

November 27, 2020

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW, Washington, DC 20551.

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39, Vienna, VA 22183

RE: FinCEN & Federal Reserve Proposal to Lower the Threshold for Collecting, Retaining, and Transmitting Information on International Funds Transfers and Transmittals, Docket Number FINCEN–2020–0002, RIN number 1506–AB41; Docket No. R–1726; RIN 7100–AF97

Dear Sir or Madam:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the proposal by the Board of Governors of the Federal Reserve (FRB) and the Financial Crimes Enforcement Network (FinCEN) (collectively, the Agencies) to lower the threshold for collecting and transmitting information associated with international funds transfers.² The proposal would affect the records that banks and other financial institutions must collect and maintain for wire transfers that originate or end outside the United States as well as the information that must be transmitted with those transfers. Currently, the threshold for collecting and maintaining the information is set at \$3,000, but the proposal would drop the threshold to \$250. In addition, the proposal would change the definition of money to include convertible virtual currencies (CVC).

Summary of the Comment

ABA urges the Agencies to withdraw the proposal. Although the Agencies state that the proposal is founded on feedback from the public, the feedback is from an Advance Notice of Proposed Rulemaking issued in 2006. The technological and industry changes that have occurred in the intervening fourteen years call into question the appropriateness of that foundation. We also note that a 30-day comment period – which includes the Thanksgiving holiday – is too short to permit financial institutions or their trade associations to assess and gather responsive data and to offer that information and meaningful feedback to the Agencies. Moreover, the request for comment comes at the same time that FinCEN has requested feedback on a separate but extremely significant request on anti-money laundering (AML) effectiveness.

¹ The American Bankers Association is the voice of the nation's \$21.1 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard nearly \$17 trillion in deposits and extend nearly \$11 trillion in loans.

² 85 *Fed. Reg.* 68005 (October 27, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-23756.pdf>

ABA urges the Agencies to take more time to carefully analyze the potential impacts that a decreased threshold would have as well as whether the threshold change would be beneficial to law enforcement. FinCEN offers evidence about the volume of transactions that are not covered by the current threshold (which may result in transaction information not being retained) but offers no evidence of prosecutions that were hampered by lack of wire transfer data. The proposal also lacks an analysis of the impact of the proposed change on financial institutions, which will require significant additional resources for quality control, updates to policies and procedures, training, auditing, and compliance reviews. These increased burdens and costs may cause banks to eliminate or reduce international wire transfer services. And, the proposal adopts a standard that is significantly lower than international recommendations without explanation for the difference.

Finally, while the change to incorporate convertible virtual currencies (CVC) under the definition of money appears innocuous, this is a rapidly changing area. The potential for unintended consequences is significant, particularly since the proposed change does not appear to take into consideration changes by other regulatory agencies or state legislatures. In addition, the short comment period makes it impossible to assess the impact – positive or negative – on payment systems or developing payment systems arising from the definitional change. ABA strongly recommends that FinCEN undertake more careful evaluation before proceeding with this part of the proposal.

Background on the Wire Transfers Threshold

The current \$3,000 threshold that requires banks to collect and maintain information about funds transfers was set in 1995. There are two separate rules involved: the Recordkeeping Rule and the Travel Rule. The Recordkeeping Rule is designed to help law enforcement and regulators detect and prosecute financial crimes by ensuring that appropriate records are available. The Travel Rule requires banks and non-bank financial institutions to collect and transmit certain information with funds transfers.

Under the Recordkeeping Rule, banks must collect specific information from the sender for a funds transfer: the name and address of the originator, the amount of the transfer, the execution date, any payment instructions, the identification of the beneficiary's bank, and, if received from the originator: the name and address of the beneficiary, the account number of the beneficiary, and other specific information that identifies the beneficiary (recipient of the funds). Separately, under the Travel Rule, the sending bank must collect the same information as required under the Recordkeeping Rule, and the rule also requires any intermediary bank to transmit the information received to the next bank in the chain.

The Agencies have identified a number of benefits to law enforcement if the threshold is lowered. FinCEN analyzed Suspicious Activity Report (SAR) data from SARs that reported terrorist financing from 2016 through 2019, specifically those which referenced a funds transfer in the narrative. FinCEN found that the mean value of wires referenced was \$509 and the median value of those wires was \$255. FinCEN also determined that 71% of the 1.29 transmittals referenced were at or below \$500 in value while 57% were at or below \$300. Similar results from SAR data were discovered with transactions involving fentanyl sent through money transmitters.

When FinCEN issued the Recordkeeping and Travel rules in 1995, the agency promised to monitor SAR activity to determine whether it was appropriate to lower the \$3,000 threshold. Recent prosecutions for terrorist activity have identified numerous transfers under \$3,000, but that is only because banks retain the information when a SAR has been filed. If a SAR is not filed, FinCEN is concerned about data that might be lost because the records are not required. The Agencies believe that adopting a \$250

mandatory threshold would lead to the retention of information that is useful to the investigation and prosecution of criminal and terrorist activities.

Law enforcement supports lowering the threshold. For example, the Department of Justice supports lowering the threshold, as it noted in response to the 2006 advanced notice of proposed rulemaking. The Drug Enforcement Administration, the IRS, and the United States Secret Service also support a lower threshold. On the international level, other jurisdictions have adopted a higher threshold of €1,000 (\$1,187.12).

FinCEN has not Demonstrated that Collecting the Additional Data Would be Useful for Law Enforcement.

A point that ABA believes must be acknowledged in this analysis, and which appears to have been overlooked, is that banks track and monitor wire transactions, even those below the current threshold, and provide information believed to be suspicious through the filing of a SAR. Otherwise, FinCEN would not have the statistics that it cites about wire transfer data reported in SARs. This begs the question: would a lower threshold actually provide more meaningful information for law enforcement? Applying a blunt instrument such as a dropped threshold seems counter-intuitive, especially at a time when FinCEN is undertaking a major project to focus on effective information.

Moreover, while the proposal reports the number of wire transfers that fall below the threshold and are not subject to the Recordkeeping or Travel rule, it does not offer data on situations where law enforcement tried to obtain the information to investigate a case and that data wasn't available. In fact, the proposal identifies instances when the information *was* included in a SAR, which suggests that the process is working as it should at the current threshold of \$3,000. Banks continually monitor transactions for anything that is odd or inconsistent with normal behavior, and over time, technology has steadily improved banks' ability to identify anomalies. If something out of the ordinary rises to the level of a SAR filing, the bank retains that information. However, the proposal to require the collection, retention, and transfer of information on all international wire transfers over \$250 for the sake of having it is exactly the kind of compliance exercise that FinCEN's analysis of AML efficiency is trying to eliminate.

The Burden and Costs Imposed Would be Significant.

The Agencies believe that the impact and costs associated with changing the threshold would be low. They assert, though ABA could not confirm, that some institutions already collect information on all funds transfers regardless of the threshold in order to simplify procedures and training by applying one set of steps for all funds transfers. However, during the short time-frame for commenting, ABA was unable to determine the number of banks that collect the information for all wires. Significantly, we were able to confirm that there are some that do not, and those banks would face significant burden as the result of the change. Before moving forward with this rulemaking, we urge the Agencies to determine how many banks would be required to change procedures to comply with a lower threshold and quantify the costs and burdens associated with the change.

As proposed, covered transactions would be defined as those that end or originate outside the United States. However, the way the proposed definition is worded, it could potentially capture far more than what the Agencies intend. For example, if a sender outside the United States on business arranged for a payment transfer from his account in the United States to a U.S. recipient, it could be deemed covered

even though the entire funds transfer occurs within the confines of the United States border. Tracking the location of travelling customers would be a challenge. Instead of focusing on the location of the sender, we believe it would be more logical to focus on the location of the account (when the transfer is made from an account). This is consistent with existing standards for this type of transfer.³

The proposal also fails to consider the opportunity cost of the lower threshold. Whenever there is a regulatory change, it triggers a re-assessment of the products and services that will be affected by the change. Although 30 days is insufficient to conduct that analysis, our members report that funds transfers operate on thin margins. If a recordkeeping change erodes those margins further, some banks may eliminate or significantly reduce their availability. That was the case when the Consumer Financial Protection Bureau adopted the disclosure rules for remittance transfers.⁴ We urge the Agencies to consider whether this proposal will cause regulated financial institutions to stop offering wire transfers, which may drive the transactions through providers not subject to record collection and make the information even harder to track for law enforcement.

ABA members have also raised concerns that the lower threshold would present challenges with transactions that increasingly are moving to digital platforms. For example, the definition could capture transfers made through debit cards as well as person-to-person transfers using platforms such as Venmo and Zelle which are not set up to track this type of data. The change could present significant problems that could disrupt these popular small dollar payment mechanisms without any benefit to law enforcement.

What is clear is that the impact from the change is likely to be far greater than the Agencies anticipate. For example, the lower threshold will require a recalibration of monitoring systems which in turn increase the costs and staff time required to track and clear a greater volume of transactions. Similarly, even if a bank had been collecting the information, by changing the official threshold, it changes the level of scrutiny these wires will be subject to, requiring enhanced procedures for quality control, compliance, training and other steps

The 2006 ANPR asked whether certain receiving banks that received their wire transfers through a domestic intermediary could readily identify whether a funds transfer had originated outside the United States. Several ABA members report that in the intervening 14 years, systems procedures have changed to provide the necessary information to determine whether a transfer originated outside the United States. However, we urge the Agencies to confirm this fact with systems operators before the rule is finalized, something that was not possible to do in the short time allotted for comments.

The Agencies Must Address the Inconsistency of the Proposed Threshold with International Standards.

ABA also urges the Agencies to consider challenges presented by the inconsistency of the proposed \$250 threshold with international standards. Many European jurisdictions have adopted a threshold of €1000 to trigger requirements for collecting and transmitting information associated with wire transfers, which is the equivalent of \$1,187.12 —far higher than the threshold recommended by the Agencies.

³ For example, 12 CFR 1005.30(c) identifies a remittance as one sent from the United States to a designated recipient, which is “any person specified by the sender as the authorized recipient of a remittance transfer to be received at a location in a foreign country.”

⁴ Remittance Transfers Assessment Report, Consumer Financial Protection Bureau, April 2019, https://files.consumerfinance.gov/f/documents/bcfp_remittance-rule-assessment_report_corrected_2019-03.pdf

This disparity will raise questions. If a wire originated in another jurisdiction that uses a higher threshold than \$250, and therefore fails to include the necessary data required by U.S. receiving banks, should the U.S. bank to reject the transfer? This has been an occasional problem in the past that proposed lower threshold will exacerbate. If banks in the United States start rejecting wires that lack the necessary information, it may cause citizens in other countries to turn to less transparent means for moving funds into the United States. This, too, is a question that should be more carefully considered before the proposal is finalized.

The Agencies Ask Other Questions that Call for Additional Research and Analysis.

The Agencies also ask about the impact of reducing the threshold to \$0. While it appears that few banks send international wires below \$250 due to the associated costs, the impact of a zero dollar threshold on international wire service availability should be evaluated through additional research.

Similarly, the Agencies ask if the proposed threshold should extend to domestic transfers as well as international wires. This question mandates an analysis by the Agencies of the domestic wire transfer market to determine the volume and dollar amounts of the overall market. Second, it requires an analysis of existing alternatives, both legitimate and illegitimate, and an assessment of the impact on the information available to law enforcement if changes to the current system drive wire transfers out of the regulated banking system.

Finally, the Agencies ask about imposing specific identity standards for identifying senders of wire transfers. Since financial institutions already have a series of procedures in place to identify customers, including those who send wires, imposing a specific mandates could require changes to existing procedures that may be disruptive and a further incentive to discontinue certain products and services. Before considering this step, we recommend the Agencies further evaluate – and discuss with different segments of the financial sector – the need for and impact of such a requirement.

Background on CVC and Digital Assets

The Agencies also propose to clarify that the definition of “money” includes convertible virtual currencies (CVCs) and apply the Recordkeeping Rule and the Travel Rule to CVCs.

Over time, a number of different CVCs have appeared, and the medium has been gaining in popularity. However, law enforcement has found that CVCs are being used in illicit activity, and jurisdictions, including Venezuela, have expressed interest in using CVCs to evade sanctions. FATF recommends that CVCs be covered by anti-money laundering rules.

Generally, Recordkeeping Rule definitions for transmittal of funds parallels the definitions in Uniform Commercial Code (UCC) 4A. Although the Recordkeeping Rule does not define “money,” the preamble to the 1995 rule refers to the UCC when a term is not otherwise defined in the Recordkeeping Rule. Under the UCC, the term “money” is defined as “a medium of exchange currently authorized or adopted by a domestic or foreign government.” FinCEN articulated a similar approach in guidance issued in 2010 for the Travel Rule; FinCEN also stated in guidance issued in May 2019 that CVCs could fall within the Travel Rule as a transmittal order.⁵

⁵ “Funds ‘Travel’ Regulations: Questions & Answers,” November 9, 2010, FIN-2010-G004, <https://www.fincen.gov/resources/statutes-regulations/guidance/funds-travel-regulations-questions-answers> and

Regulation of CVCs Requires Further Study and Analysis.

Developments involving CVCs are rapid and have the potential to confer many benefits to consumer and commercial transactions. A number of different nations are evaluating whether it makes sense to issue state-authorized CVCs as a form of exchange, and there is an incredible variety of CVCs on the market. While including CVCs in the definition of money seems logical, it may limit innovation and future development in this area. ABA urges the Agencies to take more time to evaluate the impact that this regulatory change could have to be sure that it does not foreclose future positive developments.

While some banks have begun accepting CVCs in investment accounts and custodial accounts on behalf of customers, particularly in response to the guidance issued by the Office of the Comptroller of the Currency,⁶ banks are only beginning to explore the option of using these as a vehicle for transactions. Therefore, we recommend discussion with industry to understand of current trends before issuing a proposal.

Separately, we urge the Agencies to consider and something that is not reflected in the proposal but which should be considered, is the existing regulatory and legislative environment that impact CVCs. The Securities and Exchange Commission, Commodity Futures Trading Commission and Internal Revenue Service have each issued regulations in this area, and several states, notably New York and Wyoming, have taken a role in governing CVC operations. We recommend that the Agencies study whether the proposed changes would affect and interact with the existing regulatory requirements.

Conclusion

ABA urges the Agencies to take more time to analyze the impact of proposed changes to the threshold for collecting, maintaining and transferring information on wire transfers as well as the proposal to include CVCs in the definition of money. Before issuing a new proposal, careful dialogue, possibly through roundtable discussions involving members of the Bank Secrecy Act Advisory Group, would be useful to ensure that a final rule meets the needs of law enforcement in the most efficient and effective manner.

Sincerely,



Robert G. Rowe, III
Vice President & Senior Counsel

“Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies” May 9, 2019, FIN-2019-G001, <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

⁶ See, e.g., OCC News Release 2020-98, July 22, 2020, “Federally Chartered Banks and Thrifts May Provide Custody Services For Crypto Assets” (<https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-98.html>) and OCC News Release 2020-125, September 21, 2020

“Federally Chartered Banks and Thrifts May Engage in Certain Stablecoin Activities” (<https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-125.html>).