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## The Effects the Bank Secrecy Act has had on the South Florida Banking Industry and Economy, and How the Newly Proposed IRS Regulation Would Compound Those Effects

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# THE EFFECTS THE BANK SECRECY ACT HAS HAD ON THE SOUTH FLORIDA BANKING INDUSTRY AND ECONOMY, AND HOW THE NEWLY PROPOSED IRS REGULATION WOULD COMPOUND THOSE EFFECTS

ASHLEY L. FERNALD\*

I.	INTRODUCTION.....	227
II.	THE BANK SECRECY ACT.....	228
	A. <i>The History of the Bank Secrecy Act</i> .....	229
	B. <i>Effects of BSA on South Florida Banking Industry &amp; Economy</i> .....	236
III.	THE PROPOSED IRS REGULATION REGARDING REPORTING OF INTEREST EARNED BY NONRESIDENT ALIENS .....	239
	A. <i>Evolution of Proposed IRS Regulations Regarding Reporting of Interest Earned by Nonresident Aliens</i> .....	240
	1. The 2001 Proposition.....	240
	2. The 2002 Proposition.....	240
	3. The 2011 Proposition.....	242
	B. <i>Effects of the 2011 Proposed IRS Regulation on South Florida Banking Industry &amp; Economy</i> .....	243
IV.	CONCLUSION .....	249

## I. INTRODUCTION

The current trying economic times have put added stress on the lives of many Americans. This was not an overnight change; it was a change that happened over years that adjusted the economic condition. The banking industry is one sector that has direct and indirect effects on the economy as a whole.<sup>1</sup> In fact, part of the banking system and its actions has even been

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1. See John J. Byrne, *The Bank Secrecy Act: Do Reporting Requirements Really Assist the Government?*, 44 ALA. L. REV. 801, 803 (1993).

blamed for the economic hardship.<sup>2</sup> However, if blame is going to be doled out, another thing to blame is the Bank Secrecy Act (BSA), along with other bank regulations that impair banks' lending capabilities and hurt the communities which they are a part of.<sup>3</sup> The BSA was enacted with good intentions; however, it has evolved over its forty years of existence and has grown to have a negative impact on the economic system.<sup>4</sup>

The Internal Revenue Service (IRS) has recently proposed a regulation that would compound the effects that the BSA has had on the banking industry and the economy.<sup>5</sup> This would have particularly detrimental effects on the South Florida banking industry and economy.<sup>6</sup> The main focus of this article is to assess the effects that the BSA has had on the South Florida banking system and economy, and how the proposed IRS regulation could compound those effects and worsen our economic position. The second section of this article discusses the BSA. It discusses the history of the BSA and the effects that it has had on the South Florida banking industry and the economy. The third section of this article discusses the proposed IRS regulation. It discusses the past versions of similar propositions by the IRS. Then it goes on to discuss how the most recent proposed regulation could impact the South Florida banking sector and the economy. Lastly, this article discusses how the BSA could be changed to help the economy and some proposed solutions of how the goals of the proposed IRS regulation could be achieved without this particular proposed regulation.

## II. THE BANK SECRECY ACT

The Bank Records and Foreign Transactions Act was signed into law on October 26, 1970.<sup>7</sup> "The . . . Bank Secrecy Act imposes reporting, record keeping, and anti-money laundering requirements on financial institutions . . ."<sup>8</sup> For many decades, some form of the BSA has existed.<sup>9</sup> However, the

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2. See Jennifer Mattern, *Who's to Blame for the Recession?*, DIRECTORY JOURNAL (July 24, 2009), <http://www.dirjournal.com/business-journal/whos-to-blame-for-the-recession/>.

3. See Byrne, *supra* note 1, at 802.

4. See *id.* at 801-02.

5. Remy Farag, *Proposed Regs. Expand Bank Deposit Interest Reporting for NRAs*, J. INT'L TAX'N, Mar. 2011, at 9, 9.

6. Brian Bandell, *Foreign Deposits May Be Scrutinized*, S. FLA. BUS. J. (Feb. 11, 2011, 6:00 AM), <http://www.bizjournals.com/southflorida/print-edition/2011/02/11/foreign-deposits-may-be-scrutinized.html>.

7. Byrne, *supra* note 1, at 801.

8. THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 92:22.50, at 182 (3d ed. 2009).

9. Interview with Raul Garcia, Chairman of the Exec. Comm., First Bank of Miami, in Miami, Fla. (July 21, 2011). Mr. Raul Garcia is currently the Chairman of the Executive

BSA, as it is today, is a direct result of the terrorist attacks of September 11, 2001.<sup>10</sup> While these measures came from good intentions, they have had inadvertent negative effects on the international economic system.<sup>11</sup>

#### A. *The History of the Bank Secrecy Act*

In 1970, the Bank Records and Foreign Transactions Act was enacted into law.<sup>12</sup> The second part—or Title II—of the Bank Records and Foreign Transactions Act is the part that has become known as the Bank Secrecy Act.<sup>13</sup> The original purpose of this law was to have financial institutions keep records that could be useful in criminal or tax investigations or proceedings.<sup>14</sup> The BSA attempted to accomplish this goal by mandating that financial institutions create a paper trail of financial records.<sup>15</sup> The BSA requires financial institutions to file a Currency Transaction Report (CTR) for every transaction—including a “deposit, [a] withdrawal, [an] exchange of currency, or other payment or transfer”—made through the financial institution involving more than \$10,000.<sup>16</sup> The CTR must include the following information:

- 1) the legal capacity in which the person filing the report is acting;
- 2) the origin, destination, and route of the monetary instruments;
- 3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person

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Committee of First Bank of Miami. *Id.* In addition, he is the President and Chief Executive Officer of First Bank of Miami Shares, Inc., which is the only shareholder of First Bank of Miami. *Id.* Before becoming an integral part of First Bank of Miami, Mr. Garcia was the Executive Vice President of SG Private Banking for twenty-five years and head of its Latin American division. *Id.* Prior to SG, Mr. Garcia was a branch administrator at Intercontinental Bank. *Id.* In total, Mr. Garcia has forty-one years of experience in the banking industry, most of which were spent in Miami, Florida. Interview with Raul Garcia, *supra* note 9.

10. *Id.*

11. Int'l Trade & Bus. Dev., *Impact of Homeland Security Measures on International Business in the State of Florida*, ENTER. FLA., INC. 2 (Mar. 2005), available at [http://www.feir.org/images/Impact\\_of\\_Homeland\\_Security\\_Measures\\_on\\_Florida.pdf](http://www.feir.org/images/Impact_of_Homeland_Security_Measures_on_Florida.pdf).

12. Byrne, *supra* note 1, at 801; MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE 7A-100 to 7A-101* (Rev. 2d ed. 2004).

13. SALTZMAN, *supra* note 12, at 7A-101.

14. Byrne, *supra* note 1, at 801.

15. Elizabeth A. Cheney, Special Project Note, *Leaving No Loopholes for Terrorist Financing: The Implementation of the USA Patriot Act in the Real Estate Field*, 58 VAND. L. REV. 1705, 1711 (2005).

16. Michael J. Parrish, Comment, *The Burden of Currency Transaction Reporting on Deposit Institutions and the Need for Regulatory Relief*, 43 WAKE FOREST L. REV. 559, 561 (2008); SALTZMAN, *supra* note 12, at 7A-101 to 7A-102; Cheney, *supra* note 15, at 1711; 31 U.S.C. § 5331(a) (2006).

transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both; [and] 4) the amount and kind of monetary instruments transported.<sup>17</sup>

The CTR is filed with the Treasury Department Financial Crimes Enforcement Network (FinCEN) and sometimes with the IRS.<sup>18</sup> Additionally, financial institutions must aggregate multiple transactions to determine if the \$10,000 threshold is met.<sup>19</sup>

The Money Laundering Suppression Act of 1994 established both mandatory and discretionary exceptions to CTR filing requirements.<sup>20</sup> The statute stipulates that:

The Secretary of the Treasury shall exempt, pursuant to section 5318(a)(6), a depository institution from the reporting requirements of subsection (a) with respect to transactions between the depository institution and the following categories of entities: A) Another depository institution; B) A department or agency of the United States, any State, or any political subdivision of any State; C) Any entity established under the laws of the United States, any State, or any political subdivision of any State, or under an interstate compact between [two] or more States, which exercises governmental authority on behalf of the United States or any such State or political subdivision; D) Any business or category of business the reports on which have little or no value for law enforcement purposes.<sup>21</sup>

Furthermore, a bank is entitled to exempt business customers who have had a transaction account at the bank for more than one year and who regularly make transactions over \$10,000.<sup>22</sup> However, in order for a bank to exempt a business customer from CTR filings, the bank must go through an extensive process.<sup>23</sup> Once a customer becomes eligible for exemption, the bank must file a form with the Department of the Treasury.<sup>24</sup> Then, the bank

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17. 31 U.S.C. § 5316(b)(1)–(4).

18. Cheryl R. Lee, *Constitutional Cash: Are Banks Guilty of Racial Profiling in Implementing the United States Patriot Act?*, 11 MICH. J. RACE & L. 557, 570 (2006).

19. Parrish, *supra* note 16, at 561.

20. SALTZMAN, *supra* note 12, at 7A-106.

21. 31 U.S.C. § 5313(d)(1).

22. Parrish, *supra* note 16, at 561; *see* 31 U.S.C. § 5313(e).

23. Parrish, *supra* note 16, at 561–62.

24. *Id.*

must analyze the customer each year, monitor for any suspicious activity, and file an updated exemption form every two years.<sup>25</sup>

In addition to CTRs, the BSA requires banks to file Suspicious Activity Reports (SARs).<sup>26</sup> The Annunzio-Wylie Anti-Money Laundering Act, enacted in 1992 as part of the Housing and Community Development Act, made SARs mandatory.<sup>27</sup> “The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.”<sup>28</sup> A SAR must be filed for a transaction—or transactions in the aggregate—of \$5000 or more, when the bank or its employee knows or suspects that the transaction: 1) involves funds gained from illegal activity; 2) is intended to escape the reporting requirement; 3) has no business or lawful purpose, or is uncharacteristic of the customer and has no sensible explanation; or 4) is aiding criminal activity.<sup>29</sup>

When filing a SAR, it should include information about the financial institution, what the suspicious activity was, who the actor was, any witnesses to the suspicious activity, and the person who prepared the report.<sup>30</sup> The financial institution is required to keep a copy of the SAR for five years.<sup>31</sup> Furthermore, the financial institution is not permitted to notify a person who was involved in a transaction that has been reported as suspicious.<sup>32</sup> A SAR is sent to the U.S. Department of the Treasury, the IRS, FinCEN, and other government agencies that request SARs.<sup>33</sup> FinCEN, which was created by the Department of the Treasury in 1990, keeps a database of all CTRs and SARs and makes the reports available to law enforcement officials.<sup>34</sup> “Unless requested by law enforcement or a firm’s securities regulator, neither a SAR nor any information in a SAR may be produced or disclosed, even when faced with a subpoena.”<sup>35</sup> SARs are privileged, and therefore, cannot be compelled by courts.<sup>36</sup>

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25. *Id.* at 562; see 31 U.S.C. § 5313(e)(5).

26. Parrish, *supra* note 16, at 562.

27. SALTZMAN, *supra* note 12, at 7A-103; Matthew S. Morgan, *Money Laundering: The American Law and its Global Influence*, 3 NAFTA L. & BUS. REV. AM. 24, 41, 44–45 (1997).

28. 31 U.S.C. § 5318(g)(1).

29. OEHMKE, *supra* note 8, at 182; Parrish, *supra* note 16, at 562–63; SALTZMAN, *supra* note 12, at 7A-107.

30. Morgan, *supra* note 27, at 45.

31. *Id.* at 46.

32. 31 U.S.C. § 5318(g)(2)(A)(i); OEHMKE, *supra* note 8, at 182.

33. Lee, *supra* note 18, at 571.

34. Cheney, *supra* note 15, at 1712.

35. OEHMKE, *supra* note 8, at 182–83.

36. *See id.* at 183.

On top of CTRs and SARs, banks were expected to have a “know-your-customer (KYC) program[.]”<sup>37</sup> The bank personnel had to take reasonable care to know the identity of each of their customers, know the true owners of all accounts, acquire identification information on all new customers, obtain evidence of the identity of any person who wants to conduct a transaction, and make a note of any unusual departure from a customer’s normal activities.<sup>38</sup> This KYC program was eventually withdrawn and later replaced with customer due diligence.<sup>39</sup>

The terrorist attacks on September 11, 2001 changed all facets of life in America. This includes the banking industry.<sup>40</sup> Following the September 11th terrorist attacks, on September 24, 2001, President George W. Bush issued the Terrorist Financing Executive Order.<sup>41</sup> The purpose of this executive order was to “starve terrorists of funding, turn them against each other, rout them out of their safe hiding places, and bring them to justice.”<sup>42</sup> The executive order was codified as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act—the Patriot Act.<sup>43</sup> The main purposes of the Patriot Act “were [t]o deter and punish [domestic and foreign] terrorists acts . . . [and] to enhance law enforcement investigatory tools.”<sup>44</sup> The Patriot Act augmented the requirements of the BSA.<sup>45</sup> Before the Patriot Act, the BSA “was not as formalized as it [became after] the Patriot Act.”<sup>46</sup> The Patriot Act was meant to eradicate money laundering because Congress had uncovered that money laundering had helped to fund the terrorist activities.<sup>47</sup> The Patriot Act expanded the reporting requirements that were already required by BSA.<sup>48</sup>

37. See Morgan, *supra* note 27, at 47.

38. *Id.*

39. JEFFREY TORP, CUSTOMER IDENTIFICATION COMPLIANCE TOOLKIT 3.10 (rev. ed. 2009).

40. See, e.g., Cheney, *supra* note 15, at 1715.

41. *Id.*

42. *Id.* (quoting Press Release, Office of the Press Sec’y, Fact Sheet on Terrorist Fin. Exec. Order (Sept. 24, 2001) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010924-2.html>).

43. Norma J. Williams, 2007 Update on the USA Patriot Act and Executive Order 13224 in, COMMERCIAL REAL ESTATE FINANCING 2008: WHAT BORROWERS & LENDERS NEED TO KNOW NOW, at 43, 49 (PLI Real Estate L. & Prac. Course Handbook Ser. No. 549, 2008); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §1, 115 Stat. 272-402 (2001) [hereinafter Patriot Act].

44. Williams, *supra* note 43, at 49 (alteration in original) (quoting Patriot Act, at 272).

45. Cheney, *supra* note 15, at 1707; Patriot Act § 302.

46. Interview with Raul Garcia, *supra* note 9.

47. Cheney, *supra* note 15, at 1707.

48. See Interview with Raul Garcia, *supra* note 9; Patriot Act § 302.

Additionally, the Patriot Act required banks to have programs that allowed them to confirm customer identity.<sup>49</sup> The banks are required to confirm the identity of anyone who opens an account.<sup>50</sup> Furthermore, the banks have to keep records of this information and cross-reference it with “lists [supplied] by the government to [ascertain] whether the customer is a known or suspected terrorist.”<sup>51</sup>

The banks must each create and maintain an anti-money laundering department of their own.<sup>52</sup> This includes, at the very minimum: “A) the development of internal policies, procedures, and controls; B) the designation of a compliance officer; C) an ongoing employee training program; and D) an independent audit function to test programs.”<sup>53</sup>

Another challenging requirement for banks is “due diligence.”<sup>54</sup> The statute states:

Each financial institution that establishes, maintains, administers, or manages a “private banking account”<sup>55</sup> or a correspondent account in the United States for a non-United States person, including a foreign individual visiting the United States, or a representative of a non-United States person shall establish appropriate, specific, and, where necessary, enhanced, due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts.<sup>56</sup>

The KYC program was replaced with this requirement for “customer due diligence.”<sup>57</sup> Under this program the bank employee must “verify[] the customer’s identity and [gauge] the risks [related to] that customer.”<sup>58</sup> In

49. Williams, *supra* note 43, at 50; Patriot Act § 326.

50. Williams, *supra* note 43, at 50–51.

51. *Id.* at 51.

52. *Id.* at 50.

53. 31 U.S.C. § 5318(h)(1)(A)–(D) (2006).

54. *See id.* § 5318(i)(1).

55.

The term “private banking account” means an account (or any combination of accounts) that—  
(i) requires a minimum aggregate deposits of funds or other assets of not less than \$1,000,000;  
(ii) is established on behalf of 1 or more individuals who have a direct or beneficial ownership interest in the account; and (iii) is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.

*Id.* § 5318(i)(4)(B).

56. *Id.* § 5318(i)(1).

57. TORP, *supra* note 39.

58. *Id.*



addition, the due diligence is ongoing for high-risk customers.<sup>59</sup> The enhanced due diligence required for a non-U.S. person is stringent.<sup>60</sup>

If a private banking account is requested or maintained by, or on behalf of, a non-United States person, then the due diligence policies, procedures, and controls required under paragraph (1) shall, at a minimum, ensure that the financial institution takes reasonable steps—(A) to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, such account as needed to guard against money laundering and report any suspicious transactions under subsection (g); and (B) to conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure, that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.<sup>61</sup>

The bank must also have “an understanding of normal and expected activity” for the account.<sup>62</sup> This can be confirmed in many ways, one of which is visiting the site of a business account holder.<sup>63</sup> “[T]he Secretary may require any domestic financial institution or domestic financial agency to take such steps as the Secretary may determine to be reasonable and practicable to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a foreign person . . . .”<sup>64</sup> In addition, the Secretary may make more stringent requirements depending upon the geographic location.<sup>65</sup> Furthermore, the bank must periodically monitor each high-risk relationship to determine whether any changes to the business operation occurred.<sup>66</sup>

Financial institutions face the possibility of civil money penalties if they violate provisions of the BSA.<sup>67</sup> The federal regulators and FinCEN can seek civil money penalties due to noncompliance.<sup>68</sup> If the regulator determines that there has been a “willful violation of the SAR reporting [requirements]

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59. *Id.*

60. *See* 31 U.S.C. § 5318(i)(3).

61. *Id.*

62. TORP, *supra* note 39.

63. *Id.*

64. 31 U.S.C. § 5318A(b)(2).

65. *Id.* § 5326(a).

66. TORP, *supra* note 39.

67. STEVEN MARK LEVY, FEDERAL MONEY LAUNDERING REGULATION: BANKING, CORPORATE AND SECURITIES COMPLIANCE § 10.09 (Supp. II 2011).

68. *Id.* § 7.11.

by a financial institution or by any of [the institution's] officers, directors, partners or employees," a civil penalty may be ordered.<sup>69</sup> The penalty can be "up to \$25,000 or the amount of the transaction (up to \$100,000)."<sup>70</sup> A willful violation is not just deliberate wrongdoing.<sup>71</sup> A willful violation also includes any shortcomings of BSA compliance procedures which are insufficient to discover a major kind of "suspicious activity, or internal controls and due diligence procedures" that are inadequate to substantially comply "with the financial institution's BSA policies."<sup>72</sup> Willful violations can lead not only to fines, but also to criminal prosecution by the Department of Justice.<sup>73</sup> A willful violation of a SAR reporting requirement may be subject to a "fine of up to \$250,000, or imprisonment of up to five years" upon criminal conviction.<sup>74</sup> If the violation of a SAR reporting requirement is in conjunction with a violation of another federal law or within a pattern of illegal activity involving more than \$100,000 in a one-year interval, the person in violation may be fined up to \$500,000 or be imprisoned for ten years, or both.<sup>75</sup> Generally, a financial institution can avoid criminal prosecution by agreeing to pay civil money penalties and agreeing to make the policies and procedures stronger.<sup>76</sup>

If the violation is merely a negligent violation, FinCEN can apply a civil penalty up to \$500.<sup>77</sup> However, "[i]f the negligent violation is part of a pattern of negligent activity, an additional penalty of up to \$50,000 may be assessed."<sup>78</sup> Furthermore, "[e]ach failure to timely file a suspicious activity report can lead to a civil penalty of the greater of the amount involved in the transaction (up to \$100,000) or \$25,000."<sup>79</sup> The consequences for any mistake by a financial institution or its employees can have serious consequences for both the financial institution and the individual.<sup>80</sup>

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69. *Id.*

70. *Id.*

71. *Id.*

72. LEVY, *supra* note 67, § 7.11.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.*

77. LEVY, *supra* note 67, § 7.11.

78. *Id.*

79. *Id.* § 5.14.

80. *See id.*

### B. *Effects of BSA on South Florida Banking Industry & Economy*

The reporting requirements have cost the banking industry enormous amounts of money.<sup>81</sup> These reports were “intended to provide information with ‘a high degree of usefulness.’”<sup>82</sup> Nevertheless, FinCEN and the Government Accountability Office (GAO) reported that many of the CTRs and SARs filed have no value to law enforcement, and thirty to forty percent of CTRs filed yearly are only regular, daily transactions by customers who have had long relationships with their banks.<sup>83</sup> In 1975, American banks filed 3418 CTRs.<sup>84</sup> In 1992, 9,200,000 CTRs were filed.<sup>85</sup> In 1990, it was estimated that banks spent \$129,000,000 on BSA compliance.<sup>86</sup> “In 2006, financial institutions submitted 15,994,484 CTRs . . . .”<sup>87</sup> As many as seventy-five percent of those CTRs filed in 2006 were only related to innocent business transactions.<sup>88</sup> “FinCEN estimate[d] that [a] CTR requires twenty-five minutes . . . to fill out and submit . . . .”<sup>89</sup>

The SAR relies heavily on bank employees’ judgment.<sup>90</sup> Because of this, extensive training is required for employees to detect suspicious activity.<sup>91</sup> Additionally, banks are concerned that due to the fact that many different government agencies are reviewing SARs, and that they are all reviewing SARs for different reasons, their demands about what information should be included makes filing these reports confusing.<sup>92</sup> Furthermore, because of the threat of civil money penalties and even criminal prosecution, banks may encourage their employees to file a report even if it might not be completely necessary, just to cover themselves so they do not get cited in a review.<sup>93</sup> Moreover, the bank employees themselves are most likely fearful of the possibility of being fined personally and even criminally prosecuted for not complying with reporting requirements.<sup>94</sup> With the worry of personal penal-

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81. Parrish, *supra* note 16, at 561, 564.

82. *Id.* at 559 (quoting 12 U.S.C. § 1829b(a)(1) (2006)).

83. *Id.*

84. Byrne, *supra* note 1, at 803.

85. *Id.*

86. *Id.* at 818.

87. Parrish, *supra* note 16, at 564.

88. *Id.* at 565.

89. *Id.* at 564.

90. *Id.* at 563.

91. *Id.*

92. Lee, *supra* note 18, at 575.

93. See SALTZMAN, *supra* note 12, at 7A-105 to 7A-114.

94. See *id.* at 7A-104.

ties hanging overhead, bank employees may even waste their time—and therefore the bank’s resources—by filing unnecessary reports.<sup>95</sup>

There are considerable costs associated with training employees to submit the filings and purchasing the technology required for flagging the suspicious transactions or transactions over the threshold.<sup>96</sup> The software necessary to comply with the BSA ran between \$30,000 and \$50,000, plus \$5000 per month for maintenance as of 2006.<sup>97</sup>

Mr. Garcia, the Chairman of the Executive Committee of First Bank of Miami, a community bank, stated that he believed that:

[T]he government[’s] train of thought was that they were going to monitor terrorist activity by following the money. In doing so, they, [the U.S. government], turned around and decided that the banks were going to be cops. And if the banks were not willing to be cops, which is not the job of the financial sector, then huge penalties were created and for a period [of four to five] year[s], you, [the bank], would get examinations and all they were focus[ed] on were BSA, anti-money laundering, and compliance.

....

Banks who did not take the initiative and didn’t set up the necessary compliance departments, BSA departments, monitoring, [and] the IT to follow unusual transactions, paid dearly because they were given cease [and] desist orders—very, very serious penalties.<sup>98</sup>

If a financial institution does not file a required report, “the person responsible is subject to civil penalties and [even] criminal prosecution.”<sup>99</sup> This potential penalty to bank employees may even scare them into filing SARs when they might not be necessary, throwing more resources into report filings.<sup>100</sup> This, of course, leaves less for lending, which is what should be infused into the market for small business owners to help move the economy and help with unemployment levels.<sup>101</sup>

“[A]fter [September 11th], the [P]atriot [A]ct came out, and it basically restructured the way we did business,” Mr. Jorge Triay said of the major changes that the banking industry underwent after the enactment of the Pa-

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95. *See, e.g., id.*

96. Parrish, *supra* note 16, at 563.

97. *Id.* at 565.

98. Interview with Raul Garcia, *supra* note 9.

99. SALTZMAN, *supra* note 12, at 7A-104.

100. *See id.* at 7A-107.

101. *See* Parrish, *supra* note 16, at 564.

triot Act and its changes to the BSA.<sup>102</sup> Mr. Triay found that after the Patriot Act was enacted, the banks had to invest enormous amounts of money and intellect in order to comply with the new stringent requirements.<sup>103</sup>

In order to set up a strong compliance program, a bank must be willing to give up a substantial percentage of its yearly earnings.<sup>104</sup> Mr. Garcia said that setting up the technology necessary, along with adding staff to comply with the BSA costs his bank anywhere from \$400,000 to as much as \$500,000 per year.<sup>105</sup> This amounted to roughly a third of his annual profit, which now must be added to the operating cost of the bank.<sup>106</sup> The First Bank of Miami, a community bank of \$250,000,000, spends between seven and ten percent of its total expenses on compliance alone.<sup>107</sup>

In addition to the costs of setting up a strong compliance department, banks must pay for their employees to have BSA training.<sup>108</sup> Depending on the year and the type of training necessary the bank could spend as little as \$900 per day, per person, to be trained if the conference is local.<sup>109</sup> However, if the bank has to send its employees to get trained elsewhere, this cost could increase exponentially.

Enhanced due diligence is another area of compliance that can cost a bank incredible amounts of money.<sup>110</sup> It may even require special visits by the bank for "high-risk customers."<sup>111</sup> High-risk customers include international customers.<sup>112</sup> After enhanced due diligence was required, banks sometimes had to make site visits to their high-risk customers, no matter how far.<sup>113</sup> This actually eliminated a group of customers because it was too difficult and costly to go visit some of these international customers in hard to reach or even dangerous regions.<sup>114</sup> Some banks actually had to close these customers' accounts because they would rather lose the customer than run

102. Interview with Jorge Triay, President & Chief Exec. Officer, First Bank of Miami, in Miami, Fla. (July 27, 2011). Mr. Jorge Triay is the current President and Chief Executive Officer of First Bank of Miami. *Id.* Prior to First Bank of Miami, Mr. Triay was the President and Chief Executive Officer of Ready State Bank. *Id.* In all, Mr. Triay has thirty-five years of experience in the banking industry. *Id.*

103. *Id.*

104. See Interview with Raul Garcia, *supra* note 9.

105. *Id.*

106. See *id.*

107. Interview with Jorge Triay, *supra* note 102.

108. *Id.*

109. See *id.*

110. *Id.*

111. *Id.*

112. Interview with Jorge Triay, *supra* note 102.

113. See *id.*

114. See *id.*

the risk of getting penalized for not visiting these high-risk, international customers.<sup>115</sup> So, not only did the BSA requirements after the Patriot Act force banks to spend enormous amounts of money on compliance staff, IT, and training, but its due diligence requirements also forced banks to choose between letting some customers go and losing capital, or just spending more on traveling to some hard to reach places.<sup>116</sup>

### III. THE PROPOSED IRS REGULATION REGARDING REPORTING OF INTEREST EARNED BY NONRESIDENT ALIENS

“The [United States] has long allowed foreigners to deposit money, which earns interest tax free.”<sup>117</sup> Both parties—the nonresident alien and the U.S. bank—benefit from this relationship.<sup>118</sup> The bank has the benefit of capital that can be lent, and the nonresident alien (NRA) depositor has a safe place to invest money.<sup>119</sup> At this time, “foreigners do not have to pay taxes [in] the [United States] on interest earned” on deposits in this country.<sup>120</sup> Currently, under the regulation now in effect—Reg. 1.6049-8(a)—American financial institutions are only required to report to the IRS annually interest earned on deposit accounts belonging to Canadians.<sup>121</sup> The financial institution must file form 1042-S with the IRS for any Canadian who earns interest in a U.S. financial institution, even though interest paid to a Canadian NRA is not subject to taxation.<sup>122</sup> In addition, the financial institution must send a copy of form 1042-S to the Canadian depositor.<sup>123</sup>

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115. *Id.*

116. *Id.*

117. Alex Leary, *Florida Delegation Implores Obama: Hands Off Foreign Deposits in U.S. Banks*, THE BUZZ FROM THE STAFF OF THE ST. PETERSBURG TIMES (Mar. 3, 2011, 1:34 PM) <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/florida-delegation-implores-obama-hands-foreign-deposits-us-banks>.

118. *Id.*

119. *Id.*

120. Bandell, *supra* note 6; David M. Balaban et al., *Proposed Regs. Reduce Reporting Burden for Interest Paid to NRAs*, J. INT’L TAX’N, Oct. 2002, at 62, 62; Cynthia Blum, *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579, 581 (2004).

121. Fla. S. Comm. on Banking and Insurance, SM 1344 (2011) Bill Analysis and Fiscal Impact Statement 1 (Mar. 10, 2011), [hereinafter Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement], available at [www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?FileName=2011s1344.pre.bi.Docx&DocumentType=Analysis&BillNumber=1344&Session=2011](http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?FileName=2011s1344.pre.bi.Docx&DocumentType=Analysis&BillNumber=1344&Session=2011); Farag, *supra* note 5, at 9; Balaban, *supra* note 120, at 62; Blum, *supra* note 120, at 581.

122. Mar. 10, 2011, Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 1.

123. *Id.*

### A. *Evolution of Proposed IRS Regulations Regarding Reporting of Interest Earned by Nonresident Aliens*

The IRS has proposed, time after time, ways in which U.S. banks should report interest earned by foreign accountholders.<sup>124</sup> The last three examples were proposed in 2001, 2002, and 2011.<sup>125</sup>

#### 1. The 2001 Proposition

In 2001, the IRS proposed a regulation, REG-126100-00, that would require U.S. banks to report annually to the IRS interest earned by any NRA through a deposit account.<sup>126</sup> The 2001 proposed regulation, which was one of the last acts of the Clinton Administration, was heavily criticized by the banking community.<sup>127</sup> The biggest concern “was that the administrative burden . . . would . . . outweigh any benefits.”<sup>128</sup> Furthermore, the banking community was concerned that there would be a negative impact on U.S. banks, especially those banks with a high percentage of NRA depositors.<sup>129</sup> At the time of this proposition, Florida banks claimed they would be particularly susceptible because a considerable percentage of the banks’ deposits were held by foreigners who could move their money to accounts in the Caribbean or Panama.<sup>130</sup> Moreover, some feared that the information attained under the proposed regulation could be misused.<sup>131</sup> Bankers and organizations, such as the Center for Freedom and Prosperity, and former Governor of Florida Jeb Bush expressed opposition.<sup>132</sup>

#### 2. The 2002 Proposition

On July 30, 2002, the IRS withdrew the proposed regulation from 2001 and issued a new proposed regulation.<sup>133</sup> The 2002 proposed regulation, REG-133254-02, would have required financial institutions to report interest

124. See Farag, *supra* note 5, at 9.

125. *Id.*

126. *I.R.S. Reporting of Bank Interest Paid to NRAs*, INT’L TAX BLOG (Mar. 29, 2011) [http://intltax.typepad.com/intltax\\_blog/2011/03/irs-reporting-of-bank-interest-paid-to-nras.html](http://intltax.typepad.com/intltax_blog/2011/03/irs-reporting-of-bank-interest-paid-to-nras.html); Farag, *supra* note 5, at 9.

127. See Balaban, *supra* note 120, at 62; Blum, *supra* note 120, at 581.

128. Balaban, *supra* note 120, at 62.

129. *Id.*

130. *Id.*

131. *Id.*

132. Blum, *supra* note 120, at 581–82.

133. Balaban, *supra* note 120, at 62.

earned by NRAs of sixteen countries.<sup>134</sup> The proposed regulation would have become effective for interest paid after December 31st of the year that the final form of the regulation was published.<sup>135</sup> The IRS acknowledged that the 2001 proposed regulation was too broad in requiring banks to report interest paid to any NRA.<sup>136</sup> To lessen the load on the banks, the 2002 proposed regulation required reporting interest paid to NRAs of sixteen countries, rather than all countries.<sup>137</sup> These countries were Australia, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom.<sup>138</sup> The reason the IRS chose these countries was because it decided to reduce the reporting requirement to those countries that had a bilateral tax treaty with the United States.<sup>139</sup> In addition, financial institutions could report all interest earned by NRAs of any country if the financial institution chose to do so.<sup>140</sup> The IRS believed that the proposed regulation would increase compliance with U.S. tax laws and would not put too much of a burden on U.S. banks.<sup>141</sup>

One of the purposes of this proposed regulation was to reduce the possibility for U.S. citizens to evade taxes by claiming foreign status.<sup>142</sup> Prior to this proposition, banks were only required to report interest earned on deposits kept by U.S. citizens.<sup>143</sup> Banks were not required to report interest earned by foreigners.<sup>144</sup> Therefore, a U.S. citizen could attempt to avoid paying taxes on interest earned by claiming foreign status.<sup>145</sup> One problem that this regulation did not seek to fix was the problem of a U.S. citizen giving money to a foreign owned corporation that made a deposit in a U.S. bank.<sup>146</sup>

Another purpose for the proposed regulation was to facilitate information sharing with other countries.<sup>147</sup> The theory was that it would encourage

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134. Farag, *supra* note 5, at 9; *see also* Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

135. Balaban, *supra* note 120, at 62.

136. *Id.* at 62, 64.

137. *See id.* at 64; *see also* Farag, *supra* note 5, at 9.

138. Farag, *supra* note 5, at 9.

139. Balaban, *supra* note 120, at 64.

140. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2; Farag, *supra* note 5, at 9.

141. *See* Balaban, *supra* note 120, at 64.

142. Blum, *supra* note 120, at 584.

143. *See id.*

144. *Id.*

145. *Id.* at 584–85.

146. *Id.* at 586–87.

147. Blum, *supra* note 120, at 587.



voluntary compliance by U.S. citizens.<sup>148</sup> If the proposition had been put into order, the sixteen countries included in the list above could have exchanged information with the United States.<sup>149</sup> Those sixteen countries could have learned information about interest paid by U.S. banks to their own citizens, allowing the countries to impose taxes on that interest.<sup>150</sup> Likewise, the United States could have learned about U.S. citizens who earned interest in other countries that were not paying U.S. taxes on that interest.<sup>151</sup>

After the IRS proposed this regulation, it was met with much opposition.<sup>152</sup> There were many who were concerned that if the regulation were implemented, then NRAs would not want to keep deposits in U.S. banks.<sup>153</sup> Jay Cochran, an economics professor at George Mason University, estimated that \$88.1 billion in U.S. deposits could be withdrawn from U.S. financial institutions if this proposed regulation were enacted.<sup>154</sup> One of the reasons that a NRA would remove his or her money from the United States, if this regulation was implemented, is the worry that once the IRS had the information, it would communicate that information to the tax authorities of the NRA's country of origin.<sup>155</sup> Furthermore, if the NRA's home country was oppressive, corrupt, or unstable, there could be horrible consequences for the NRA.<sup>156</sup> Wealthy persons from countries like these could face persecution, robbing, or kidnapping if the information fell into the wrong hands.<sup>157</sup>

### 3. The 2011 Proposition

The newest of the IRS proposed regulations, if finalized, would require U.S. financial institutions to report all interest of more than ten dollars earned on deposits by *all* NRAs, of *all* countries, to the IRS using form 1042-S.<sup>158</sup> Banks would have to report interest earned after December 31st

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148. *Id.*

149. *Id.* at 588.

150. *Id.*

151. *Id.*

152. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2; see Letter from Bill Posey, Member of Cong., to Barack Obama, President of the United States, (Mar. 2, 2011) (on file with *Nova Law Review*), available at <http://posey.house.gov/UploadedFiles/IRS-DelegationLetter-March3-2011.pdf>.

153. See Blum, *supra* note 120, at 623.

154. Heather Landy, *Fight Over Reporting of Foreigner Interest Returns*, 176 AM. BANKERS 1, 1 (2011).

155. Blum, *supra* note 120, at 624.

156. *Id.*

157. *Id.* at 624–25.

158. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2 (emphasis added); Farag, *supra* note 5, at 9 (emphasis added).

of the year that the regulation is finalized.<sup>159</sup> There are several purposes for this proposed regulation.<sup>160</sup> One of these purposes is to increase information sharing with other countries.<sup>161</sup> The idea is that this will help to establish agreements with other countries to exchange information on interest earned by each country's citizens.<sup>162</sup> The IRS wants to receive information regarding interest paid to U.S. citizens and residents by banks in other countries.<sup>163</sup> Another purpose of the regulation is to minimize tax evasion by U.S. citizens who are keeping deposits in U.S. banks but are claiming to be NRAs.<sup>164</sup> Yet, another purpose of the proposed regulation is to discover foreign companies that are controlled by American citizens.<sup>165</sup>

### B. *Effects of the 2011 Proposed IRS Regulation on South Florida Banking Industry & Economy*

Currently, wealthy foreigners have accounts in the United States and Florida because of the privacy ensured by the banks and the relative stability of the political system and economy.<sup>166</sup> This is particularly true for "people from [South] America, where there has been corruption and economic collapse[]." <sup>167</sup> According to the Commerce Department, foreigners have roughly \$3.6 trillion in U.S. banks and securities combined.<sup>168</sup> Furthermore, foreigners have an estimated "\$35 billion to \$50 billion in Florida banks."<sup>169</sup> Banks are concerned that the newly proposed IRS regulation will drain capital from the U.S. banks and the economy.<sup>170</sup>

159. Farag, *supra* note 5, at 9.

160. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

161. *Id.*; Bandell, *supra* note 6; Clemente L. Vazquez-Bello, *U.S. Banks Fear Loss of Foreign Deposits Due to Proposed IRS Regulation*, GUNSTER'SBOARDROOMBRIEF.COM (Feb. 17, 2011), <http://boardroombrief.com/theblog/2011/02/17/u-s-banks-fear-loss-of-foreign-deposits-due-to-proposedregulation/>.

162. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

163. *I.R.S. Reporting of Bank Interest Paid to NRAs*, *supra* note 126; Vazquez-Bello, *supra* note 161.

164. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2; Farag, *supra* note 5, at 9.

165. Bandell, *supra* note 6; Vazquez-Bello, *supra* note 161.

166. Bandell, *supra* note 6; Vazquez-Bello, *supra* note 161.

167. See Telephone Interview with Alex Sanchez, President & Chief Exec. Officer, Fla. Bankers Ass'n, Tallahassee, Fla. (Aug. 1, 2011).

168. Zachary Fagenson, *Looming IRS Rule Could Drain Billions in Foreign Deposits from Florida Banks*, MIAMI TODAY NEWS.COM (Week of June 2, 2011), <http://www.miamitodaynews.com/news/110602/story4.shtml>.

169. *Id.*; see Interview with Raul Garcia, *supra* note 9 (stating that roughly half of the deposits at First Bank of Miami are from NRAs).

170. Landy, *supra* note 154.

The tradition is that deposits and certain government securities have been offered to NRAs tax-free. They would have to meet certain criteria—they would have to fill out forms that [are] excepted by [the] IRS, where they declare themselves foreigners, and they are foreigners—not [just] trying to pass as one. And as a result of that, monies that could have gone to Panama, Nassau, Cayman, and other international centers, came to the U.S. Banks were [then] able to use those funds, [and] lend them domestically. The attraction was always that you are playing on an equal playing field. Meaning, if you have a deposit in Panama, Panama may pay you a quarter of a point more than an FDIC insured deposit in the U.S., but the tax consequences would be the same. Most of the clients don't mind getting a quarter of a point less if they know the[y] have the U.S. government behind their investment. And this is something that made banks in South Florida thrive.<sup>171</sup>

Lobbyists for banks have been speaking to people on Capitol Hill regarding their opposition to the proposed regulation.<sup>172</sup> This includes Mr. Alex Sanchez, the President of the Florida Bankers Association.<sup>173</sup> Mr. Sanchez told *Miami Today* that “[i]t was basically three bureaucrats from the IRS and they wanted to listen to comments. . . . I suspect, and I’m being very frank, the people at the hearing are not the ones who are going to make the decision. It’s the Obama administration policy decision-makers.”<sup>174</sup> In May 2011, Mr. Sanchez went to Washington where he testified before an IRS panel on the impact that the proposed regulation could have if it were to take effect.<sup>175</sup> The Florida Senate has even released a bill analysis and fiscal impact statement in response to the proposed IRS regulation, REG-146097-09.<sup>176</sup> In addition, Congressman Bill Posey<sup>177</sup> had a letter signed by all of the Florida Delegation of U.S. Congressmen in opposition to the regulation.<sup>178</sup> Congressman Posey stated, “[t]his IRS proposal is a bad idea that will drive tens of billions of dollars out of U.S. banks and our economy.”<sup>179</sup> He went on to say, “[a]t a time when we’re trying to improve the balance sheets of

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171. Interview with Raul Garcia, *supra* note 9.

172. Landy, *supra* note 154.

173. Fagenson, *supra* note 168.

174. *Id.*

175. *Id.*

176. See Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 1.

177. Congressman “Bill Posey [is] a Florida Republican [and] sits on the House Financial Services Committee.” Landy, *supra* note 154.

178. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

179. Landy, *supra* note 154.

U.S. financial institutions, this proposal undermines that very goal.”<sup>180</sup> At another time, Congressman Posey said, “[t]his rule has the potential to be very damaging to our already struggling economy. . . . The current confidentiality practice is a major incentive for wealthy foreigners to invest their money here in the United States, making capital more available for loans to businesses for expansion and job creation.”<sup>181</sup>

The biggest concern is that this regulation would lead to a loss of these foreign deposits.<sup>182</sup> In addition to Florida, eleven other states’ congressmen and women have written letters in opposition to the proposed regulation.<sup>183</sup> Florida bankers fear that the regulation could chase away foreign depositors.<sup>184</sup> Mr. Alex Sanchez said, “[i]t’s the wrong idea at the wrong time . . . especially when the [P]resident himself has called for the infusion of capital to help create jobs . . . . This is money deposited in banks that they lend to small businesses.”<sup>185</sup> The Institute of International Bankers is also preparing to fight the proposed regulation.<sup>186</sup>

Miami banking attorney, Clemente Vazquez-Bello said, “[t]hey want to take away our banking business offering privacy and confidentiality,” and also said, “[t]his is unnecessary overkill without regard to the impact it would have to our businesses and economy.”<sup>187</sup>

Local Florida banks hold a large amount of deposits from foreigners.<sup>188</sup> These banks include BAC Florida Bank, Espirito Santo Bank, BBU Bank, and Pacific National Bank.<sup>189</sup>

Jay Cochran says that he expects the withdrawal of deposits to be magnified because of his estimation of \$88.1 billion in response to the 2002 proposed regulation.<sup>190</sup> He also said, “given the precarious nature of the U.S. economy, now does not seem like a good time to be damaging the U.S. credit markets.”<sup>191</sup>

The proposed IRS regulation could lead to these foreign depositors moving deposits to another tax free country that will not report the interest

180. *Id.*

181. Leary, *supra* note 117.

182. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

183. Fagenson, *supra* note 168.

184. Bandell, *supra* note 6.

185. Fagenson, *supra* note 168.

186. Landy, *supra* note 154.

187. Bandell, *supra* note 6.

188. *Id.*

189. *Id.*

190. Landy, *supra* note 154.

191. *Id.*

earned to the country of origin of the NRA.<sup>192</sup> If NRA depositors withdrew their deposits from U.S. banks this could create a problem of the solvency for banks.<sup>193</sup> Florida, in particular, would suffer a great level of withdrawals.<sup>194</sup> The departure of foreign deposits could have noteworthy repercussions on Brickell Avenue in Miami due to its lively international banking sector.<sup>195</sup> This withdrawal of money by NRAs would decrease the amount that could be lent by banks.<sup>196</sup> If the banks have less money to lend, then the banks will make less money, which would force the banks to let employees go.<sup>197</sup> The deposits, which are lent by South Florida banks, often to local businesses, create jobs locally.<sup>198</sup> If NRA depositors withdrew their money from South Florida banks, this money would no longer be available for lending to local businesses, and the South Florida economy may be stunted. This stunted economy would keep the “circle” of bad economic times going as less people would have jobs, less people would have money to spend, and then businesses would make less money, forcing them to lay off more people and the circle goes round and round.

In addition, when NRAs have deposits in the United States, it is probable that the NRAs will spend some of this money in the United States on U.S. products and services, helping to stimulate the economy.<sup>199</sup> However, if the money is removed from the United States and deposited in another country, it is extremely unlikely that any of the NRA’s money will be spent in the United States.<sup>200</sup>

In addition to the negative effects that the regulation would have on Florida, it could have personal negative effects on these NRA depositors who could face kidnapping and extortion if their country of origin knew of their foreign deposits.<sup>201</sup> “A wealthy family from another country could be worried about the government seizing their businesses or criminals learning

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192. Leary, *supra* note 117.

193. Letter from Lilly Thomas, Vice President & Regulatory Counsel, Indep. Cmty. Bankers of Am., to Dep’t of the Treasury, IRS (Apr. 1, 2011) (on file with *Nova Law Review*), available at [www.icba.org/files/ICBASites/PDFs/ltr060211a.pdf](http://www.icba.org/files/ICBASites/PDFs/ltr060211a.pdf).

194. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

195. Bandell, *supra* note 6.

196. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 3; see also Bandell, *supra* note 6.

197. See Bandell, *supra* note 6.

198. *Id.*

199. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 3.

200. *Id.*

201. *Id.*

about their wealth and kidnapping them . . . .”<sup>202</sup> In a letter from the members of the Florida Delegation, it was written that:

Many nonresident alien depositors are from countries with unstable governments or political environments where personal security is a major concern. They are concerned that their personal bank account information could be leaked by unauthorized persons in their home country governments to criminal or terrorists groups upon receipt . . . .<sup>203</sup>

If wealthy foreigners are concerned about their safety or the safety of their families, they may likely withdraw their money from U.S. banks and deposit them somewhere else where their privacy could be ensured.

If foreign depositors withdrew their money from the United States, like many Florida bankers fear, there would be less capital in the United States for lending and spending.<sup>204</sup> Patricio Perez, managing director for RSM McGladrey’s bank accounting practice said, “[i]f a bank lost a certain percentage of deposits, it is obviously going to diminish its lending opportunities and it obviously has to cut down on the staff to service those deposits and loans.”<sup>205</sup> Additionally, this would create “quite a liquidity problem.”<sup>206</sup> Rafael F. Saldaña, the president and chief executive officer of BBU Bank, a bank based in Coral Gables, Florida, added, “[w]e use that money to lend locally to business people who create economic development and jobs here in South Florida . . . . Money that could be available for local lending won’t be available.”<sup>207</sup> It would also give an edge to competitors over the United States.<sup>208</sup> It would “put U.S. banks, and in particular, banks in . . . Florida, at a disadvantage.”<sup>209</sup> International areas like Panama, Switzerland, and the Caribbean are competing with the United States to take foreign deposits.<sup>210</sup> The proposed regulation would give them a competitive edge.<sup>211</sup>

The Independent Community Bankers of America (ICBA) wrote to the Senator with their concerns for what the proposed IRS regulation could do to

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202. Bandell, *supra* note 6 (quoting Alex Sanchez, president of the Florida Bankers Association).

203. Letter from Bill Posey to Barack Obama, *supra* note 152.

204. Bandell, *supra* note 6; *see* Interview with Raul Garcia, *supra* note 9.

205. Bandell, *supra* note 6.

206. Interview with Jorge Triay, *supra* note 102.

207. Bandell, *supra* note 6.

208. *Id.*

209. Interview with Raul Garcia, *supra* note 9.

210. Bandell, *supra* note 6; Fagenson, *supra* note 168.

211. Bandell, *supra* note 6.

the community banks throughout the country.<sup>212</sup> The ICBA said that Florida would have significant “economically damaging reductions in bank capital” because of its high concentration of NRA deposits.<sup>213</sup> This would jeopardize bank safety and soundness, and banks, many of which are already having issues, would be at risk for failure.<sup>214</sup> The probable effects of the proposed IRS regulation are in opposition to the orders of regulators for the banks to have more capital available.<sup>215</sup> Beyond this, the proposed IRS regulation would be in opposition to the longstanding policy decision of Congress not to tax foreigners to promote “an inflow of capital that would benefit our economy.”<sup>216</sup> The ICBA “urge[d] all policymakers to recognize that this onerous new IRS reporting requirement would be an unwarranted burden on community banks and would have a direct, adverse impact on investment, lending, and the economic recovery.”<sup>217</sup>

ICBA also wrote to the IRS at the Department of the Treasury in opposition of the proposed regulation.<sup>218</sup> The letter stated:

[The] reporting requirement would likely result in significant shifts of foreign deposits to banks located in countries that give more reverence to depositors’ privacy. It would not only discourage nonresident aliens from depositing their assets in U.S. financial institutions but also encourage the withdrawal of existing deposits. Foreign deposits in U.S. banks are largely a function of the confidentiality, privacy, and stability of our banking system. These deposits are generally a stable source of funds, which banks use to support their lending activities. Such significant withdrawals, particularly in small and mid-sized banks in border states, would reduce the availability of capital needed for lending to consumers and small businesses. Reducing credit flow and thwarting economic development in these communities is contrary to the President’s and Treasury’s goal to stimulate lending to the small business sector, recharge our economy and create jobs.<sup>219</sup>

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212. Letter from Camden R. Fine, President & Chief Exec. Officer, to Marco Rubio, U.S. Senator, (June 2, 2011) (on file with *Nova Law Review*), available at [www.icba.org/files/ICBASites/PDFs/ltr060211a.pdf](http://www.icba.org/files/ICBASites/PDFs/ltr060211a.pdf).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Letter from Camden R. Fine to Marco Rubio, *supra* note 212.

218. Letter from Lilly Thomas to Dep’t of the Treasury, *supra* note 193.

219. *Id.*

Marco Rubio, U.S. Senator for Florida, wrote a letter to President Barack Obama, and captured the enormity of the effects the proposed regulation could have by writing:

At a time when unemployment remains high and economic growth is lagging, forcing banks to report interest paid to nonresident aliens would encourage the flight of capital overseas to jurisdictions without onerous reporting requirements, place unnecessary burdens on the American economy, put our financial system at a fundamental competitive disadvantage, and would restrict access to capital when our economy can least afford it.<sup>220</sup>

#### IV. CONCLUSION

“The State of Florida, . . . due to its geographic position, large volume of international trade and investment activity, our role as a hemispheric entrepot, and our position as a leading tourism destination, is particularly vulnerable to . . . negative consequences.”<sup>221</sup> If the proposed IRS regulation passes, it would burden the banking system during a very challenging economic time.<sup>222</sup> It could entice international clients to move their deposits to other countries, which would be a terrible loss for South Florida and to the overall financial system at a time when the United States simply cannot afford it.<sup>223</sup>

One important thing that must happen in order to make the system run better and to waste less time and money is to streamline the filing requirements to remove the burden on financial institutions and reduce filing of valueless reports.<sup>224</sup> One way of doing this is by raising the CTR filing threshold.<sup>225</sup> The current threshold of \$10,000 was established in 1970.<sup>226</sup> The threshold should be increased to account for inflation of forty-one years.<sup>227</sup> Because the threshold has not been increased to account for inflation, CTRs filed today are based on a relatively lower value than CTRs filed in the 1970s.<sup>228</sup> “As the CTR filing threshold has not been updated to reflect the

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220. Letter from Marco Rubio, U.S. Senator, to Barack Obama, President of the United States, (Apr. 4, 2011) (on file with *Nova Law Review*), available at [www.floridabankersassociation.com/docs/links/IRS\\_NRA\\_Rubio.pdf](http://www.floridabankersassociation.com/docs/links/IRS_NRA_Rubio.pdf).

221. Int’l Trade & Bus. Dev., *supra* note 11, at 2.

222. Vazquez-Bello, *supra* note 161.

223. Interview with Raul Garcia, *supra* note 9.

224. Parrish, *supra* note 16, at 564–66.

225. *Id.* at 568.

226. *Id.*

227. *Id.* at 568–69.

228. *Id.* at 569.



financial reality of inflation, the filing requirement has become watered down to include transactions of much lower relative value than those originally captured by the \$10,000 threshold in 1970.”<sup>229</sup> FinCEN and financial industry associations’ data shows that if the CTR filing threshold was increased, there would be immediate relief of some of the compliance burden for financial institutions.<sup>230</sup>

The proposed IRS regulations are not necessary to achieve the purposes of the proposed regulation.<sup>231</sup> One of the purposes that the IRS stated was to improve voluntary compliance of paying taxes.<sup>232</sup> There are already practices in order to verify tax evasion by “false claims of alien status.”<sup>233</sup> Banks already must conform to documentation requirements to guarantee that persons claiming alien status and exemption from taxes qualify for this exception.<sup>234</sup> So, one of the purposes stated for the proposed IRS regulation is already being fulfilled by a less burdensome practice.<sup>235</sup>

One option is to withdraw the proposed IRS regulation and to allow the Foreign Account Tax Compliance Act (FATCA) implementation.<sup>236</sup>

Vazquez-Bello said the IRS proposal is not needed in light of a new law, *the Foreign Account Tax Compliance Act (FACTA)* [sic], set to start in 2013. It would force all foreign banks that maintain an account in the U.S. to either say they have no U.S. depositors or provide the IRS with information on their U.S. depositors. Since most foreign banks need an account here to conduct business, that law would have a broad impact and halt a lot of the tax evasion . . . .<sup>237</sup>

Congress enacted FATCA on March 18, 2010.<sup>238</sup> FATCA was enacted as part of the Hiring Incentives to Restore Employment (HIRE) Act.<sup>239</sup> FATCA “targets noncompliance by U.S. taxpayers through foreign ac-

229. Parrish, *supra* note 16, at 569.

230. *Id.*

231. Letter from Lilly Thomas to Dep’t of the Treasury, *supra* note 193.

232. *Id.*

233. *Id.*

234. *Id.*

235. *See id.*

236. Bandell, *supra* note 6.

237. *Id.* (emphasis added).

238. Niels Jensen, Note, *How to Kill the Scapegoat: Addressing Offshore Tax Evasion with a Special View to Switzerland*, 63 VAND. L. REV. 1823, 1849 (2010).

239. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, IRS.GOV, <http://www.irs.gov/newsroom/article/0,,id=242164,00.html> (last updated July 14, 2011).

counts.”<sup>240</sup> FATCA will be implemented in phases due to implementation challenges to financial institutions and because it is a “major undertaking for financial institutions.”<sup>241</sup> FATCA requires U.S. taxpayers to report information on foreign assets greater than \$50,000 on a new IRS form (Form 8938).<sup>242</sup> This applies to assets held on March 31, 2011 or later.<sup>243</sup> If a taxpayer fails to report the required information on Form 8938, there will be an initial \$10,000 penalty, followed by penalties up to \$50,000 after notification by the IRS.<sup>244</sup> Additionally, if the taxpayer underpays due to non-disclosed foreign financial assets, there could be a penalty of up to forty percent.<sup>245</sup>

“FATCA requires [foreign financial institutions] to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.”<sup>246</sup> The foreign financial institutions must enter into an agreement with the IRS by June 30, 2013.<sup>247</sup> Foreign financial institutions must agree to 1) identify accounts and have certain due diligence procedures; 2) report information to the IRS about the U.S. accountholders or foreign entities with substantial U.S. ownership; and 3) withhold and pay to the IRS thirty percent on certain payments to non-participating foreign financial institutions and account holders who are unwilling to provide information.<sup>248</sup> Foreign financial institutions that refuse to agree with the IRS would be subject to withholding of certain payments, such as “U.S. source interest and dividends, gross proceeds from . . . U.S. securities, and passthru payments.”<sup>249</sup>

Therefore, there is an incentive for the foreign financial institutions to enter into the agreement with the IRS because if the institution chooses not to enter into the agreement, the institution would be taxed on all investments earned in the United States despite the client’s nationality.<sup>250</sup> In other words, if the foreign financial institution chooses not to enter into the agreement with the IRS, it would be subjecting all clients to a thirty percent tax on in-

240. *Id.*

241. *Id.* (quoting IRS Commissioner Doug Shulman).

242. *Summary of Key FATCA Provisions*, IRS.GOV, <http://www.irs.gov/businesses/corporations/article/0,,id=236664,00.html> (last updated Aug. 18, 2011).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, *supra* note 239.

247. *Summary of Key FATCA Provisions*, *supra* note 242.

248. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, *supra* note 239; *Summary of Key FATCA Provisions*, *supra* note 242.

249. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, *supra* note 239.

250. *See* Jensen, *supra* note 238, at 1849–50.

come earned in the United States.<sup>251</sup> While the foreign financial institutions would give up U.S. citizens' privacy if the institution chose to comply with the IRS agreement, the institution's other clients would not be affected in any way.<sup>252</sup> Rather than finalizing the proposed IRS regulation, and causing further economic hardship to South Florida, the government should instead just wait for FATCA to begin applying.<sup>253</sup> After FATCA has been active for a while, the IRS should re-evaluate the situation and see if FATCA is in fact helping to force U.S. citizens who have deposits in foreign financial institutions to pay taxes on that money.

Another way to minimize the burden on banks would be to change the proposed IRS regulation to only list some countries, rather than have the banks report interest earned by residents of *all* countries.<sup>254</sup> Mr. Alex Sanchez, who is the President and Chief Executive Officer of the Florida Bankers Association, which is a lobbying group for Florida banks, offered this suggestion to the IRS.<sup>255</sup> He explained that it would not be useful to even collect the information on countries such as Mexico or Venezuela, because very few Americans even have accounts in those countries.<sup>256</sup> Therefore, these countries, which have high level of kidnappings and extortion of their wealthy, and which have many citizens with accounts in the United States whom would likely withdraw their money if their interest was going to be reported, should be left off the list of countries which banks should have to report interest on.<sup>257</sup> Instead, the IRS should include countries such as France, the United Kingdom, and Germany, which have better relations with the United States and would be more likely to reciprocate the information.<sup>258</sup>

There are other methods to achieve the goals of the proposed IRS regulation, which have less destructive impacts to the South Florida economic market; therefore, these methods should be exhausted before putting any more stress than necessary on an already sunken market.<sup>259</sup>

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251. *Id.*

252. *Id.* at 1850.

253. *See id.*

254. *See* Telephone Interview with Alex Sanchez, *supra* note 167.

255. *Id.*

256. *Id.*

257. *See id.*

258. *Id.*

259. *See* Telephone Interview with Alex Sanchez, *supra* note 167.