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Treasury's Terrorist Finance Program's Access to Information Held by the Society for Worldwide Interbank Financial Telecommunication (SWIFT)

Jennifer K. Elsea and M. Maureen Murphy
Legislative Attorneys
American Law Division

Summary

Recent press reports have raised questions about the Department of the Treasury's Terrorist Finance Tracking Program's access to information on international financial transactions held by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a Brussels-based organization owned by banks in many countries, which serves as a hub for international funds transfers. Its records contain names, addresses, and account numbers of senders and receivers of international wire transfers between banks and between securities firms, thus providing a useful source for federal officials responsible for following money trails across international borders. On June 29, 2006, the House of Representatives passed H.Res. 895 voicing support for the Treasury program as fully compliant with all applicable laws; condemning the unauthorized disclosure of classified information; and calling upon news media organizations not to disclose classified intelligence programs. H.Res. 904 was introduced to discourage government censorship of the press. This report addresses these issues and will be updated as legislative events merit.

Background. News stories appearing in the *New York Times*, the *Wall Street Journal*, and the *Los Angeles Times*¹ in June, 2006, described efforts by the Department of the Treasury to trace international banking system transfers of funds to and from terrorists by accessing information held by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a Brussels-based entity owned by financial organizations world-wide that serves as a major hub for international communications among banks and other financial institutions. It has at least one office in the United States.

¹ See Eric Lichtblau and James Risen, "Bank Data Sifted in Secret by U.S. to Block Terror," *New York Times* A-1 (June 23, 2006); Barton Gellman, et al., "Bank Records Secretly Tapped," *Washington Post*, A-1 (June 23, 2006); Josh Meyer and Greg Miller, "U.S. Secretly Tracks Global Bank Data," *Los Angeles Times*, A-1 (June 23, 2006); and Glenn R. Simpson, "Treasury Tracks Financial Data in Secret Program," *Wall Street Journal* A-1 (June 23, 2006).

What is Treasury’s authority for access to SWIFT information? Treasury² cites Executive Order 13224,³ “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism,” as authority for the SWIFT program as a component of its “Terrorist Financing Tracking Program.” E.O. 13224 was issued by President Bush on September 23, 2001, pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706. IEEPA permits the President to exercise broad powers over property or financial transactions, including transfers of credit or payments through banking institutions and securities or other obligations, that involve any interest of a foreign country or a national of that country. To invoke its authorities, the President must declare a national emergency based on the existence of an unusual or extraordinary threat to U.S. national security, foreign policy, or economy having its source, in whole or substantial part, outside the United States.

Finding that foreign terrorist acts, including those of September 11, and threats of future terrorism constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, President Bush issued E.O. 13224. It delegates to the Secretary of the Treasury all necessary authority under IEEPA to block the assets within U.S. jurisdiction of named individuals and entities who are determined by the Secretary of State and the Secretary of the Treasury, in consultation with each other and with the Attorney General, to pose a significant risk of terrorism or to be assisting, sponsoring, or providing financial, material, or technological support for terrorist acts or designated persons.⁴ It requires agencies to coordinate with other countries through bilateral and multilateral agreements and other arrangements to prevent and suppress terrorist acts, deny financial services to terrorists, and share financial intelligence. Treasury’s Office of Foreign Assets Control (OFAC) administers the terrorists sanctions programs and has issued four separate sets of terrorist sanctions regulations, 31 C.F.R., Parts 594 to 597.⁵ The Global Terrorism Sanctions Regulation, 31 C.F.R., Part 94, blocks “property and interests in property ... that are in the United States, that hereafter come within the United States, or that hereafter come within the control of U.S. persons, including their overseas branches” of persons listed on the Annex to E.O. 13244⁶ and a list of other categories of foreign terrorists. It defines “United States person” to include, among other things, “any person in the United States,” and “person” to include an “entity,” which means “a partnership, association, corporation, or other organization, group, or subgroup.”⁷ It declares that the blocked property or interests therein “may not be transferred, paid, exported, withdrawn or otherwise dealt in,” and makes void any

² See “Terrorist Financing Tracking Program: Fact Sheet” (JS-4340, June 23, 2006); “Statement of Under Secretary Stuart Levey on the Terrorist Finance Tracking Program” (JS4334 June 23, 2006), available at [<http://www.treas.gov/press/international.html>](visited June 28, 2006); see also “Letter to the Editors of *The New York Times* by Treasury Secretary Snow,” (June 26, 2006).

³ 66 Fed. Reg. 49079 (Sept. 25, 2001).

⁴ E.O. 13224, § 1.

⁵ Text and summaries of the various blocking regulations, Executive Orders, and statutes are found on the OFAC website at [<http://www.treas.gov/offices/enforcement/ofac/>].

⁶ See 31 C.F.R. Ch. 5, App. A (list of all blocked persons, including Specially Designated Global Terrorists); Office of Foreign Assets Control, “Terrorism: What You Need to Know About U.S. Sanctions,” 2-99, available at [<http://www.treas.gov/offices/enforcement/ofac/>].

⁷ 31 C.F.R. §§ 594.315, 594.308, and 594.303.

transfer in violation of the regulation.⁸ By incorporating by reference⁹ the general recordkeeping and reporting requirements of 31 C.F.R., Part 501, the regulation includes OFAC's authority to require reports of transactions and to "subpoena ... the production of all books, papers, and documents relating to any matter under investigation regardless of whether any report has been required or filed in connection therewith."

What privacy protections apply to records of financial transactions?

The United States has no general law of financial privacy. The Constitution provides no protection against governmental access to financial information turned over to third parties. *United States v. Miller*, 425 U.S. 435 (1976). Although the Fourth Amendment to the United States Constitution requires a search warrant for a law enforcement agent to obtain a person's own copies of financial records, it does not protect the same records when they are held by financial institutions. The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, sets procedures for federal government access to customer financial records held by financial institutions. It generally requires customer notice when federal authorities seek access to bank information on individuals or partnerships of five or fewer individuals. The law requires that federal agencies seeking disclosure of customer financial records use one of several procedures, among which are administrative subpoenas or summons and formal written requests.¹⁰ This law, however, applies generally only to depository institutions.¹¹ Among the various exceptions to the customer notice requirements are disclosures to a federal agency "seeking only the name, address, account number, and type of account of any customer or ascertainable group of customers associated (1) with a financial transaction or class of financial transactions, or (2) with a foreign country or subdivision thereof in the case of a Government authority exercising financial controls over foreign accounts in the United States under ... [IEEPA]."¹² A federal agency that obtains records under this law may transfer them to another agency by certifying "in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry, or intelligence or counterintelligence activity, investigation or analysis related to international terrorism within the jurisdiction of the receiving agency."¹³

What other federal laws apply to tracking terrorist finances? Other federal laws may be implicated in federal efforts to detect terrorist financing, including substantive criminal law and procedural statutes defining terrorism and support for terrorism and money laundering and specifying procedures for seizing terrorist assets. The following concentrate on financial institution recordkeeping and reporting.

⁸ 31 C.F.R. §§ 594.201 and 594.202(a).

⁹ 31 C.F.R. § 594.601.

¹⁰ 12 U.S.C. §§ 3405 and 3408.

¹¹ 12 U.S.C. § 3401(1).

¹² 12 U.S.C. § 3413(g).

¹³ 12 U.S.C. § 3412.

1. *The Bank Secrecy Act of 1970 (BSA)*¹⁴ and its major component, the Currency and Foreign Transactions Reporting Act (CFTRA),¹⁵ require reports and records of cash, negotiable instrument, and foreign transactions. They authorize the Secretary of the Treasury to prescribe regulations to insure that adequate records are maintained of transactions that have a “high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.”¹⁶ CFTRA contains significant requirements related to foreign-based monetary transactions. Citizens are required to keep records and file reports regarding transactions with foreign financial agencies, pursuant to rules promulgated by the Treasury Secretary.¹⁷ Monetary instruments of more than \$10,000 that are exported from or imported into the United States must also be reported.¹⁸

2. *Title III of the USA PATRIOT Act*¹⁹ is devoted to combating terrorist financing. It makes providing material support to a foreign terrorist organization a predicate offense for money laundering prosecution under section 1956 of Title 18 of the U.S. Code.²⁰ It authorizes the Treasury Secretary to require domestic financial institutions to undertake certain “special measures,” from increased recordkeeping to forbidding transactions with respect to specific regions, financial institutions, or transactions outside of the United States determined to be of primary money laundering concern.²¹ The USA PATRIOT Act also permits forfeiture of accounts held in a foreign bank if that bank has an interbank account in a U.S. financial institution; in essence, law enforcement officials are authorized to substitute funds in the interbank account for those in the targeted foreign account.²² Forfeiture is also authorized for currency reporting violations and violations of BSA prohibitions against evasive structuring of transactions.²³

3. *The Suppression of the Financing of Terrorism Convention Implementation Act* implements the International Convention for the Suppression of the Financing of Terrorism by making it a crime to collect or provide funds to support terrorist activities (or to conceal such fund-raising efforts), regardless of whether the offense was committed in the United States or the accused was a United States citizen.²⁴

¹⁴ P.L. 91-508, codified at 12 U.S.C. §§ 1829b, 1951-1959; 31 U.S.C. §§ 5311 *et seq.*

¹⁵ 31 U.S.C. §§ 5311-5322.

¹⁶ 12 U.S.C. § 1829b.

¹⁷ 31 U.S.C. § 5314.

¹⁸ 31 U.S.C. § 5316.

¹⁹ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorists (USA PATRIOT Act)*, P.L. 107-56, Title III “The International Money Laundering Abatement and Anti-Terrorist Financing Act.” For a more detailed discussion of Title III and its implementation, see CRS Report RL33020, *Terrorist Financing: U.S. Agency Efforts and Inter-Agency Coordination*, coordinated by Martin A. Weiss.

²⁰ 18 U.S.C. § 2339B.

²¹ 31 U.S.C. § 5318A(a).

²² 18 U.S.C. § 981(k).

²³ 31 U.S.C. § 5317(c).

²⁴ Title II of P.L. 107-197 (codified at 18 U.S.C. § 2339C).

4. *The Intelligence Reform and Terrorism Prevention Act of 2004* requires the Treasury Secretary to issue regulations mandating the reporting of cross-border transmittals by certain financial institutions,²⁵ and to submit a report to Congress on the Treasury Department's efforts to combat money laundering and terrorist financing.²⁶

Is the publication of classified information a criminal act? Whether the publication of information related to the Treasury's monitoring program is illegal depends on whether it falls within the definition of one of the categories of information protected by statute and is committed with the requisite intent.²⁷ The most pertinent of these statutes would seem to be the Espionage Act of 1917,²⁸ which protects "information related to the national defense" by prohibiting the gathering as well as the willful communication, delivery, or transmission of such information to any person not entitled to receive it, with the intent or reason to believe the information will be used against the United States or to the benefit of a foreign nation.²⁹ The courts give deference to the executive determination of what constitutes "defense information,"³⁰ but the text of the statute seems to indicate that information related to the military establishment was the primary object of the law. Information that is made available by the government to the public is not covered under the prohibition, in any event, because public availability of such information negates the bad-faith intent requirement.³¹ On the other hand, the Constitution protects the public right to access government information and to express opinions regarding the functioning of the government. The First Amendment to the U.S. Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."³² Although the Supreme Court has held that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest . . .,"³³ it has been reluctant to enjoin the press from publishing information, especially that relating to news and commentary on current events.³⁴

What international law may be implicated by the program? The United Nations Participation Act (UNPA),³⁵ which authorizes the President to implement measures ordered by the United Nations Security Council, may provide some authority

²⁵ *Id.* at § 6302.

²⁶ *Id.* at § 6303(a).

²⁷ For an overview of the legal framework for the protection of classified information, see CRS Report RL33502, *Protection of National Security Information*, by Jennifer K. Elsea.

²⁸ Act of June 15, 1917, ch. 30, title I, 40 Stat. 217, codified at 18 U.S.C. §§ 793 *et seq.*

²⁹ 18 U.S.C. § 793.

³⁰ See *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. (1988).

³¹ *Gorin v. United States*, 312 U.S. 9, 27-28 (1941).

³² For an analysis of exceptions to the First Amendment, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

³³ *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115, 126 (1989); see also *New York Times Co. v. United States*, 403 U.S. 713 (1971).

³⁴ *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

³⁵ 59 Stat. 620 (1945), codified as amended at 22 U.S.C. §§ 287 *et seq.*

for the activity.³⁶ The U.N. Security Council, which plays a lead role in determining threats to the international peace and security, has declared that international terrorism is such a threat and has called upon member states to “cooperate with each other . . . to prevent and suppress terrorist acts, . . . [to] prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;. . . [and to] exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts.”³⁷ Following the September 11, 2001 terrorist attacks on the United States, the U.N. Security Council reiterated its earlier pronouncements, calling upon the member states to cooperate in the fight against terrorism, in particular by adopting measures to suppress the funding of terrorism and adhering to international agreements pertaining to the same.³⁸ Among such agreements is the International Convention for the Suppression of Financing Terrorism, adopted by the United Nations General Assembly in 1999, which obligates states party to take measures to identify, discover, freeze, or seize the moneys used or intended for use to finance terrorist attacks of an international character.³⁹ The obligations of state parties extend to activities of their own citizens related to international terrorism, and to terrorist acts that may take place outside of their own territory. The UNPA therefore appears to cover the type of monitoring at issue, at least so long as the measures are calibrated to monitor only transactions that are reasonably related to an investigation of possible terrorist financing and are otherwise constitutional.

Has Congress responded? On June 29, 2006, the House of Representative passed H.Res. 895, voicing support for the Treasury Terrorist Finance Tracking Program as lawful; condemning the unauthorized disclosure of classified information; and calling upon news media organizations not to disclose classified intelligence programs. Another resolution was introduced, H.Res. 904, commending the American press for its service in keeping the public informed of government activity.

On July 11, 2006, the House Financial Services Committee’s Oversight and Investigations Subcommittee will hold a hearing on the Terrorist Finance Tracking Program.

³⁶ Section 5 of the UNPA, 22 U.S.C. § 287c provides in pertinent part that Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

³⁷ S/RES/1269 (Oct. 19, 1999).

³⁸ S/RES/1373 (Sep. 28, 2001)(calling on UN member states to work together to suppress terrorist financing, share intelligence on terrorism, and “implement...the relevant international conventions and protocols to combat terrorism”).

³⁹ G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (1999).