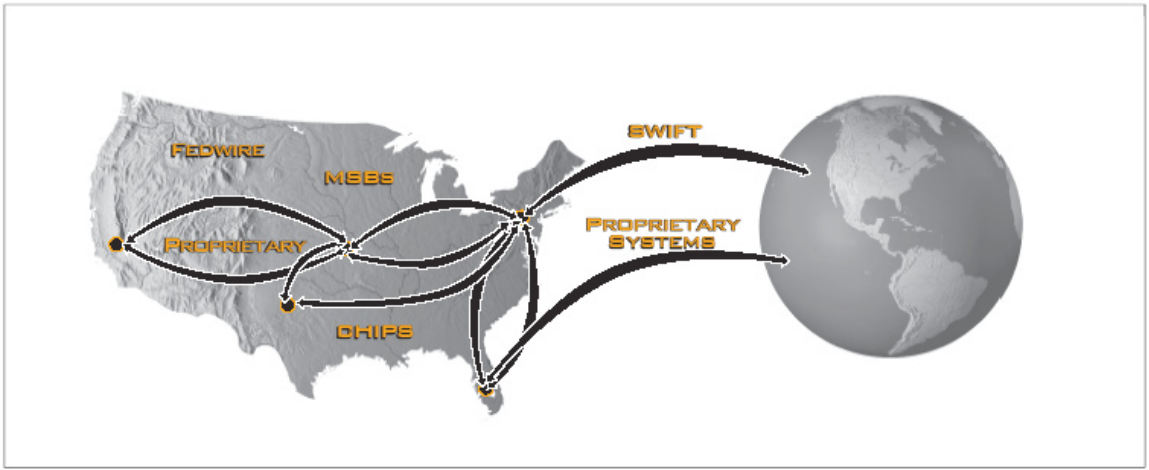
5.0 Form, Manner, and Content of Reporting

Financial institutions may use standardized or proprietary or internal systems to handle all or part of an electronic funds transfer (i.e., between branches of the same institution). Proprietary systems pose a special challenge to designing a reporting system because of the wide range of potential message formats, communications protocols, and data structures involved. The primary challenge that arises in this context is that a reporting requirement would require that the U.S.-based institution implement processes for identifying and extracting cross-border funds transfer information from its proprietary communications systems. The implementing regulation must take into account this kind of permutation in order to ensure that FinCEN collects cross-border transfers that follow this pattern.

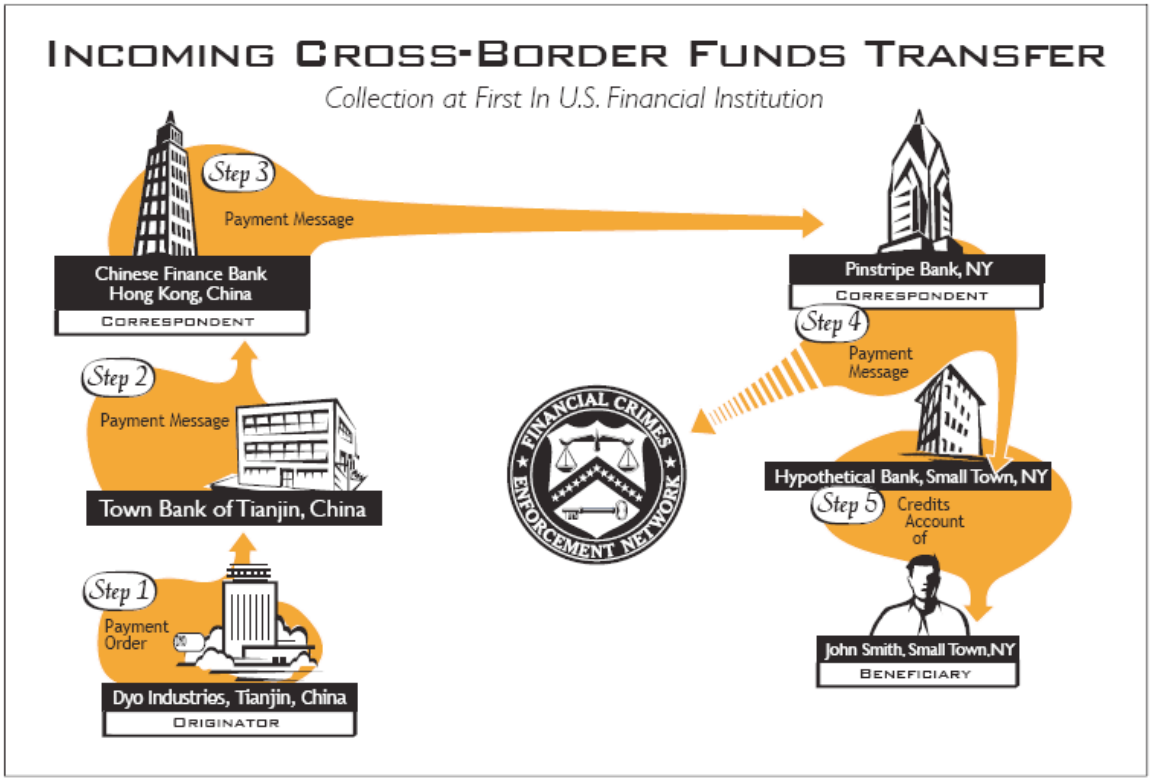
Although myriad systems are available to U.S. financial institutions to process electronic funds transfers, cross-border funds transfers tend to flow through a small number of channels as they enter and leave the United States (i.e., Fedwire, CHIPS and SWIFT; see Appendix D).[18] As institutions pass payment orders along through correspondents en route to their destination, those institutions' systems convert the orders from the many available formats to one of only a few. At some point in the cross-border payment chain a single U.S. financial institution must communicate directly with a foreign financial institution.



18 Many in industry and government have raised the question of what changes, if any, the proposed collection system would require to the established funds transfer messaging systems (i.e., CHIPS, SWIFT, Fedwire). In its response to FinCEN's industry survey issued in March 2006, the American Bankers Association stated that "Imposing a new requirement to include this type of information for all wire transfers would require substantial changes to US payment systems." Such changes were not necessary to the implementation of the corresponding requirements in either Canada or Australia. It is the conclusion of this study that not only would no such change be required, but that if such a change were necessary in order to make such a system work, the system would not be feasible.

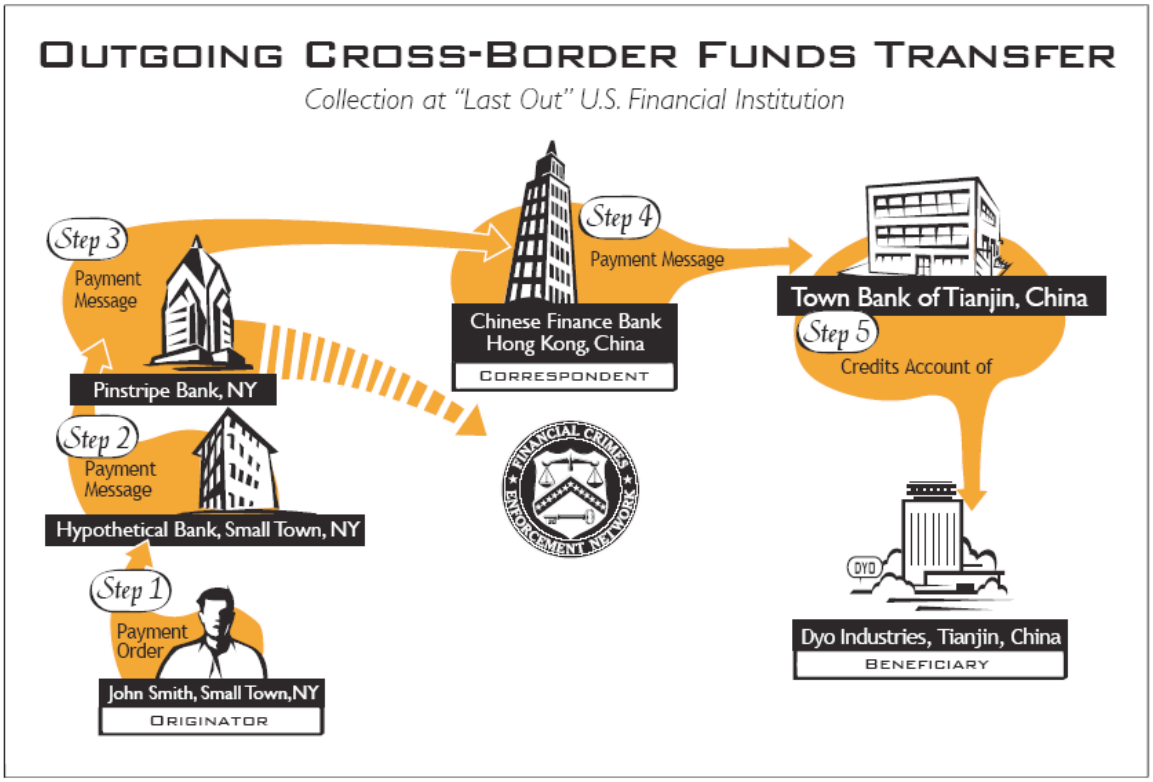
5.1 Collecting from the "First In/Last Out" Institution in the U.S.

The following graphic illustrates an incoming cross-border funds transfer transaction and identifies the "first in" U.S. bank (Pinstripe Bank) as the institution that must report the transfer. In this scenario, the originator, DYO Industries in China, is requesting their bank, Town Bank of Tianjin, to send a funds transfer to the beneficiary, John Smith in New York. The funds transfer flows through several intermediary correspondent banks along the way.



The "first in" bank in the U.S. may serve as a correspondent in the overall transaction chain or it may be the beneficiary's bank. Because the details contained in a funds transfer message's optional fields may change or disappear along the chain, the "first in" bank may have the most complete information related to the transaction of any U.S. financial institution.

The following graphic illustrates an outgoing cross-border funds transfer transaction, and identifies the "last out" U.S. institution (Pinstripe Bank) as the institution required to report the transfer to FinCEN.



A "last out" bank's record should identify the originator, the originator's bank, and other information about the transaction (e.g., beneficiary, beneficiary's bank, information exchange, additional banks involved and their roles, date, amount, etc.). Similarly, the "last out" bank's record may provide a more complete picture of the entities involved in the overall chain of the transaction. Investigators and analysts could then determine where to turn for further information on the transaction and customer. In addition, the customer identification (to the extent it is included in the original message) and other transaction detail information should remain intact and available throughout this correspondent stage and therefore remain available in the instructions handled by the last out banks.

Whether a "first in" or "last out" institution, because of the size and nature of institutions that serve in correspondent roles for cross-border funds transfers, these banks are more likely to be connected with and use centralized message systems (SWIFT, Fedwire, CHIPS) and their standardized message formats. These standardized formats increase the ability of these institutions to handle the transactions with little manual intervention. In addition, these larger banks may often automatically "map over" messages from one system's format to another (e.g., from SWIFT to Fedwire; from SWIFT to CHIPS). Accordingly, many would have systems in place to perform much of the data extraction necessary to create the reports required.

We conclude that it would be most effective to collect funds transfer reports from the "First In/Last Out" institutions. In other words, the obligation to report should fall upon those U.S. institutions that transmit an electronic funds transfer instruction directly to a non-U.S. financial institution or conversely, those that receive such instructions directly from a non-U.S. financial institution. This approach aims to capture a funds transfer instruction at the point at which it crosses the U.S. border. The advantages of the approach are that it focuses the reporting requirement upon larger institutions that are most familiar with international funds transfers, have the technological systems in place to facilitate such transfers, and are in the best economic position to implement compliance systems and processes.[19] Based on our research, we also believe that this will effectively capture the majority of funds transfers entering and leaving the United States without creating needless duplication among the reports submitted to FinCEN. In addition, such a requirement would have the effect of reducing the variation in the types of messages captured and the number of institutions submitting reports.

5.2 Money Services Businesses as Collection Points

In addition to the banking industry, certain money services businesses (MSBs) operate as retail money transmitters. Money transmitters provide many of the same attractions as the major bank-based electronic funds transfer systems. Money transmitters often maintain agent relationships with businesses around the globe, permitting rapid, secure transfer of funds. The largest MSBs generally maintain centralized communications systems and database records of customer transactions that provide an obvious source for the funds transfer information collection. (Appendix D describes funds transfer operations by MSBs.)

This kind of centralized data repository provides a much more efficient collection point than do the agent businesses. In addition, under current Bank Secrecy Act regulations, all money transmitters that meet the definition of an MSB are required to register with FinCEN, except if it serves solely as an agent of another MSB. Therefore, it is easier to identify and monitor this smaller collection universe of MSBs than to collect information directly from MSB agents.

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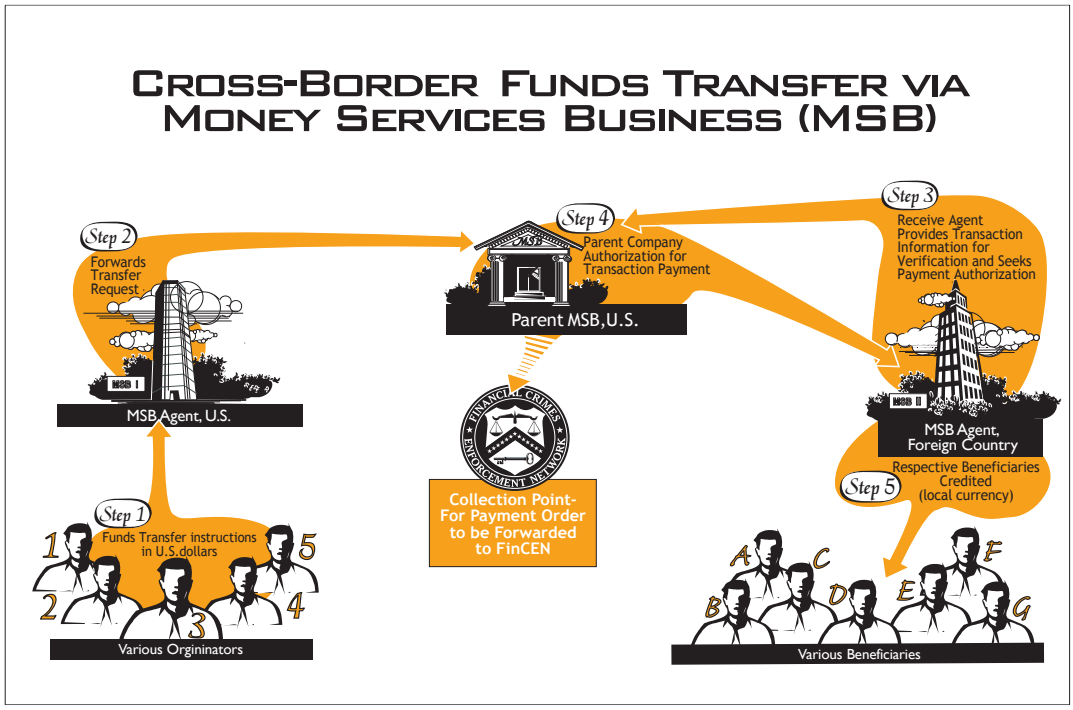
19 In its response to FinCEN's March 2006 industry survey, the American Bankers Association offered that "An unscientific poll of bankers visiting ABA's compliance web page revealed that only 1 in 4 respondents identified themselves as conducting "last out, first in" cross-border transfers." The ABA also noted "for some [banks] it required less IT logic to be built into the reporting system." Significantly, the ABA opined ". . . a "last out, first in" reporting obligation would suffice to capture the cross border transfer of funds and whatever information is attached to that transmittal. Although this method shifts much of the reporting cost to a smaller number of generally larger banks, many of the[m] possess sufficient capacity to perform the reporting with greater efficiency than would be the case if the obligation rested with all originating or beneficiary's institutions."

The diagram below further illustrates a money transfer process occurring through one of the large, centralized money transmitters.



Money transmitters generally effect funds transfers through a bank.[20] However, there are other models, and it is beyond the scope of this study to enumerate the possible permutations. We conclude that a combination of realistic expectations, carefully tailored reporting requirements, and phased implementation of reporting can overcome this challenge.

5.3 Form

Electronic funds transfer messages generally are consistent in terms of the types of information that they contain regardless of the underlying message system on which they travel. Typically, funds transfers include information such as the account number of the bank customer, the originator of the transfer, the beneficiary of the transfer, the originating and beneficiary bank, the dollar

20 Note, however, that this is not true of all money transmitters. As the 9/11 Commission noted, "A hawala, at least in its 'pure' form, does not use a negotiable instrument or other commonly recognized method for the exchange of money. Hawaladars instead employ a variety of means, often in combination, to settle with each other: they can settle preexisting debt, pay to or receive from the accounts of third parties within the same country, import or export goods (both legal goods, with false invoicing, or illegal commerce, such as drug trafficking) to satisfy the accounts, or physically move currency or precious metal or stones." Monograph on Terrorist Financing, National Commission on Terrorist Attacks Upon the United States p. 68.

amount (sometimes denominated in foreign currency), instructions for the disposition of the funds, and other information. In addition, some payment system messages contain a variety of codes that identify the country of origin and destination, the bank of origin and destination, and other information. However, depending on the funds transfer system, the actual format of the data can vary substantially.

To accommodate these variations, FinCEN must adopt a limited number of standard forms for funds transfer reporting. These standards must accommodate automated filing of large collections of funds transfer reports, manual uploading of mid-sized collections of funds transfer reports, and discrete filing by small volume funds transfer service providers. In addition, the standards must assimilate the variations between the different funds transfer message systems from which the reporting institutions will extract the data. Finally, the standards must be such that reporting institutions can convert the source data from their systems into the required format with a minimum of manual intervention or system modifications.[21]

Any implementing regulation should permit institutions to comply with this requirement through the submission of customized reports that comply with a format prescribed by FinCEN or through the submission of certain pre-existing formats (i.e., CHIPS or SWIFT messages) that contain the required data elements. The pre-existing forms deemed acceptable by FinCEN would serve as proxies for formally prepared reports. In addition, FinCEN must prescribe an acceptable standardized format that specifies the specific data elements required. Institutions that must report but that lack the ability to deliver data in one of the approved pre-existing formats would need to convert their own data into this prescribed format and deliver it to FinCEN.

Developing the minimum data requirements and standard formats will require close consultation with members of the U.S. financial services industry through the rulemaking process or otherwise. Collaboration is essential to ensuring that institutions can reasonably implement the technology to extract SWIFT messages from their systems or convert other data into the prescribed format with a minimum of investment in time and labor.

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21 The ABA suggests, "regardless of the nature of any imagined reporting requirement, the financial services industry's responsibility should extend only to the simple transmittal of raw data, with FinCEN assuming full responsibility for the refinement and distillation of the data into a format useful to law enforcement agencies." While we believe that accommodation of every possible format is unreasonable, the approach proposed in the text recognizes the potential cost and strikes a balance aimed at accommodating the widest possible variation in reporting formats.

5.4 Manner

Reporting institutions would be responsible for extracting the cross-border funds transfer data from their operation systems and generating appropriate reports for submission to FinCEN through a secure web protocol. The BSA E-Filing program has successfully implemented this kind of solution to allow large filers to use Connect:Direct, a commercial product, to transfer the BSA data from their own systems to FinCEN. Since many of the reporting institutions have already established the connections with FinCEN, it will be easier to continue using the same method for funds transfer data submission.

As a practical matter, due to the volume of anticipated reporting, it will be necessary for FinCEN to mandate electronic filing of all cross-border funds transfer data. However, the specific means of delivering these electronic reports must be flexible enough to accommodate the various business processes of the reporting institutions and the volume of reports submitted by the various institutions. For institutions that process high volumes of cross-border funds transfers, FinCEN proposes to rely upon its existing BSA E-filing infrastructure. We propose that the modified BSA E-Filing system provide three separate means of submitting reports.

For those institutions with sufficient infrastructure and volume, FinCEN should provide a means to submit reports in large batch files through an automated communication between the institutions' systems and BSA E-Filing. For those institutions that lack the infrastructure or choose not to automate the report submission, FinCEN must also provide an interface through which employees of the institution can manually upload prepared electronic report files through a secure internet portal. Last, FinCEN must provide a secure internet portal through which institutions that process only a very small number of cross-border transfers may complete an online form containing the required information.

5.5 Content

As noted earlier, we conclude that the information or data elements about a funds transfer that U.S. financial institutions must maintain under 31 C.F.R. § 103.33 provide sufficient information for meaningful analysis. Thus, we recommend that any implementing regulation define the required elements of a cross-border funds transfer report in terms identical to those in the funds transfer rule, 31 C.F.R. § 103.33. The funds transfer rule currently applies to transactions of $3,000 or more and we do not propose any different threshold for cross-border funds transfer reporting.[22] We believe that any proposed rule

22 According to the American Bankers Association, "Thresholds – as long as there is no aggregation requirement – are not particularly complicating system wise – but distinctions can involve compliance monitoring challenges especially if the notion of structuring is applied to wire activity."

should incorporate by reference the data elements and threshold requirements of the Funds Transfer Rule in order to accommodate any changes that might occur in the future. We recommend further that any proposed regulation apply the applicable threshold only for discrete transactions rather than requiring financial institutions to attempt to identify multiple transactions aggregating to an amount above the threshold. We believe that the added costs to industry that an aggregation requirement would entail are unwarranted because the affected financial institutions already are required to monitor transactions for suspicious activity, including "structured" transactions, and to report any transaction or series of transactions in currency of more than $10,000.