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Western Unionizing the *Hawala*?: The Privatization of *Hawalas* and Lender Liability

*Smriti S. Nakhasi**

I. INTRODUCTION

Hawala, an ancient banking system used predominantly in South Asia and the Middle East, has recently posed a regulatory quandary for law enforcement and capital markets.¹ This comment addresses the pitfalls of a prominently proposed, well-intentioned solution to bring the *hawala* system into the modern banking structure and under the regulatory eye of law enforcement. As will be seen, the inherent nature of the *hawala* system and the lender risks associated with privatizing create enormous obstacles to realizing these privatization efforts. The problem with many proposed solutions is that they try to impose guidelines upon a system based on cultural, religious, and consumer needs that vary from those recognized by the hegemonic political economic structure.

Part II of this comment explains the history, development, and various uses of the *hawala* system, involving both legal and illegal transactions. Part III assesses why the distinct nature of the system troubles the hegemonic political economic structure.

After an explanation of the *hawala* system and its problematic relationship with the goals of the hegemon, Part IV describes three approaches proposed to curtail the illegal uses of the *hawala* system. Part V of the comment discusses the reasons for the enduring nature of the *hawala*, providing insight into the needs of its customers, and analyzes the most prominently proposed solution in light of these consumer needs. Part VI analyzes the same solution in light of lender liability laws of the United States, Pakistan, India, and the United Arab Emirates (“U.A.E.”).

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¹ John D. Z. Waszak, Comment, *The Obstacles to Suppressing Radical Islamic Terrorist Financing*, 36 CASE W. RES. J. INT’L L. 673, 682–83 (2004) (documenting the Financial Action Task Force’s recommendations for regulatory solutions to these issues).

Finding these proposed solutions inadequate in light of consumer needs, Part VII identifies a more practical solution implemented by the Philippine government and proposes a solution that embraces the cultural necessities of customers, while enabling the government to regulate the *hawala* by controlling the conduits and not the sources of the transactions. Part VIII concludes that a successful method of integrating the *hawala* system into a more transparent system, in order to avoid abuses, involves not the regulation of the entity itself, but the means by which the entity conducts its business.

II. THE *HAWALA* SYSTEM: WHAT IS IT?

The *hawala* system is an ancient banking system originating, and still used widely, in the Middle East and in South Asia.² *Hawala* pre-dates the modern banking system, having its first known origins in China during the Teng Dynasty.³ The growing Chinese tea trade required a means of transferring money from the south of China to the Imperial Capital without the burden and risk of carrying large sums of money between the two locations.⁴ To solve this problem, provincial governors maintained special courts in the capital that issued certificates to merchants, who could present the certificate to the provincial governors and redeem their money in the

² Joseph Wheatley, Comment, *Ancient Banking, Modern Crimes: How Hawala Secretly Transfers the Finances of Criminals and Thwarts Existing Laws*, 26 U. PA. J. INT'L ECON. L. 347, 349 (2005) (citing *Hawala and Underground Terrorist Financing Mechanisms: Hearing before the S. Subcomm. on Int'l Trade and Fin.*, 107th Cong. 45–49 (2001) (statement of Patrick Jost, SRA International); LISA C. CARROLL, INTERPOL, ALTERNATIVE REMITTANCE SYSTEMS DISTINGUISHING SUB-SYSTEMS OF ETHNIC MONEY LAUNDERING IN INTERPOL MEMBER COUNTRIES ON THE ASIAN CONTINENT (2000), available at <http://www.interpol.com/Public/FinancialCrime/MoneyLaundering/EthnicMoney/default.asp>; Financial Action Task Force on Money Laundering, Report on Money Laundering Typologies 2002–2003, at 6 (2003), available at <http://www.fatf-gafi.org/dataoecd/29/33/34037958.pdf>; U.S. Gen. Acc. Off., No. GAO-04-163, Terrorist Financing: U.S. Agencies Should Systematically Assess Terrorists' Use of Alternative Financing Mechanisms 18 (Nov. 14, 2003), available at <http://www.gao.gov/new.items/d04163.pdf>; CHRISTINE HOWLETT, INVESTIGATION & CONTROL OF MONEY LAUNDERING VIA ALTERNATIVE REMITTANCE & UNDERGROUND BANKING SYSTEMS 5 (Apr. 2001), available at <http://www.churchilltrust.com.au/Fellows%20Reports/Howlett%20Christine%202000.pdf>; Mian Ahad Hayaud-Din, *The Hawallah Network: Culture and Economic Development in Afghanistan*, 78 INT'L SOC. SCI. REV. 21, 21 (2003); PATRICK M. JOST & HARJIT SINGH SANDHU, INTERPOL, THE HAWALA ALTERNATIVE REMITTANCE SYSTEM AND ITS ROLE IN MONEY LAUNDERING (Jan. 2000), available at <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/default.asp> (describing alternative remittance systems); Michelle Cottle, *Eastern Union: Hawala v. the War on Terrorism*, NEW REPUBLIC, Oct. 15, 2001, at 24).

³ Alan Lambert, *Organized Crime, Terrorism, and Money Laundering in the Americas: Underground Banking and Financing of Terrorism*, 15 FLA. J. INT'L L. 9, 13 (2002).

⁴ *Id.*

southern province.⁵ The Chinese, who based their system on “chits” or “tokens,”⁶ called the system *fai chen*, which means “the flying money.”⁷ The Arabs adopted a similar system to avoid robbery on the Silk Road.⁸

The *hawala*, which means “in trust” in Hindi⁹ and “transfer” in Arabic,¹⁰ serves as a conduit for both legal and illegal transactions, the former being of economic concern and the latter being of greatest concern to law enforcement.¹¹ To explicate the *hawala* system, Joseph Wheatley provides an apt example involving two *hawaladars*, Khalid and Nawaz.¹²

In Wheatley’s first scenario describing a typical legal transaction under the *hawala* system, Fareed, a U.S. resident of Pakistani descent wishes to send money to his family in Pakistan.¹³ Fareed then approaches Khalid, a *hawaladar*, or money remitter, in the United States who has a counterpart in Pakistan, Nawaz.¹⁴ Both Khalid and Nawaz own jewelry stores, with a side business as a *hawala* broker.¹⁵ Fareed gives Khalid the money he wishes to send to his family, plus a small commission.¹⁶ Khalid, in return, gives Fareed a password that he can email to his family in Pakistan.¹⁷ Khalid contacts Nawaz and instructs him to furnish the requisite funds to the party providing the password associated with the transaction.¹⁸ Fareed’s family in Pakistan, equipped with the password sent to them via email from Fareed, obtains the money from Nawaz, minus the commission.¹⁹ In this way, no money has physically crossed international borders.²⁰

To resolve the inevitable issue of debt obligation transfers between the two *hawaladars*, the *hawala* system allows for the transfer of debt from one

⁵ *Id.*

⁶ Herbert V. Morais, *Fighting International Crime and Its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 620 (2005).

⁷ Lambert, *supra* note 3, at 13.

⁸ *Id.*

⁹ Morais, *supra* note 6, at 619.

¹⁰ John F. Wilson, *Hawala and Other Informal Payment Systems: an Economic Perspective*, Seminar on Monetary and Financial Law 2 (Mar. 16, 2002), <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/wilson.pdf> (unpublished manuscript, on file with the International Monetary Fund).

¹¹ See Wheatley, *supra* note 2, at 348–51.

¹² See *id.*

¹³ *Id.* at 349.

¹⁴ *Id.* at 349–50.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Wheatley, *supra* note 2, at 348–51.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

hawaladar to another over a series of transactions.²¹ Built on a foundation of trust among the network of *hawaladars*, each money remitter pays back his debt through the series of transactions, which eventually equalize the position of one *hawaladar* against another.²² In a larger network, Nawaz may owe money to a third *hawaladar* (residing in the United States), and Khalid could settle his debt with Nawaz by directly paying the third party.²³

In Wheatley's second scenario, Khalid and Nawaz are engaged in an ongoing business relationship as jewelers.²⁴ Involving the illegitimate process of invoice manipulation,²⁵ through conventional bank transfers, gold and precious gem smuggling, or printed currency shipments, Khalid sends Nawaz \$3,000 worth of jewelry but only charges him for \$2,000.²⁶ Through this "underinvoicing," Khalid has easily settled a \$1,000 debt to Nawaz.²⁷

Conversely, Nawaz may owe Khalid money.²⁸ In such cases, Khalid sends Nawaz \$2,000 worth of jewelry but charges him \$3,000.²⁹ Accordingly, by this "overinvoicing," \$1,000 entered the United States covertly.³⁰

Fundamentally, these transactions and these networks' functionalities hinge on relationships based on trust and social connections.³¹ To preserve

²¹ *Id.* at 350–51.

²² *Id.*

²³ Wheatley, *supra* note 2, at 351.

²⁴ *Id.* at 350–51.

²⁵ Knowingly and willfully using "any false, forged, or fraudulent invoice" with the intent to defraud the United States is a customs violation. 18 U.S.C. § 545 (2000).

²⁶ Wheatley, *supra* note 2, at 350–51 (citing Financial Action Task Force on Money Laundering, Report on Money Laundering Typologies 2002–2003, at 19–24 (2003) (describing money laundering methods), available at <http://www.fatf-gafi.org/dataoecd/29/33/34037958.pdf>; Financial Action Task Force on Money Laundering, Report on Money Laundering Typologies 1999–2000, at 6 (Feb. 3, 2000), available at <http://www.fatf-gafi.org/dataoecd/29/37/34038120.pdf>; Samuel Munzele Maimbo, *The Money Exchange Dealers of Kabul: A Study of the Hawala System in Afghanistan* 12 (World Bank, Working Paper No. 13, 2003), available at <http://www-wds.worldbank.org/> (type in Search Documents and Reports: *Money Exchange Dealers of Kabul: A Study of the Hawala System in Afghanistan*) (last visited Jan. 11, 2007).

²⁷ *Id.*

²⁸ *See id.* at 351.

²⁹ *Id.*

³⁰ *See United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2001) (describing invoice manipulation by *hawaladars*).

³¹ Wheatley, *supra* note 2, at 350–51 ("[H]awalal debt . . . tends to require a more formal process of account balancing using conventional bank transfers, gold and precious gem smuggling, and printed currency shipments. Invoice manipulation (a customs violation) could also obscure *hawala* transfers As a result, piercing the veil of secrecy around *hawala* has presented a challenge for law enforcement.").

these relationships, secrecy veils the *hawala* system.³² Secrecy becomes especially necessary where illegal transactions constitute an element of the *hawala* debt transfers.³³ *Hawaladars* engaged in illegal transactions often operate façade businesses with high sales costs that serve to conceal the large sum transactions (and the two percent commission they receive) from law enforcement.³⁴ In fact, many *awaladars* will publicly disavow their profession and invariably refuse to discuss it altogether.³⁵

III. WHY WE CARE

The international community should be concerned with the *hawala* system and its unregulated nature for two reasons. First, the lack of transparency creates an imperfect picture of global economic health.³⁶ According to the efficient capital markets theory, market prices are economically efficient because all information about the capital markets is available to analysts.³⁷ The lack of records, let alone the lack of regulation, synonymous with the *hawala* system³⁸ indicates that there are gaps in information. Because of these gaps, the market remains on unsteady ground and could eventually erode economic stability.³⁹

Second, because of its secretive nature, the unregulated *hawala* system has become an appealing alternative for money launderers.⁴⁰ As Natarajan explains, it is inevitable that financial institutions will be necessary for the money laundering operation.⁴¹ To that end, governments fear that when criminals use credit and financial institutions to launder their proceeds, the

³² Michelle Cottle, *Eastern Union: Hawala v. the War on Terrorism*, NEW REPUBLIC, Oct. 15, 2001, at 24.

³³ See Wheatley, *supra* note 2, at 350.

³⁴ Cottle, *supra* note 32, at 24 (describing Cottle's personal experience with a *awaladar*).

³⁵ *Id.*

³⁶ See Eugene F. Fama, *Efficient Capital Markets: A Review of Theory & Empirical Work*, 25 J. FIN. 383, 383 (1970) ("A market in which prices always 'fully reflect' available information is called 'efficient.'").

³⁷ *Id.*

³⁸ See Cottle, *supra* note 32, at 24.

³⁹ See Fama, *supra* note 36, at 387–88 ("But though transaction costs, information that is not freely available to all investors, and disagreements among investors about the implications of given information are not necessarily sources of market inefficiency, they are potential sources.").

⁴⁰ See Kavita Natarajan, Note, *Combating India's Heroin Trade through Anti-Money Laundering Legislation*, 21 FORDHAM INT'L L.J. 2014, 2017–21 (1998) ("[Anti-money laundering] statutes compel professional money launderers to find alternative methods to introduce the funds into the mainstream financial system . . . [M]oney laundering is further complicated by the ancient underground form of banking known as *Hawala*.").

⁴¹ *Id.* (citing Nicholas Clark, *The Impact of Recent Money Laundering Legislation on Financial Intermediaries*, 14 DICK. J. INT'L L. 467, 470 (1996)).

economic stability of these systems erode.⁴²

Natarajan notes that the *hawala* system has been used frequently in drug trafficking in India, especially heroin trafficking.⁴³ In the post-September 11, 2001 era, terrorist financiers are using *hawalas* to evade the increased reporting regulations introduced by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") and its international counterparts.⁴⁴ *Hawalas* provide the perfect environment to avoid financial auditors and law enforcement officials as they have no detailed record keeping, no governmental registration, and limited connections to "mainstream banking."⁴⁵

Thus, being able to capture a more transparent view of the *hawala* system and curtail its illegal use is of pressing concern to policy makers and economists alike. To that end, academics and scholars have proposed several strategies.

IV. PROPOSED APPROACHES TO CURTAIL ILLEGAL USE OF *HAWALA*

Scholars have offered distinct approaches to curtailing the illegal use of *hawala*. One approach recommends enhancing investigative techniques,⁴⁶ while another approach designates civil society as the key actor poised to delegitimize the *hawalas*.⁴⁷ A third approach encompasses alternative remittance systems created to compete with the *hawala* system.⁴⁸

⁴² Council Directive 91/308/EEC, Prevention of the Use of the Financial System for the Purpose of Money Laundering, 1991 O.J. (L 166) 77 (EC) (explaining that where "credit and financial institutions are used to launder proceeds from criminal activities[...], the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public").

⁴³ Natarajan, *supra* note 40, at 2059–63.

⁴⁴ See Wheatley, *supra* note 2, at 359, 363 (citing David Marshall Nissman, *Hawala*, U.S. Att'ys' Bull., May 2002, at 13, 16–17, 20–21, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5003.pdf).

⁴⁵ *Id.* at 357, 374.

⁴⁶ *Id.* at 374–75; see Nikos Passas, *Informal Value Transfer Systems and Criminal Organizations: A Study into So-Called Underground Banking Networks* (1999), available at <http://usinfo.state.gov/eap/img/assets/4756/ivts.pdf> (advocating international information sharing for investigative purposes).

⁴⁷ Jude McCulloch & Sharon Pickering, *Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-Colonialism*, 45 BRIT. J. CRIMINOLOGY 470, 471–72 (2005).

⁴⁸ See Wheatley, *supra* note 2, at 374; Sireesha Chenumolu, Note, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 GA. J. INT'L & COMP. L. 385, 420 (2003).

A. Approach One: Investigative Strategies

The premise underlying the proposed investigative strategies is that money transferred by the *hawala* attains usefulness only when converted into cash.⁴⁹ That is, at some point in the process, *hawaladars* must tender cash to the recipients, like Nawaz must tender cash to Fareed's family members,⁵⁰ though not through a cross-border transaction. In order for Nawaz to tender the cash to Fareed and others, Nawaz likely maintains a bank account.⁵¹ Where the *hawaladar* operates a front organization, he may link the bank account to a front corporate entity; otherwise, it may be his own personal account.⁵² The argument follows that this cash conversion requires an inevitable relationship between *hawaladars* and banks.⁵³ Therefore, the internal bank investigators can look for particular indicators of *hawala* activity. For instance, internal investigators can look for accounts reflecting high deposit activity, deposits that are cash or checks from local ethnic customer bases, checks that list secondary account names, and accounts that indicate outgoing wire transfers to financial centers such as Great Britain, Switzerland, or Dubai.⁵⁴

While these solutions are viable in the United States, curtailing the illegal use of *hawala* must be a global effort in order to be successful. Assuming that the premise is true, and that money transferred realizes its usefulness only when converted into cash, the proposed investigative solutions need worldwide enforcement in all private banking institutions. Without this, money launderers and criminals will forum shop to find jurisdictions with weaker bank investigating and take advantage of that single banking jurisdiction to do their business.

B. Approach Two: Positive Strategies

The second approach offers few normative responses, but its positive statement explains that civil society is the key determinant in the effort to reduce illegal *hawala* activity.⁵⁵ That is, civil societies using the *hawala* system treat it as a permissive activity.⁵⁶ The logic follows that when civil societies treat the *hawala* system as a state crime, *hawalas* will lose their legitimacy.⁵⁷

⁴⁹ See Wheatley, *supra* note 2, at 374–75; Passas, *supra* note 46, at 37.

⁵⁰ See Wheatley, *supra* note 2, at 349–51.

⁵¹ Passas, *supra* note 46, at 14.

⁵² *Id.* at 21, 44.

⁵³ *Id.* at 44.

⁵⁴ Wheatley, *supra* note 2, at 375 (“Investigators . . . identify *hawala* brokers using [those] trends and patterns.”)

⁵⁵ McCulloch & Pickering, *supra* note 47.

⁵⁶ *Id.* at 481–82.

⁵⁷ *Id.* at 481 (citing PENNY GREEN & TONY WARD, STATE CRIME: GOVERNMENTS,

C. Approach Three: “Western Unionizing” the *Hawala*

The final approach, with which this comment is primarily concerned, attempts to challenge the *hawala* system through an attack on economic grounds. Because *hawala* proliferates due to its efficiency, it stands to reason that if the private banking system were more competitive, *hawala* would gradually disappear. Some proposed solutions have included “lower taxes on remittances, floating currency rates, and the relaxation of currency regulations and interest rates.”⁵⁸ This “Western Unionizing” approach appreciates the power of the consumer in these situations, but, as will be discussed later, it fails to prioritize correctly the consumers’ preferences.

Some governments have promoted alternatives by approving partnerships between corporate wire transfer corporations and postal services or banking operations.⁵⁹ For instance, Pakistan’s state-run bank collaborated with Western Union, and in India, “[t]he Indian government approved a partnership between Western Union and national postal service to operate in cities around the country.”⁶⁰

Proponents of these solutions tout the governmental remittance systems that “compet[e] . . . with *hawala*[s] . . . in speed, efficiency of execution, settlement and delivery of money and services,”⁶¹ in Egypt, Jordan, Lebanon, and many Persian Gulf states.⁶² Both in the Persian Gulf and in the Philippines, banks or exchange companies offer door-to-door delivery.⁶³

Seeing the relative success of these door-to-door delivery services, scholars have proposed incorporating the *hawala* into the current global structure.⁶⁴ Specifically, such proposals suggest that *hawaladars* form exchange companies and adhere to reporting requirements.⁶⁵ This suggestion and others like it imply that entities like Western Union would acquire individual *hawaladars* and incorporate them into the Western Union corporate structure as subsidiaries.⁶⁶ Each *hawaladar* would

VIOLENCE AND CORRUPTION 4 (2004)).

⁵⁸ Wheatley, *supra* note 2, at 376.

⁵⁹ *Id.* at 367–68.

⁶⁰ *Id.* at 377 (citing *Western Union*, PRESS TRUST OF INDIA, Jan. 15, 2004, 2004 WL 104818608).

⁶¹ Robert Looney, *Hawala: The Terrorist’s Informal Financial Mechanism*, 10 MIDDLE E. POL’Y 164, 167 (2003).

⁶² Wheatley, *supra* note 2, at 377.

⁶³ Looney, *supra* note 61, at 167.

⁶⁴ McCulloch & Pickering, *supra* note 47, at 479.

⁶⁵ Mohiuddin Aazim, *Money Changers Not Ready to Go After June 30*, DAWN: THE INTERNET EDITION (Oct. 12, 2003), <http://www.dawn.com/2003/10/12/ebr5.htm>.

⁶⁶ *NBP Signs Deal with Western Union*, DAWN: THE INTERNET EDITION, Jan. 24, 2003, <http://www.dawn.com/2003/01/24/ebr7.htm> (discussing the role of Western Union in Pakistan).

continue business transactions with his previous clients, but would be required to adhere to the internal reporting requirements prescribed by the principal company.⁶⁷

V. PROBLEMS WITH PROPOSED STRATEGY—CONSUMER CONCERNS

While this solution theoretically appears to curtail *hawala* abuses by making alternative remittance systems more economically enticing, it has inherent problems. The proposal fails to consider or to meet the six major concerns facing regular *hawala* customers when choosing a money remittance system. First, this proposal does not address the customers' need for secrecy and anonymity.⁶⁸ Second, the alternative remittance systems inherently cannot compete with the efficiency of the *hawala* system.⁶⁹ Third, privatized money remitters are not as reliable as the *hawala* system.⁷⁰ Fourth, *hawalas* have an advantage on the privatized, regulated systems in cost.⁷¹ Fifth, *hawalas* are better equipped to meet the needs of customers not located in large cities.⁷² Finally, the *hawala* system uniquely meets the religious concerns of many of its customers.⁷³

A. Problem One: Lack of Anonymity

The *hawala*'s secrecy is just one facet of the system that makes it preferred by its customers.⁷⁴ *Hawalas*, unlike banks, do not require formal identification.⁷⁵ Thus, *hawalas* provide anonymity to people trying to conceal illegal immigration or preferring not to leave a paper trail.⁷⁶

The first inherent problem with privatizing the *hawala* is the system's secrecy and anonymity for the consumer. As McCulloch and Pickering describe, "the informal financial systems are superior in terms of meeting

⁶⁷ See, e.g., *id.* ("[The Pakistani State Bank Governor] advised Western Union to concentrate on remitters based in Saudi Arabia.").

⁶⁸ See McCulloch & Pickering, *supra* note 47.

⁶⁹ See *Banks Mobilize Expatriate Pakistanis to Send Remittances*, PAK. PRESS INT'L INFO. SERV., Jan. 23, 2003 [hereinafter *Banks Mobilize*]; Natarajan, *supra* note 40, at 2063.

⁷⁰ See Wheatley, *supra* note 2, at 355.

⁷¹ *Id.*

⁷² See Rachana Pathak, *Obstacles to Regulating the Hawala: A Cultural Norm or A Terrorist Hotbed?*, 27 FORDHAM INT'L L.J. 2007, 2015 (2004).

⁷³ See McCulloch & Pickering, *supra* note 47, at 479; Pathak, *supra* note 72, at 2025.

⁷⁴ *Hawala and Underground Terrorist Financing Mechanisms: Hearing before the S. Subcomm. on Int'l Trade and Fin.*, 107th Cong. 44 (2001) (statement of Tarik M. Yousef, Professor, Georgetown University) [hereinafter Yousef Statement].

⁷⁵ PATRICK M. JOST & HARJIT SINGH SANDHU, INTERPOL, THE HAWALA ALTERNATIVE REMITTANCE SYSTEM AND ITS ROLE IN MONEY LAUNDERING (Jan. 2000), <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/default.asp>.

⁷⁶ *Id.*

community needs.”⁷⁷ In the post-September 11, 2001 world, typical users of the *hawala* system, those of Middle Eastern and South Asian descent, already are highly sensitized to the heightened government scrutiny,⁷⁸ especially concerning financial transactions. Those users are unlikely to prefer a system replete with records and paper trails.⁷⁹ Even legitimate consumers like Fareed may desire anonymity and hesitate to draw unwanted attention to themselves or their family overseas.⁸⁰

McCulloch and Pickering further argue that proposing the privatization of the *hawala* system is “[c]onsistent with an imperialist mindset and neo-liberal economic programme.”⁸¹ This notion emphasizes the difficulty in such a program, especially in the Middle East and South Asia. By “impos[ing a] standard [that] is the formal banking systems of the developed world[,] rather than the long-established alternative systems of less developed nations,”⁸² the proposed solution ignores the consumer benefits of the inherent covert nature of *hawala*.

B. Problem Two: Lack of Efficiency

Second, customers prefer the *hawala* system because of its transaction efficiency.⁸³ *Hawala* transactions often take place within a day or two, especially with the advances of e-mail and facsimile technology.⁸⁴ On average, it can take a bank a week to open a bank account and then courier the money overseas.⁸⁵

Thus, the second problem with “Western Unionizing” the *hawala* is the lack of efficiency that the private wire transfer system provides compared to the *hawala*.⁸⁶ While exchange companies in Egypt, Jordan, Lebanon, and the Philippines appear to be competing with *hawalas* in speed, efficiency, settlement, and delivery of money and services,⁸⁷ the exchange companies do not face the same stringency of governmental and regulation requirements that exist in Europe, the United States, and South

⁷⁷ McCulloch & Pickering, *supra* note 47, at 480.

⁷⁸ Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63, 74–75 (2002).

⁷⁹ Erich Ferrari, Comment, *Deep Freeze: Islamic Charities and the Financial War on Terror*, 7 SCHOLAR 205, 221–22 (2005).

⁸⁰ *Id.*

⁸¹ McCulloch & Pickering, *supra* note 47, at 480.

⁸² *Id.*

⁸³ Adil Anwar Daudi, *Invisible Bank: Regulating the Hawala System in India, Pakistan and the United Arab Emirates*, 15 IND. INT’L & COMP. L. REV. 619, 628–29 (2005).

⁸⁴ Wheatley, *supra* note 2, at 354.

⁸⁵ *Id.*

⁸⁶ JOST & SANDHU, *supra* note 75.

⁸⁷ Banks Mobilize, *supra* note 69.

Asia.⁸⁸

Where India and Pakistan have implemented governmental liaison programs with *hawalas*, they intrinsically cannot contend with the twenty-four hour *hawala* transaction time because conflicts between instituting money-laundering laws and preserving financial privacy disallow a real commitment to either efficiency or law enforcement.⁸⁹ The bureaucracy inevitably slows the transaction process to a rate uncompetitive with the *hawala*.

C. Problem Three: Lack of Reliability

Third, the trust element inherent in the *hawala* system makes it more reliable than wire transfers, which are occasionally lost or stolen in transit.⁹⁰ More importantly, because of the social network element of the *hawala* system, fraud within the system is rare.⁹¹

Thus, the third problem with privatizing *hawalas* is that there is no way to control for the lack of reliability. Western Union has lost wire transfers, and sometimes couriers steal funds while in transit.⁹² Conversely, each *hawaladar* establishes its legitimacy with his customers and other *hawaladars* within his network through trust.⁹³ *Hawala* networks operate primarily through interpersonal relationships; the stronger the *hawaladar's* reputation, the larger a clientele he is likely to obtain.⁹⁴ *Hawaladars*, thus, exercise greater care in ensuring that funds are not lost or stolen.⁹⁵ They are personally liable for each transaction they facilitate.

The *hawala* system's advantage over wire services is its reliability.⁹⁶ By merging into a larger conglomerate, where funds are fungible and where there is less personal accountability, the *hawala* will lose its market share, and consumers will seek out independent *hawaladars*. In this way, there is little incentive for individual *hawaladars* to merge with larger corporate wire services like Western Union, especially when they risk losing their

⁸⁸ See generally Natarajan, *supra* note 40.

⁸⁹ See *id.* at 2063–64, 2069 (The governments of India and Pakistan agreed to exchange information regarding, “identification, freezing, and forfeiture of property . . . related money laundering.”).

⁹⁰ Wheatley, *supra* note 2, at 355 (citing JOST & SANDHU, *supra* note 75).

⁹¹ JOST & SANDHU, *supra* note 75.

⁹² See, e.g., *id.*

⁹³ *Hawala and Underground Terrorist Financing Mechanisms: Hearing before the S. Subcomm. on Int'l Trade and Fin.*, 107th Cong. 45–49 (2001) (statement of Patrick Jost, SRA International) [hereinafter Jost Statement] (noting that even in rare instances where fraud occurs, other network *hawaladars* cover the debts of their fraudulent colleague).

⁹⁴ JOST & SANDHU, *supra* note 75.

⁹⁵ Jost Statement, *supra* note 93 (“[W]hen someone places an order with a *hawaladar*, there is little if any doubt that the money will be delivered.”).

⁹⁶ Wheatley, *supra* note 2, at 355.

client base.

D. Problem Four: More Expensive for Consumers

A fourth reason consumers prefer *hawalas* is because money remittance in the *hawala* system costs less than sending money through a private wire transfer service.⁹⁷ Most *hawaladars* charge an average of two percent commission per transaction.⁹⁸

Meanwhile, if Fareed, from the earlier hypothetical, tried to use a private bank to send the money overseas, the bank would charge him a fee to open a bank account, to exchange the money at a higher bank exchange rate, and to provide courier services offering greater security than surface mail.⁹⁹ All those fees, compared to a ten-dollar *hawaladar* fee with a one to two percent commission rate,¹⁰⁰ clearly demonstrate the affordability of the *hawala*.

Thus, alternative remittance systems are inherently more expensive than the *hawala* system for the consumer. Privatized wire remittance systems naturally pass on most of the regulatory costs of operating such a system to the consumers.¹⁰¹ If Western Union acquires a *hawala*, the commission fees associated with each transaction will be higher than commission fees offered to consumers by independent *hawalas* because of the newly introduced regulatory costs, presently exemplified in the cost discrepancy between the two systems.¹⁰² In the case of a bank using *hawaladars* as brokers, there are the additional costs to the consumer of opening checking accounts and paying for courier services.¹⁰³

E. Problem Five: Less Expansive

Hawalas reach more remote areas, where larger financial institutions

⁹⁷ "Western Union charges \$22 to transfer \$200 from Karachi, Pakistan to New York City." Wheatley, *supra* note 2, at 353 (citing Fasih Ahmed, *Antiterror Measure Helps Pakistan*, WALL ST. J. EUR., Oct. 21, 2003, at A3).

⁹⁸ SAMUEL MUNZELE MAIMBO, *THE MONEY EXCHANGE DEALERS OF KABUL: A STUDY OF THE HAWALA SYSTEM IN AFGHANISTAN* 5 (World Bank, Working Paper No. 13, 2003), available at http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/2003/10/16/000090341_20031016085357/Rendered/PDF/269720PAPER0Money0exchange0dealers.pdf (last visited Nov. 17, 2005); see also Philip Bowring, Opinion, *War on Third-World Remittances*, INT'L HERALD TRIB., Nov. 29, 2005, at 6.

⁹⁹ Wheatley, *supra* note 2, at 329.

¹⁰⁰ MAIMBO, *supra* note 98, at 5.

¹⁰¹ Fasih Ahmed, *Antiterror Measure Helps Pakistan*, WALL ST. J. EUR., Oct. 21, 2003, at A3. Obviously, the regulatory costs depend on the governmental regime, but as will be seen in the later discussion about lender liability, regulatory schemes, if present, necessarily add costs.

¹⁰² Wheatley, *supra* note 2, at 354–55.

¹⁰³ *Id.* at 349.

do not have branch offices.¹⁰⁴ Because of profitability and technology capability concerns, financial institutions and wire transfer services locate themselves in cities, not readily accessible to all the customers served by the *hawala*.¹⁰⁵ In the same vein, *hawalas* can adapt to unstable situations that would inevitably debilitate regular private banking functions,¹⁰⁶ because at its very basic level, a *hawala*'s functionality is dependent only upon the ability for two people to communicate with each other.

While alternative banking systems envisioned and established by Egypt, Jordan, Lebanon, other Persian Gulf states, and the Philippines may compete with the *hawala* system in cost efficiency and sometimes even in reaching smaller villages through door-to-door delivery,¹⁰⁷ limitations do exist for a privatized system in a regulated environment.¹⁰⁸ For example, Western Union limits the amount transferred to Pakistan to \$1,000 each thirty-day period,¹⁰⁹ and the transaction takes five business days.¹¹⁰

These restrictions necessarily inhibit customers, especially in emergencies. The advantage to using *hawalas* is their ability to function even during cataclysmic situations like "wars, civil unrest, conflicts and economic crisis."¹¹¹ When the *hawala* network becomes dependant on the functionality of a private banking facility, the network risks losing its adaptability, and inherently loses its advantageous expansiveness. Necessarily, customers will turn to independent *hawaladars* during such crises to solve their problems.

Only recently, in the aftermath of the October 8, 2005 earthquake in Kashmir, crisis tested the liquidity of foreign exchange reserves.¹¹² Economic reports about the liquidity crisis established that, "even

¹⁰⁴ Yousef Statement, *supra* note 74, at 44.

¹⁰⁵ *Id.*

¹⁰⁶ Daudi, *supra* note 83, at 628.

¹⁰⁷ Looney, *supra* note 61, at 167.

¹⁰⁸ Pathak, *supra* note 72, at 2013.

¹⁰⁹ See <http://www.westernunion.com> (select "United States" from drop-down menu below text that reads "Send money transfer online from;" select "Money in Minutes" from Price Online Services drop down menu; select "Pakistan" as Sending to: country; type "500" in Amount box; select "New York" as Sending from: state). Western Union restricts online transfers to \$1000 per thirty-day period to Pakistan. <http://www.westernunion.com> (select "United States" from drop-down menu below text that reads "Send money transfer online from;" select "Money in Minutes" from Price Online Services drop down menu; select "Pakistan" as Sending to: country; type "2999" in Amount box; select "New York" as Sending from: state; read resulting error message).

¹¹⁰ Pathak, *supra* note 72, at 2013.

¹¹¹ Daudi, *supra* note 83, at 628 (quoting MOHAMMED EL QORCHE ET AL., INTERNATIONAL MONETARY FUND, INFORMAL FUNDS TRANSFER SYSTEMS: AN ANALYSIS OF THE INFORMAL HAWALA SYSTEM 9 (2003)).

¹¹² *Downslide in Liquid Foreign Exchange Reserves Continues*, BUS. RECORDER, Oct. 29, 2005.

augmented inflows of foreign funds, [in the form of] both . . . relief and enhanced expatriate remittances to help quake-torn relatives, fell far short of actual foreign exchange requirements.”¹¹³ Economists postulated that the lack of liquidity shifted movement to informal systems like *hawala*.¹¹⁴ Accounts like these shed doubt on the viability of government approved partnerships and the “Western Unionization” of the *hawala* system, especially in this particular case where the Indian government had approved a partnership between Western Union and its national postal service.¹¹⁵

F. Problem Six: Failure to Address Religious Concerns

The final problem, and perhaps the most difficult for any proposed alternative remittance system to address adequately, is its failure to contend with religious concerns. Islam mandates the use of *hawalas*; the Koran teaches (or its followers often believe) that the charging of interest runs counter to the teachings of the Koran.¹¹⁶ Zagaris explains that investment companies, like *Al Taqwa*, provide clients investment opportunities like a mutual fund, but abide by Islamic law doctrine forbidding “charging interest or owning anything connected with alcohol, weapons, gambling, or adultery.”¹¹⁷ Under *sharia* Islamic law, procedures exist to “provide for the regulation of commerce and financing.”¹¹⁸ These procedures, called *thick al muwamalat*, mean ““transactions amongst the people.””¹¹⁹ Religious leaders have articulated the proper procedures for transferring debt and the rules regarding *hawala* to ensure that transactions do not violate Islamic law.¹²⁰ Because the Koran encourages Muslims to “build financial relationships based on trust rather than contract,”¹²¹ a “Western Unionized” *hawala* system necessarily would entangle the *hawala* customers in a larger, contract-based relationship, diluting the ability to build relationships on trust.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Wheatley, *supra* note 2, at 377.

¹¹⁶ McCulloch & Pickering, *supra* note 47, at 479.

¹¹⁷ Bruce Zagaris, *Financial Aspects of the War on Terror: The Merging of the Counter-Terrorism and Anti-Money Laundering Regimes*, 34 LAW & POL’Y INT’L BUS. 45, 70 (2002). While the United States government may have investigated *Al Taqwa* for money laundering violations, their case illustrates not the pristine examples of a *hawala*, but instead underlines the connectedness of the *hawala* and religious needs.

¹¹⁸ Fletcher N. Baldwin, Jr., *Organized Crime, Terrorism, and Money Laundering in the Americas: Introduction*, 15 FLA. J. INT’L L. 3, 13 (2002).

¹¹⁹ *Id.*

¹²⁰ See Shi’a Islamic Laws on *Hawala* According to the Fatawa of Ayatullah al Uzama Syed Ali al-Husaini Seestani, available at <http://www.al-islam.org/laws/transactions3.html#2298> (last visited Oct. 11, 2005) (describing basic rules of *hawala* transfers).

¹²¹ Edward Hegstrom, *Iranian Exiles in Quandary*, HOUST. CHRON., May 5, 2003, at A14.

Thus, the privatization of *hawala* requires a thorough consideration of consumer needs. Ultimately, the problem with this alternative, though theoretically sound, remains that unless such a privatized system can hurdle the challenges of providing an anonymous, efficient, reliable, low cost, expansive, and religiously legal money remittance system, consumers will continue to rely on the *hawala* system for their debt transactional needs.

VI. PROBLEM WITH PROPOSED STRATEGY—LENDER LIABILITY

Even if a “Western Unionized” *hawala* system meets the consumer needs of secrecy and anonymity, efficiency, reliability, affordability, comprehensiveness, and religious compatibility, the acquiring bank or wire remittance system faces risks that greatly outweigh any economic benefit it may receive through capturing a greater market share of the customer base. By analyzing the lender liability laws in the United States, Pakistan, India, and the U.A.E., it will become evident that banks or private institutions show reluctance to privatize *hawalas*, even in countries that have been able to overcome some of the aforementioned consumer obstacles.

A. Lender Liability in the United States

First, in the United States, a country where “informal [money remittance] networks are very popular with immigrant communities,”¹²² two prominent bank regulatory structures govern American banks. The Bank Secrecy Act (“BSA”) and the USA PATRIOT Act impose strict reporting requirements on American banks, which potentially expose them to liability if they acquire a typical *hawala* network that neither regularly records transactions nor performs customer identity verifications.

B. Bank Secrecy Act

Congress enacted the BSA in 1970 to combat money laundering in the United States.¹²³ Amended in 2001 by the USA PATRIOT Act, Congress added “know-your-customer” obligations for financial institutions doing business in the United States.¹²⁴ The record-keeping rules apply to both licensed and informal systems.¹²⁵ In addition, informal money transfer systems, like *hawala*, must register as money transmitting businesses.¹²⁶ *Hawaladars* also have an obligation to file suspicious activity reports

¹²² Walter Perkel, *Money Laundering & Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 200 (2004).

¹²³ Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in various sections of Titles 12, 15, and 31 of the U.S. Code).

¹²⁴ Pub. L. No. 107-56, 115 Stat. 272-400, § 326 (2001).

¹²⁵ *Id.* § 359 (amending 31 U.S.C. § 5330(d)(1)(A)).

¹²⁶ *Id.*

within thirty days of the detected suspicious activity.¹²⁷

By incorporating *hawalas* into the global financial structure through a principal-agent relationship, Western Union would still be accountable to the U.S. Government for obligations to file suspicious activity reports.¹²⁸ Because in a traditional *hawala* system little to no paper trail exists,¹²⁹ Western Union would expose itself to liability daily because of the challenges it faces in meeting its obligations under the BSA.¹³⁰ Conversely, if Western Union were to require *hawaladars* to keep detailed records, customers would likely retreat from using such a system, as discussed in the above sections.

Additionally, by complying with the regulations, banks expose themselves to civil liability, which Natarajan aptly describes as naturally occurring conflicting interests in implementing anti-money laundering legislation.¹³¹ This conflict is particularly apropos in the *hawala* case, where implementing an anti-money laundering regime that includes strict regulation of the financial industry to avoid criminal liability renders a bank susceptible to civil liability.¹³² That is, although some anti-money laundering laws provide for immunity from breach of confidence actions if a bank reports confidential customer information to law enforcement authorities, those protections are limited in application.¹³³

C. USA PATRIOT Act

The second powerful regime governing transactions in the United States consists of the provisions of the USA PATRIOT Act. Congress passed the USA PATRIOT Act in the aftermath of the terrorist attacks of September 11, 2001. Among other things, the USA PATRIOT Act criminalizes the knowing transfer of funds derived from crimes or from funds to be used in crimes.¹³⁴ If convicted, violators face fines and up to five years' imprisonment.¹³⁵

Even if Western Union may not "knowingly" transfer criminal funds, and therefore may escape criminal liability, Western Union may share responsibility for paying a fine on behalf of the *hawaladar*, should the

¹²⁷ *Id.*

¹²⁸ See Natarajan, *supra* note 40, at 2072.

¹²⁹ See Wheatley, *supra* note 2, at 356.

¹³⁰ See Natarajan, *supra* note 40, at 2072 (referring to "know-your-customer laws," of which the BSA is one).

¹³¹ *Id.* at 2074.

¹³² *Id.* at 2074–76.

¹³³ *Id.* at 2075.

¹³⁴ 115 Stat. 272–400, § 373(b)(1)(C).

¹³⁵ *Id.* § 373(a).

hawaladar be unable to pay, as in a typical principal-agent relationship.¹³⁶ The extent of recourse, however, hinges on how closely the Western Union-*hawaladar* relationship resembles a principal-agent relationship.¹³⁷ As Justice Cardozo prophetically wrote nearly eighty years ago, “There is no doubt that, at common law, a corporation, doing business as a carrier of passengers or goods, may charge itself with liability for loss on a connecting line, and to that end may enter, within reasonable limitations not yet accurately defined, into a joint adventure with another.”¹³⁸

Thus, for privatized money remitters or banks, the stringent reporting requirements and the “know-your-customer” laws pose expensive challenges when dealing with an agent that has little to no infrastructure or desire to regulate its customers and record its transactions. For a profit-maximizing firm, increased exposure to liability and increased regulatory costs may outweigh any revenue increase due to greater market share.

D. Lender Liability in Pakistan

Pakistan is another country where *hawala* is a popular form of money remittance.¹³⁹ In Pakistan, however, *hawala* is illegal.¹⁴⁰ In 2002, a law was enacted requiring *hawaladars* “to record their transfers and register with the government.”¹⁴¹ In 2003, the Pakistani government created the Financial Intelligence Bureau, whose main responsibility is to analyze data

¹³⁶ See *Richardson v. New Century Mortgage Corp.*, No. 05-60826, 2005 WL 1554026 at *9 (N.D. Miss. Oct. 16, 2006) (discussing vicarious liability). Although plaintiffs bear the burden of pleading the principal-agent relationship, once that relationship is established, vicarious liability applies. It may not be difficult to establish this principal-agent relationship in the Western Union-*hawaladar* situation because of the principles of agency described in the RESTATEMENTS OF AGENCY. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (“Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent.”); see also RESTATEMENT (THIRD) OF AGENCY § 1.01, comment c (stating that “a person may be an agent although the principal lacks the right to control the full range of the agent’s activities, how the agent uses time, or the agent’s exercise of professional judgment” and “[a]n agent also has power to affect the principal’s legal relations through the operation of apparent authority, as stated in § 2.03”); RESTATEMENT (SECOND) OF AGENCY § 14 (stating that agency is “the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act”).

¹³⁷ See *Richardson v. New Century Mortgage Corp.*, 2005 WL 1554026 at *9.

¹³⁸ *Berkey v. Third Ave. Ry. Co.*, 155 N.E. at 61 (emphasis added).

¹³⁹ See Wheatley, *supra* note 2, at 356.

¹⁴⁰ *Id.* at 366.

¹⁴¹ *Id.* at 366–367 (citing Asad Cheema, *Snow Lauds Pakistan’s Efforts to Curb Terror, Money-Laundering*, THE DAILY MAIL, Sept. 20, 2003, available at <http://web.archive.org/web/20040407144148/http://dailymailnews.com/200309/20/news/101.html>).

on suspicious transactions.¹⁴² Finally, Pakistani law, much like U.S. law, requires money remitters to comply with reporting requirements.¹⁴³

Even with the new laws, there are still many unregistered money remitters.¹⁴⁴ Because of this, it would be hard for Western Union to comply with both Pakistani and U.S. reporting requirements, if a transaction occurs between a party in the United States and a party in Pakistan. Moreover, because of the discrepancy regarding money remitters' registrations, Western Union cannot avoid the difficulties in distinguishing between funds originating from a legal source, that is, through a registered money remitter, or funds originating from an illegal source, that is, a *hawaladar*.¹⁴⁵

Even if the Pakistani government provided Western Union with an updated list of legal money remitters with whom Western Union could do business, those money remitters would have to verify that they did not receive funds from unregistered money remitters. Creating a network of purely registered money remitters necessarily diminishes the expansiveness of the system, and the same problems exist in meeting consumer requirements.¹⁴⁶ In the event that the registered money remitters do transact with their unregistered counterparts, Western Union exposes itself to violations under Pakistani law for transacting with illegal money remitters.¹⁴⁷ Furthermore, the difficulty in discerning transaction originators poses liability issues under the American "know-your-customer" laws.¹⁴⁸

Despite Pakistan's efforts to close down illegal money remitting operations, the use of the *hawala* system is still prevalent in the country.¹⁴⁹ Yet again, a profit-maximizing corporation is not likely to acquire a *hawaladar* and its business clientele while risking increased liability exposure and acquiring less than a full monopoly.¹⁵⁰

¹⁴² Wheatley, *supra* note 2, at 367.

¹⁴³ *Id.* at 367–68.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 366 (“[R]eliance on registration and suspicious transaction reports blinds investigators to *hawala* brokers that fail to register, operate with limited records, and avoid the mainstream financial system.”).

¹⁴⁶ See *supra* notes 128–30 and accompanying text.

¹⁴⁷ Wheatley, *supra* note 2, at 366 (explaining how Pakistan has outlawed *hawala*, yet “[f]oreign remittances through banking channels fell from \$150 million to \$50 million per month”).

¹⁴⁸ See *supra* notes 125–28 and accompanying text.

¹⁴⁹ See Wheatley, *supra* note 2, at 367–68.

¹⁵⁰ Western Union, abiding by Pakistani laws and transacting with only registered money remitters, cannot obtain a monopoly, because illegal money remittance is still quite prevalent in Pakistan. *Id.*

E. Lender Liability in India

India, like Pakistan and the United States, is a hotbed for *hawala* networks.¹⁵¹ Yet, unlike Pakistan and the United States, Indian laws are much less stringent. A 2003 law established requirements for detailed records of transactions; however, there is no explicit filing requirement for suspicious activities.¹⁵²

Under these more lenient filing requirements, Western Union's acquisition of *hawaladar* operations may be feasible. Still, Indian law does require detailed records of transactions, which may pose problems for the acquiring institution.¹⁵³ For example, in the instance where a criminal entity utilizes the services of a Western Union-affiliated *hawaladar* to launder its dirty money, Western Union will likely be unable to produce the necessary documentation to comply with Indian laws because traditional *hawala* systems lack the infrastructure and incentive to manage or create a paper trail of their customers.¹⁵⁴ Again, though Western Union may require affiliate *hawaladars* to keep detailed records, Western Union may be unable to avoid liability from actions of its agents.¹⁵⁵

The liability associated with *hawaladars* engaging in illegitimate transactions would necessitate intensive background checks on *hawaladars* whom Western Union will employ or acquire. Unfortunately, these checks will likely be both expensive and ineffective because of the aforementioned difficulty in distinguishing between legitimate and illegitimate transactions, particularly because of the lack of record keeping, a paramount underpinning of the *hawala* system.¹⁵⁶

Finally, even if Western Union surmounts these obstacles, it will still face liability in the United States for cross-border transactions that enter the jurisdiction of the United States.¹⁵⁷ The risks and costs associated with background checks for every *hawaladar* employed and constant verification of the legitimacy of its transactions would likely prevail over the benefit to a greater market share that it might enjoy after acquisition of the individual *hawaladars*.

¹⁵¹ See Financial Action Task Force on Money Laundering, Report on Money Laundering Typologies 1999–2000, at 6 (Feb. 3, 2000), available at <http://www.fatf-gafi.org/dataoecd/29/37/34038120.pdf> [hereinafter FATF Report].

¹⁵² See India Code, The Prevention of Money-Laundering Act § 12, (Act No. 15 of 2003) (India), available at <http://indiacode.nic.in/rspaging.asp?tfnm=200315>.

¹⁵³ FATF Report, *supra* note 151; Wheatley, *supra* note 2, at 370.

¹⁵⁴ See Wheatley, *supra* note 2, at 356.

¹⁵⁵ See *supra* notes 128–30 and accompanying text.

¹⁵⁶ See Wheatley, *supra* note 2, at 356.

¹⁵⁷ See *supra* text accompanying notes 122–38.

F. Lender Liability in the U.A.E.

Lender liability laws are relatively new in the U.A.E. In January 2002, the U.A.E. promulgated a new money laundering law, which established disclosure requirements.¹⁵⁸ Specifically, banks and *hawaladars* are required to report all movement of cash in excess of \$550.¹⁵⁹ Additionally, the U.A.E. government has established limits “on the percentage of paid-in capital a bank can lend to a single individual or corporate entity.”¹⁶⁰

While exchange companies have formed that are competitive with *hawalas*, banks are hesitant to collaborate with them in promoting formal money transfer channels.¹⁶¹ The liability is too great for banks that are required to report the movement of cash in excess of \$550. If Western Union, in place of the U.A.E.-based banks, entered into a parent-subsidiary relationship with the *hawaladars*, it would likely experience the same reporting challenges.¹⁶²

Though some may counter that the U.A.E. is not likely to enforce the reporting requirements, illustrative evidence of banks hesitating from coordinating with the *hawaladars*¹⁶³ suggests the existence of a very real and present apprehension of enforcement by the government. Again, even if the U.A.E. does not enforce the regulations, Western Union must contend with the U.S. laws as a U.S. corporation. The “know-your-customer” laws still apply, and Western Union must report suspicious activities.¹⁶⁴ Thus, such lender liability presents an overwhelming and costly challenge that may be more precarious than the economic benefit is worth.

VII. WHAT IS THE SOLUTION?

Seeing that lender liability laws and consumer needs will likely preclude the existence or sustainability of a privatized *hawala* system, the issue necessarily turns to what solution will work to bring the *hawala* system into the current, formal, global, financial structure or, at the very least, into a functional regulatory framework. Some countries, like the Philippines, have adopted regulatory regimes that regulate the tools money

¹⁵⁸ Wheatley, *supra* note 2, at 365.

¹⁵⁹ Jon Marks, *UAE Strives To Be the Gulf's No. 1*, *BANKER*, Sept. 2002, at 179; Wheatley, *supra* note 2, at 365.

¹⁶⁰ Robin Allen, *UAE to Tighten Rules for 'Terrorist' Cash System*, *FIN. TIMES*, Nov. 6, 2002, at 12.

¹⁶¹ M.S. Rafique at 2005 UAE Central Bank Hawala Seminar, *available at* [http://centralbank.ae/pdf/Hawala2005/Presentation%20\(Slides\)%202.pdf](http://centralbank.ae/pdf/Hawala2005/Presentation%20(Slides)%202.pdf) [hereinafter Rafique Slides].

¹⁶² See *supra* notes 128–30130 and accompanying text.

¹⁶³ Rafique Slides, *supra* note 161.

¹⁶⁴ See *supra* notes 128–30 and accompanying text.

remitters use instead of regulating the money remitters themselves.¹⁶⁵

In the Philippines, few people have bank accounts and even fewer have credit cards.¹⁶⁶ Like the typical *hawala* consumer, Filipinos living in rural areas lack access to bank branches, thus increasing travel and time expenses for routine financial transactions.¹⁶⁷ However, nearly forty-two percent of Filipinos have mobile phones.¹⁶⁸ The Philippine government, recognizing the prevalent use of cellular and mobile technology as the primary conduit for remittance transactions, delegated supervisory and regulatory powers over mobile phone operators to the central bank.¹⁶⁹ Despite imposed volume limitations¹⁷⁰ that may inhibit the true functionality of the *hawala* system, the premise of a tangential approach to regulating *hawalas* as opposed to a more direct offensive seems better tailored for the subtle nature of the *hawala*.

Another possibility for the unique success achieved in the Philippines could be the relatively low volume of remittance transactions compared to other countries. Informal evidence suggests that in 2000, even before the 2001 enactment of the Philippine Anti-Money Laundering laws, the amount of money transmitted through informal Philippine channels constituted a small proportion of the total *hawala* remittances in recipient countries.¹⁷¹ With a less significant volume, and consequently fewer channels to regulate, finding a single tool, like mobile or cellular technology, is easier than attempting to combat *hawala* transactions where more money and more networks implicate multiple tools that the government might have to regulate.

A more practical approach to combating abuses of the *hawala* system should account for the inherent values of the system lauded by customers. Economic competitiveness alone is not the answer. From a culturally

¹⁶⁵ Presentation by Austin Belton, Asian Development Bank, 2005 Hawala Conference, available at <http://centralbank.ae/pdf/Hawala2005/hawala%20conference%20presentation%20.pdf> [hereinafter Belton Presentation].

¹⁶⁶ Joey Mendoza, presentation at ADB-IDB/IMF UNDP Joint Conference on Remittances (Sept. 12–13, 2005), available at <http://www.adb.org/Documents/Events/2005/ADB-IADB-MIF-UNDP/jmendoza.pdf>. Mendoza represented G-Xchange, marketing mobile technology that enables consumers to transfer money to other mobile phones with explicit anti-money laundering provisions. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Belton Presentation, *supra* note 165.

¹⁷⁰ *Id.*

¹⁷¹ See John F. Wilson, *Hawala and Other Informal Payment Systems: an Economic Perspective*, Seminar on Monetary and Financial Law 11 (Mar. 16, 2002), available at <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/wilson.pdf> (unpublished manuscript, on file with the International Monetary Fund) (arguing that the decrease in volume of remittances is due to “improvements and cost reductions for banking channels, and also [the] unification of the exchange rate some time ago”).

relative perspective, economics is a factor, but other factors exist in deciding how to transfer money. Governments will need to be creative and assess the means by which *hawaladars* conduct their business. No catchall solution will cure the problem of *hawala* abuse. Though generally following the same premise, each country and each network uses different mechanisms, and it is up to each government to regulate those mechanisms.

While the regulation of mobile technology addresses *hawala* use in the Philippines, it may be impractical in the United States, where constitutional constraints and the populace's value of privacy would lead citizens to decry such legislation. Moreover, it may be that American *hawaladars* predominantly use email, making cell phone regulation inappropriate.

Thus, an appropriate solution involves governmental efforts to understand the *hawala* mechanisms within their respective countries and construct innovative solutions to attack subtly procedural tools instead of a direct assault on the front-end or back-end of the transactions.

VIII. CONCLUSION

After assessing a predominant solution proposed by scholars in the area, it becomes clear that a "Western Unionizing" of the *hawala* system falls short of consumer expectations and poses too great of a risk for corporate entities required to assume liability for undocumented transactions. Seeing this, one must conclude that a viable solution would contemplate the consumer incentives for using the *hawala* system and the mechanisms used by *hawaladars* in the country trying to regulate the *hawala* system.