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Ann E. Misback  
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Financial Crimes Enforcement Network  
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*Delivered via email: regs.comments@federalreserve.gov*

November 27, 2020

Subject: Federal Reserve Docket No. R-1726; RIN 7100-AF97  
FinCEN Docket No. FINCEN-2020-0002, RIN 1506-AB41

Dear Ms. Misback,

We write on behalf of the Yale Privacy Lab and Fight for the Future, Inc.,<sup>1</sup> to register our concerns about the manner and method by which this proposed rule<sup>2</sup> is being analyzed and promulgated -- namely, its failure to consider privacy.

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<sup>1</sup> See generally <https://privacylab.yale.edu/>, <https://www.fightforthefuture.org/>.

<sup>2</sup> See U.S. Department of the Treasury, Financial Crimes Enforcement Network (FinCEN) et al., *Threshold for the Requirement To Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds That Begin or End Outside the United States, and Clarification of the Requirement To Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets With Legal Tender Status* (Oct. 27, 2020), <https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and> (hereinafter “proposed rule”).

Privacy is ingrained in the United States Constitution,<sup>3</sup> Supreme Court precedent,<sup>4</sup> state constitutions,<sup>5</sup> and a range of federal statutes.<sup>6</sup>

The right to privacy is especially important where -- as here -- the government proposes collecting large amounts of personal data about individual Americans that could reveal intimate decisions, medical purchases, political expressions, familial relations, and increasingly granular purchases or movements. Privacy interests are further heightened when the government seeks to amass voluminous data without obtaining a warrant, serving a subpoena, or engaging in any individualized legal process. The prospect of bringing dragnet data collection into Americans' small-dollar cross-border payments via this proposed rulemaking necessarily impacts constitutional and statutory privacy interests.

Yet neither privacy law nor privacy effects are analyzed or even referenced in the rule proposed by the Financial Crimes Enforcement Network (FinCEN) and the Board of Governors of the Federal Reserve System (FRB), regarding the data collection threshold for what is known as the "Travel Rule."<sup>7</sup> The proposed rule conspicuously fails to *even mention* the term 'privacy' anywhere in the analyses of the rule's impacts (including the cost-benefit analyses) or in the requests for comments. This is deeply problematic as a matter of process and substance.

While different federal agencies may sometimes take different views on the scope of privacy law or policy, it is common ground that privacy is critical to the public interest and necessarily relevant as a matter of law. Naturally, agencies and branches of government regularly acknowledge legal interests in privacy -- including FinCEN itself.<sup>8</sup> In other recent impact

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<sup>3</sup> See, e.g., U.S. Const. Amends. I, III, IV, V, XIV.

<sup>4</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) ("Various [constitutional] guarantees create zones of privacy."). See also Deborah R. Gilg, U.S. Attorney, *Know Your Rights: A Guide to the United States Constitution* at 11, <https://www.justice.gov/sites/default/files/usao-ne/legacy/2012/04/27/Civil%20Rights%20Book-NE-2.pdf> ("the First, Third, Fourth, and Fifth Amendment create 'zones of privacy' around a citizen's property and person").

<sup>5</sup> See, e.g., Constitution of California, Art. I §1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."); see also National Conference of State Legislatures, *Privacy Protections in State Constitutions* (Nov. 6, 2020), <https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx> ("Constitutions in Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina and Washington have explicit provisions relating to a right to privacy").

<sup>6</sup> See, e.g., The Privacy Act of 1974; Children's Online Privacy Protection Act; Electronic Communications Privacy Act; Video Privacy Protection Act; Right to Financial Privacy Act; Gramm-Leach-Bliley Act; Family Educational Rights and Privacy Act; Health Insurance Portability and Accountability Act of 1996.

<sup>7</sup> Proposed rule, *supra*.

<sup>8</sup> See, e.g., FinCEN, *Feasibility of a Cross-Border Electronic Funds Transfer Reporting System Under the Bank Secrecy Act* (Oct. 2006), [https://www.fincen.gov/sites/default/files/shared/CBFTFS\\_Complete.pdf](https://www.fincen.gov/sites/default/files/shared/CBFTFS_Complete.pdf) at 26 ("Finally, FinCEN has created a position within its Office of Information and Technology to advise the Chief Information Officer regarding privacy issues implicated by the collection of BSA Information. This official will advise the CIO on the development and implementation of information technology to help ensure that Bank Secrecy Act and related

assessments, FinCEN rightly analyzed the extent to which a particular rulemaking would result in “Reduced Privacy” and “Increased Costs to Non-criminal Clients.”<sup>9</sup> Likewise, in 2010, when FinCEN announced a Notice of Proposed Rulemaking (NPRM) on cross-border electronic transfer reporting, FinCEN specifically cited survey findings that “customer privacy [is] a significant concern,” and asked commenters to weigh in on the “Effects of the Rule on Customer Privacy.”<sup>10</sup> Today, the agency offers no explanation for why a similar approach would not be prudent – even though the issue in question is essentially the same as the 2010 NPRM.

The categorical failure to consider or analyze privacy law or effects also creates serious infirmities under the Administrative Procedure Act. For example, the proposed rule does not comport with Circular A-4 of the Office of Management and Budget,<sup>11</sup> under which agencies “should carry out a careful evaluation” of “important benefits and costs (e.g., *privacy protection*) [that] may be inherently too difficult to quantify or monetize given current data and methods.”<sup>12</sup> Under Circular A-4, agencies should also describe “distributional effects,” which “refer[] to the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography).”<sup>13</sup> While the proposed rule examines the costs of implementation by financial institutions, it does not consider the costs passed along to consumers. Those costs would surely have a disparate impact on Americans who send modest cross-border remittances to family living abroad, immigrant communities, lower-income Americans, and/or communities of color. Moreover, the failure to consider privacy (even though FinCEN has done so in the past) may be arbitrary and capricious.

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data and records are collected, transmitted, maintained and utilized only for authorized purposes *and that the privacy interests of those persons subject to BSA reporting are considered.*”) (emphasis added); Federal Communications Commission, *FCC Adopts Privacy Rules to Give Broadband Consumers Increased Choice, Transparency and Security for their Personal Data* (Press Release) (Oct. 27, 2016), <https://www.fcc.gov/document/fcc-adopts-broadband-consumer-privacy-rules> (“The rules implement the privacy requirements of [federal law] . . . This approach is consistent with other privacy frameworks, including the [agency’s] and the Administration’s Consumer Privacy Bill of Rights.”).

<sup>9</sup> FinCEN, *Regulatory Impact Assessment for FinCEN Notice of Proposed Rulemaking: “Customer Due Diligence Requirements for Financial Institutions,”* Docket No. FinCEN-2014-0001 (Dec. 2015), [https://www.fincen.gov/sites/default/files/shared/CDD\\_RIA.pdf](https://www.fincen.gov/sites/default/files/shared/CDD_RIA.pdf).

<sup>10</sup> FinCEN, *Cross-Border Electronic Transmittals of Funds* (Sept. 30, 2010), <https://www.federalregister.gov/documents/2010/09/30/2010-24417/financial-crimes-enforcement-network-cross-border-electronic-transmittals-of-funds>.

<sup>11</sup> Office of Management and Budget, Circular A-4, *Regulatory Analysis* (Sept. 17, 2003), [https://obamawhitehouse.archives.gov/omb/circulars\\_a004\\_a-4/](https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/) (hereinafter “Circular A-4”). *See also* Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* at 4, n.4 (updated Sept. 3, 2019), <https://fas.org/sgp/crs/misc/R43056.pdf> (“Circular A-4 . . . describes ‘best practices’ for agencies’ regulatory impact analyses” and “has been used by OMB and agencies since it was issued in 2003”).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.*

In sum, we are concerned that the proposed rulemaking here, in failing to carefully evaluate the impact on privacy interests at all, is fatally flawed. Specifically, the potential privacy implications here are amplified by the fact that lowering the threshold to \$250 (or even \$0, as the proposed rule considers in various places) mandates collecting, storing, and sharing increasingly granular personal and financial data about individuals sending small amounts, many of whom are disproportionately lower-income and would be asked to bear the additional financial burdens of FinCEN's new proposal. Neither the inter-agency community nor the general public can even begin to examine those concerns because the proposed rule ignores them. Therefore, we believe it is premature to finalize the proposed rule and that moving forward on the existing administrative record may open up the proposed rule to legal challenges.

At the very least, we respectfully urge the agencies to forestall issuance of this rule until a more fulsome analysis is undertaken that considers the impact on privacy -- including data privacy, financial privacy, and the constitutional right to privacy. Thank you for your consideration.

Sincerely,

/s/ JP Schnapper-Casteras

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