

Alert | Financial Regulatory & Compliance



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FRB and FinCEN Propose Significant Amendments to Recordkeeping and Travel Rule Regulations

On Oct. 23, 2020, the U.S. Department of the Treasury, Financial Crimes Enforcement Network (FinCEN) and the Board of Governors of the Federal Reserve System (FRB) (FinCEN and the FRB collectively, the Agencies), issued a joint notice of proposed rulemaking (Proposed Rule) that would amend the Recordkeeping Rule¹ and Travel Rule² regulations issued under the Bank Secrecy Act (BSA).

Under the current Recordkeeping and Travel Rule regulations, financial institutions must collect, retain, and transmit certain information related to funds transfers and transmittals of funds in amounts of \$3,000 or more.³ ***The Proposed Rule would lower the threshold from \$3,000 to \$250 for***

¹ 31 C.F.R. §§ 1020.410(a) and 1010.410(e).

² 31 C.F.R. § 1010.410(f).

³ The Recordkeeping Rule and Travel Rule collectively require banks and nonbank financial institutions to collect, retain, and transmit the following information on funds transfers and transmittals of funds in amounts of \$3,000 or more: (i) name and address of originator/transmittor; (ii) the amount of the payment or transmittal order; (iii) the execution date of the payment or transmittal order; (iv) any payment instructions received from the originator or transmittor with the payment or transmittal order; and (v) the identity of the beneficiary's bank or recipient's financial institution. In addition, the originator's bank or transmittor's financial institution must retain the following information if it receives this information from the originator or transmittor: (i) name and address of the beneficiary/recipient; (ii) account number of the beneficiary/recipient; and (iii) any other specific identified or the beneficiary or recipient.

cross-border transactions (i.e., transactions that “begin or end outside the United States”).⁴ The threshold for domestic transactions would remain unchanged.

Furthermore, the Proposed Rule would revise the definitions of “payment order” and “transmittal order” under the BSA regulations so that the Recordkeeping Rule and Travel Rule apply to ***transactions involving convertible virtual currency (CVC) and digital assets having legal tender status.***

FinCEN published guidance in May 2019 advising that CVC-based transfers effectuated by nonbank financial institutions may fall within the Recordkeeping and Travel Rules on the grounds that such transfers involve the making of a “transmittal order” by the sender.⁵ The blockchain community has pushed back on FinCEN’s extension of the Recordkeeping and Travel Rules to transactions involving CVC and has argued, among other things, that CVC is not “money” as defined by the Recordkeeping and Travel Rules, and that if FinCEN intends to expand the definition under the Recordkeeping and Travel Rules to encompass CVC transactions, it should do so through a notice-and-comment rulemaking.⁶ In the Proposed Rule, FinCEN revises the definitions of “payment order” and “transmittal order” to make explicitly clear that the term “money” includes ***CVC and a medium of exchange currently authorized or adopted by a domestic or foreign government, including any digital asset that has legal tender status in any jurisdiction.*** The Proposed Rule defines “CVC” as “a medium of exchange (such as cryptocurrency) that either has an equivalent value as currency, or acts as a substitute for currency, but lacks legal tender status.”

In lowering the current thresholds for cross-border transactions from \$3,000 to \$250, the Agencies make reference to having considered Suspicious Activity Reports filed by money transmitters, which show that a substantial volume of potentially illicit funds transfers and transmittals of funds occur below the \$3,000 threshold, and recent criminal prosecutions, which show that individuals are sending and receiving funds to finance terrorist activity in amounts below (and in some cases, well below) the current \$3,000 threshold. The Agencies state that the views of law enforcement partners and recommendations of the Financial Action Task Force further support minimizing current thresholds.

In proposing to formally and explicitly extend the application of the Recordkeeping and Travel Rules to CVC and digital assets that have legal tender status, the Agencies emphasize that public use of CVCs has grown significantly in recent years, and that bad actors have used CVCs to facilitate international terrorist financing, weapons proliferation, sanctions evasion, and transnational money laundering.

Written comments on the Proposed Rule must be submitted no later than Nov. 27, 2020.

⁴ Under the Proposed Rule, a funds transfer or transmittal of funds would begin or end outside the United States if “the financial institution knows or has reason to know that the transmitter, transmitter’s financial institution, recipient, or recipient’s financial institution is located in, is ordinarily resident in, or is organized under the laws of a jurisdiction other than the United States or a jurisdiction within the United States.” A financial institution would have “reason to know” that a transaction begins or ends outside the United States if such information could be determined based on the information the financial institution receives in the transmittal order, collects from the transmitter to effectuate the transmittal of funds, or otherwise collects from the transmitter or recipient to comply with regulations implementing the BSA.

⁵ FinCEN Guidance – FIN-2019-G001, Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies at 11-12, May 9, 2019.

⁶ Chamber of Digital Commerce’s letter to FinCEN, Nov. 26, 2019.

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