ANN. §§ 533C.202–03, 533C.206 (West 2011); KAN. STAT. ANN. § 9-509 (Supp. 2011); KAN. ADMIN. REGS. § 17-22-1 (2012); KY. REV. STAT. ANN.

Although state licensing laws provide valuable protections for consumers, there is room for improvement in the current scheme. Presently, remittance firms that aspire to operate in multiple states are subject to the hodgepodge of state licensing requirements described above.[194] For MSBs, licensing requirements present the single largest barrier to entry into the money transfer industry and present a significant cost for established firms.[195] These firms note that the costs of posting multiple bonds and complying with multiple nonconforming reporting and record-keeping laws can present significant costs.[196] The heterogeneous scheme places a particularly large burden on new Internet-based businesses because they must obtain licenses in forty-six states and Washington, D.C.[197] Not complying with this regulatory mishmash gives underground firms a significant competitive advantage that they can pass along to consumers, ultimately disincentivizing compliance.

3. Taxes and Self-Deportation Policies.—In recent years, the United States has become increasingly embroiled in a debate about the future of its

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§§ 286.11-011, 286.11-013, 286.11-017 (LexisNexis 2007); LA. REV. STAT. ANN. §§ 6:1035, 6:1037 (2005); ME. REV. STAT. ANN. tit. 32, §§ 6105, 6107, 6108 (1999); MD. CODE ANN., FIN. INST. §§ 12-406, 12-411–12 (LexisNexis 2011); MASS. GEN. LAWS ANN. ch. 169, §§ 2, 3 (West 2003); MICH. COMP. LAWS ANN. §§ 487.1013–14 (West Supp. 2012); MINN. STAT. ANN. §§ 53B.05, 53B.08–09 (West 2012); MISS. CODE ANN. §§ 75-15-9, 75-15-11, 75-15-15 (Supp. 2012); MO. ANN. STAT. §§ 361.711, 361.715, 361.718 (West 2000 & Supp. 2012); NEB. REV. STAT. § 8-1004, 8-1006 (2009); NEV. REV. STAT. §§ 671.050, 671.070, 671.100 (2011); N.H. REV. STAT. ANN. § 399-G:5 (Supp. 2011); N.J. STAT. ANN. §§ 17:15C-5, 17:15C-7–8 (West 2001); N.Y. BANKING LAW § 18-a, 643 (McKinney 2008 & Supp. 2012); N.C. GEN. STAT. §§ 53-208.5, 53-208.8–.9 (2011); N.D. CENT. CODE §§ 13-09-04–05, 13-09-08 (2009); OHIO REV. CODE ANN. §§ 1315.05, 1315.07, 1315.13 (West Supp. 2012); OKLA. ADMIN. CODE §§ 85:15-3-2(c), -3, -6 (2012); OR. REV. STAT. §§ 717.215, 717.225, 717.230 (2011); 7 PA. CONS. STAT. ANN. § 6106 (West 1995); R.I. GEN. LAWS §§ 19-14-4, 19-14-6 (Supp. 2011); S.D. CODIFIED LAWS §§ 51A-17-6, 51A-17-8, 51A-17-16 (Supp. 2012); TENN. CODE ANN. §§ 45-7-205, 45-7-208–09 (2007); TEX. FIN. CODE ANN. 151.307–08 (West 2006); 7 TEX. ADMIN. CODE § 33.27 (2012); VT. STAT. ANN. tit. 8, §§ 2506–07, 2510 (2009); VA. CODE ANN. §§ 6.2-1904–06 (2010); WASH. REV. CODE ANN. §§ 19.230.040–60 (West 2007 & Supp. 2012); W. VA. CODE ANN. §§ 32A-2-5, 32A-2-8, 32A-2-10 (LexisNexis 2011); WIS. STAT. ANN. §§ 217.05–06 (West 2009); WYO. STAT. ANN. §§ 40-22-105–06, 40-22-109 (West 2007).

194. *See Regulation Hearing*, *supra* note 1, at 5 (statement of Joe Cachey, Chief Compliance Officer, Western Union Company) (bemoaning the "current regulatory chaos" that MSBs face); RATHA & RIEDBERG, *supra* note 44, at 6 (discussing the "wide variation in the regulatory requirements of bonding and net worth among 30 states in the United States"); Passas, *supra* note 70, at 12–13 (identifying an "uncoordinated patchwork" of state law requirements as a shortcoming of the current U.S. regime).

195. *See* ANDREASSEN, *supra* note 74, at 10 (explaining that remittance firms report licensing and bonding requirements as major obstacles to conducting their business); *id.* at 14 (citing licensing as the biggest barrier to entry for new players in the remittance marketplace).

196. *See id.* at 9–10 (showing that most firms find licensing and bonding requirements in the United States to be a major obstacle in the remittance marketplace).

197. *See* Press Release, Thomas P. Vartanian, The Future of Electronic Payments: Roadblocks and Emerging Practices (Sept. 19, 2000) (explaining that nationwide conformity with money transmitter laws imposes significant burdens on anyone contemplating the development of electronic payment products and networks).

national immigration policy. Some states have come to believe that the federal government is either incapable of or unwilling to enforce immigration laws.[198] These states have taken it upon themselves to try to encourage immigrants to "self-deport" by having state police enforce federal immigration laws and by attempting to create an otherwise hostile climate for immigrants.[199] This strategy has led to the passage of laws that will affect remittances directly, through the imposition of taxes, and indirectly, through the creation of a general anti-immigrant climate.

The most direct way that state law can affect remittances (besides perhaps outlawing the practice all together) is through the imposition of a tax. For example, Oklahoma currently imposes a $5 tax on all cross-border money transfers of less than $500 and an additional 1% fee for all transactions over $500.[200] Other states have considered imposing similar assessments.[201] It is unlikely that Oklahoma hoped to generate revenue by enacting its remittance tax; rather, the tax's purpose—discouraging the practice of remitting[202]—is merely one shot in a larger war over U.S. immigration policy and the status of illegal immigrants.[203]

State self-deportation policies may also affect remittance flows, albeit more indirectly. These policies have gained popularity as an alternative to the traditional, enforcement-based model of fighting illegal immigration. The concept is relatively simple—deporting the 11 million illegal immigrants currently living in the United States is a practical impossibility. So instead, states have opted to try to induce them to leave by making life difficult.[204] Alabama recently passed a bill known as H.B. 56 that exemplifies this approach.[205] It requires law enforcement to question suspected illegal immi-

198. Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674 (2011).

199. *See* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 160 (2008) (explaining that statutes like Arizona's employment verification law led to tens of thousands of self-deportations).

200. OKLA. STAT. ANN. tit. 63, § 2-503.1j (West Supp. 2012).

201. *E.g.*, H.B. 2677, 50th Leg., First Reg. Sess. (Ariz. 2011) (levying an assessment on international money wire transfers); S.B. 268, 80th Leg., Reg. Sess. (Tex. 2007) (imposing a fee for money transmissions to destinations outside the United States).

202. *See* Rosser, *supra* note 23, at 40 (arguing that a tax on remittances would amount to a sin tax).

203. Under the Oklahoma law, a remitter is entitled to a tax credit equal to the fee imposed if she files an Oklahoma tax return. OKLA. ADMIN. CODE § 710:50-15-111 (2011). The implication is thus that the tax falls only on undocumented remitters that do not otherwise file taxes. *See* Sean Murphy, *Oklahoma Lawmaker Defends Wire Money Transfer Tax*, SALON.COM (Apr. 12, 2010), http://www.salon.com/2010/04/12/ok_mexico_trade_flap/ (explaining that the drafter of the Oklahoma tax statute justified the law in part because it burdens mostly illegal immigrants and traffickers from Mexico).

204. Julia Preston, *Romney's Plan for 'Self-Deportation' Has Conservative Support*, CAUCUS, N.Y. TIMES (Jan. 24, 2012, 5:37 PM), http://thecaucus.blogs.nytimes.com/2012/01/24/romneys-plan-for-self-deportation-has-conservative-support/.

205. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, ALA. CODE §§ 31-13-1–30 (Supp. 2012).

grants and bars noncitizens from engaging in certain transactions and from receiving some types of benefits.[206] Anecdotal evidence suggests that self-deportation policies will affect remitting behavior. For example, the radio program *This American Life* recently aired a story about H.B. 56.[207] In one part of the program, an undocumented worker named Carolina explained that she had tried to pick up a gift of money sent to her by her mother at a MoneyGram located in a Walmart.[208] Carolina explained that the clerk refused to give her the money because she could not prove her immigration status, even though no federal or state law (or even a policy of Walmart or MoneyGram) makes proof of citizenship a prerequisite to picking up funds.[209] Others may face the same difficulties as Carolina—when they try to send money abroad, they may be turned away. Immigrants that have negative experiences similar to Carolina's, or even negative experiences unrelated to money transfer services, may become discouraged with or distrustful of formal institutions like banks and may increasingly turn to IVTS or underground channels to conduct money transfers.

Oklahoma-style taxes on remittance transfers and Alabama-style self-deportation laws are a bad idea from an AML perspective because they actively encourage the use of informal channels. Economists have regularly argued that the liberalization of the economy (i.e., removal of trade barriers) effectuates the move from informal to formal channels of remitting.[210] Presumably, the higher costs of remitting in tax-imposing jurisdictions like Oklahoma will discourage at least some consumers from transmitting money through taxed channels. This is particularly true because under Oklahoma's scheme, transfers of under $500 are taxed at a fixed rate which may represent a significant cost to the remitter depending on the size of the transaction.[211] The World Bank estimates that the average cost of sending $200 from the United States was $13.86 (6.93% of the principal) in the third quarter of 2011; that same transaction would cost $18.86 (9.43% of the principal) or

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206. *See* John W. Hargrove & Jennifer J. McGahey, *Alabama's New Immigration Law: Nuts and Bolts for Alabama Employers*, 73 ALA. LAW. 122, 124 (2012) (describing the various restrictions that the Alabama law imposes).

207. *This American Life: Reap What You Sow*, Chicago Public Media (Jan. 27, 2012).

208. *Id.*

209. *Id.*

210. *See* John Gibson et al., How Cost-Elastic Are Remittances? Estimates from Tongan Migrants in New Zealand 1–2, 12–13 (Dec. 14, 2005) (unpublished manuscript), *available at* http://siteresources.worldbank.org/DEC/Resources/PEBGibsonMcKenzieRohorua.pdf (discussing the results of a study of remittances sent to the Pacific Islands that found that remittances have a negative cost elasticity, which means that a reduction in costs will lead to an increase in the behavior). Presumably, because an Oklahoma-style tax increases the cost of transferring money for the remitter, the volume of remittances sent in jurisdictions adopting taxes would decrease. *See* BUENCAMINO & GORBUNOV, *supra* note 67, at 9 ("There is . . . a strong case for the removal of taxes on remittances from overseas."); Rosser, *supra* note 23, at 40 (arguing that taxes will "lead to a deliberate movement away from formal channels towards informal remittance channels").

211. *See supra* note 200 and accompanying text.

36% more in Oklahoma.[212] Thus, remittance taxes dramatically increase the cost of sending money abroad, and remitters in tax-imposing jurisdictions will almost certainly attempt to avoid the relatively higher costs of remitting by seeking out informal channels for transmitting funds.[213] From a purely AML perspective, Oklahoma should drop the tax and other states should refrain from passing similar laws. Alabama-style self-deportation laws also create a problem because they make life more difficult for immigrants that are already often hesitant to participate in formal banking. Self-deportation laws may further discourage remitters from using formal channels for their remittance needs.

V. A National Solution

The previous section argued that the best way to ensure the effectiveness of U.S. AML law is eliminating the flow of funds through underground channels by making formal channels a better option for consumers. This final Part provides a brief prescription. Presently, MSBs and other remittance providers face a complex regulatory system. They must answer to the CFPB, FinCEN, the IRS, face de facto regulatory scrutiny from their banks, and depending on the geographic reach of the firm, up to forty-six state banking agencies. Instead of this patchwork of regulation, Congress should assign a single regulator with responsibility for regulating the entire money transmission industry, including banks and IVTS.[214]

A. Proposed National Scheme

More specifically, the statute creating the single regulator should assign that agency the various regulatory responsibilities related to remittance providers that other agencies currently hold. The agency's primary responsibility would be issuing a money-transmitter license similar to those currently issued by states. The national license would work in much the same way as the current state licenses do—in order to transmit money, a

212. This calculation is based solely on the effect of adding a $5 flat fee to the U.S. average found at WORLD BANK, REMITTANCE PRICES WORLDWIDE 2 tbl.1 (2011).

213. *See* DAVID LANDSMAN, THE NAT'L MONEY TRANSMITTERS ASS'N, NMTA REPORT ON THE NEW MONEY TRANSMITTER FEE IN OKLAHOMA 6 (2009), *available at* http://nmta.us/site/DocsPosted/Oklahoma/OK_Tax_White_Paper.pdf (bemoaning the fact that "[m]ost of the transactions lost to licensees will not go to banks, but rather, to alternate (unlicensed) channels"); Sanket Mohapatra, *Taxing Remittances Is Not a Good Idea*, PEOPLE MOVE, WORLDBANK (Dec. 18, 2010, 1:42 AM), http://blogs.worldbank.org/peoplemove/node/1320 (arguing that remittance taxes will "drive these money flows underground" and noting that maintaining these taxes is difficult because remitters "can resort to using informal channels").

214. There is already evidence of movement in this direction. A bill proposed by Representative Spencer Bachus would have created a department of MSB compliance within the Treasury Department. Money Services Business Compliance Facilitation Act of 2009, H.R. 4331, 111th Cong. (2009). The bill would charge the new department with ensuring that state and federal regulators coordinate standards for MSB licensing and registration and would permit approved self-regulatory organizations to create registration standards. *Id.* § 2(a).

remittance provider would first need to be licensed. The agency would grant licenses only if the firm complied with the AML, consumer protection, and safety-and-soundness laws the new agency would be charged with enforcing. These provisions would look quite similar to their current incarnations, as discussed in Part III, but with changes to address the deficiencies discussed in Part IV.

First, remittance providers would remain subject to the BSA. Remittance providers would still need to screen for suspicious transactions and provide data law enforcement would need for investigations. But the new act would remove the *malum prohibita* crimes created by 18 U.S.C. § 1960. Instead, the new regulator would simply have the power to deny or revoke the license of a remittance provider that is out of compliance. However, the new agency would not be permitted to follow the often harsh path currently followed by FinCEN—it would focus on education and outreach and could only revoke a license when a provider knowingly failed to comply with regulations. Further, the current complex registration requirements would be removed altogether—AML compliance would be enforced solely through the licensing procedures. Education, culturally sensitive outreach, and greater simplicity would encourage buy-in from IVTS, leading to more money flowing through transparent channels while avoiding imposing unnecessary harm on consumers.

The statute would also need to address the problem of unbanking of MSBs. In July of 2009, Representative Carolyn Maloney proposed the Money Services Business Act of 2009.[215] The Act would have created a certification process whereby an MSB could certify that it and its agents comply with the BSA.[216] The Act would then hold that banks have no obligation to review certified MSBs for BSA compliance.[217] The implementing statute should contain a similar provision in order to ensure that banks are no longer charged with the de facto obligation of regulating MSBs. This would allow MSBs to more easily obtain banking services, making them more competitive.

The agency would also have responsibility for implementing the safety-and-soundness regulations currently enforced by various state banking agencies and the consumer protection provisions of § 1073 of Dodd-Frank currently administered by the CFPB. The implementing statute would create uniform, nationally applicable safety-and-soundness standards that the remittance provider would need to meet in order to obtain its license. It would also contain a preemption clause that would expressly preempt state law. This would eliminate the hodgepodge of national laws remittance providers currently navigate and replace them with a set of uniform standards. Applying for one license with one standardized requirement

215. H.R. 2893, 111th Cong. (2009).
216. *Id.* § 3(a).
217. *Id.*

would greatly reduce costs for remittance providers while still shielding consumers from firms with unsavory business practices. Reducing the costs of complying with safety-and-soundness regulations would provide particular benefits for Internet-based and national remittance providers, making these firms more competitive.

As discussed above, the effects of § 1073 are less than clear.[218] Thus, the implementing statute would largely retain § 1073, but would charge the agency with monitoring the law's implementation and efficacy. But one aspect of the law has a special potential to stifle competition. The implementing statute should create a permanent exception for banks and other providers that utilize open-network systems and allow these institutions to provide good-faith estimates of the fees that will be charged. Disclosures containing estimates would help consumers shop around while still ensuring that these institutions remain competitive.

Finally, a federal scheme would be unable to change the various state anti-immigration laws. But the new regulator, consistent with its goal of encouraging competition in the remittance marketplace, should advocate against the passage of similar laws and place pressures on states like Alabama and Oklahoma so that those laws are repealed.

B. Industry-Related Policy Changes

Further, the new agency should encourage competitiveness in the formal channels by encouraging consumers to remit through banks and Internet-based firms. Currently, remitters rarely choose these methods, but they have the potential to compete directly with IVTS, and thus their use should be encouraged.

1. Enhancing Bank Competitiveness.—Currently, banks make up a relatively small proportion of the remittance marketplace.[219] However, this need not necessarily be the case. The Philippine National Bank and other commercial banks have long played a role in the remittance industry and account for between a third and half of the Filipino remittance market.[220] If U.S. banks were as competitive, they could potentially account for a similar percentage.

One of the largest barriers depository institutions face is mistrust from immigrant communities.[221] By contrast, IVTS are often appealing to consumers precisely because of this trust element.[222] Thus, an important step forward is to try to ensure that banks are more trusted among immigrant

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218. *See supra* section IV(B)(1).

219. *See supra* note 60.

220. Kevin Mellyn, Worker Remittances as a Development Tool Opportunity for the Philippines ¶ 40 (June 13, 2003) (unpublished manuscript).

221. *See generally* APPLESEED, *supra* note 59.

222. *See supra* note 80 and accompanying text.

communities. It is important that immigrants that come to a bank have a positive experience and feel comfortable. The new agency could promote positive experiences by providing bilingual literature to banks or even by conducting outreach in communities with large immigrant populations.[223] It could also publicize the fact that federal law allows banks to accept alternative forms of identification such as the Matrícula Consular when opening accounts.[224]

While reaching out to customers is an important first step, banks also need to have the ability to compete with IVTS. However, the traditional bank offering—international wire transfers—are intended for commercial transactions and are a relatively expensive way to send money abroad.[225] Instead, the new statute should encourage the use of the Federal Reserve's significantly less expensive ACH programs.[226] First, the agency could try to convince banks that, while giving customers access to programs like Directo a México would be unlikely to profit the institution directly, it would help the bank build relationships with customers that would ultimately open accounts and use other profitable products.[227] The new statute could also reward banks for offering these services through Community Reinvestment Act (CRA) credits.[228] The new statute could memorialize this policy and explicitly contain a provision that grants banks CRA credits. The new law could even provide more dramatic incentives such as direct subsidization or tax breaks for banks that develop successful, low-cost remittance services.

2. Mobile-Phone- and Internet-Based Services.—New technologies have provided new ways for consumers to send remittances that have the

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223. Sonderup, *supra* note 60, at 506; *see also* APPLESEED, BANKING IN A GLOBAL MARKET 17–18 (2009) (explaining that bank staff may need to be trained to spend more time with new remittance customers to make them feel comfortable as well as understand the banking system in customers' destination countries).

224. *See* APPLESEED, *supra* note 59, at 36 (explaining that banks can accept foreign identifications).

225. *See* Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6197 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005) (noting that historically wire transfers have been used for large transactions); *supra* note 57 and accompanying text.

226. *See Intro to the ACH Network*, *supra* note 52 ("Rather than sending each payment separately, ACH transactions are accumulated and sorted by destination for transmission during a predetermined period. This provides significant economies of scale."); *supra* note 52 and accompanying text.

227. *See* APPLESEED, *supra* note 223, at 38 (explaining Pinnacle Bank's rationale for adopting the Directo a México service).

228. The purpose of the CRA is to encourage financial institutions "to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901 (2006). The CRA achieves this purpose by requiring bank examiners to assign the bank a rating that affects its ability to merge with other institutions based on whether it provides services to all segments of a community. Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 517 (2005).

potential to make remitting cheaper and more convenient for consumers.[229] Avoiding policies that would limit the growth of these industries should be a priority for the new regulator.[230] Promoting new technologies is important because transactions conducted through the Internet or mobile phones are inexpensive for consumers and leave a sufficient paper trail for governments to follow when combating money laundering, and the adoption of these services could give formal channels that utilize them a significant advantage over IVTS. While IVTS often provide an excellent service to consumers, mobile-phone- or Internet-based remittances likely provide a better value still. As such, an important part of the new agency's role should be ensuring there are no regulatory obstacles that inhibit the development of these technologies.

VI. Conclusion

Combating money laundering, including money laundering that occurs through IVTS, is an important national security objective. But noncompliant IVTS obstruct the implementation of an effective AML scheme because they attract legitimate transactions, making illegal transactions more difficult to identify, and do not provide adequate paper trails for law enforcement. Considering the ease with which IVTS can avoid detection, sanctions are not an adequate solution. Instead, policy makers should strive to induce voluntary compliance by making our regulatory scheme simpler, and make our formal channels more competitive by reducing the burdens of regulatory compliance through a single, national regulator.

—Colin Watterson

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229. *See* Colin C. Richard, *Mobile Remittances and Dodd-Frank: Reviewing the Effects of the CFPB Regulations*, 12 U. PITT. J. TECH. L. & POL'Y 1, 4–5 (2012) (discussing the lower price of mobile remittances compared to cash-based options).

230. For example, under Dodd-Frank § 1073, providers at brick-and-mortar stores are required to provide written disclosures, but disclosures can be provided in electronic form for transactions conducted over the Internet and on the consumer's mobile phone or via text message when a transaction is conducted entirely over a mobile phone. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6216 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005).