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Via electronic submission

November 25, 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: RIN 1506-AB41; Docket Number FinCEN-2020-0002

Dear Sir or Madam:

The Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to respond to the Financial Crimes Enforcement Network and the Federal Reserve Board (collectively, the “Agencies”) joint notice of proposed rulemaking which seeks public comment to decrease Recordkeeping and Travel Rule (collectively, “the rules” or “proposed rules”) thresholds and amend the definition of “money,” under these rules.

Background

Under the Bank Secrecy Act (“BSA”) rules, banks must collect and retain information on certain funds transfers and transmittals of funds (“recordkeeping rule”)² as well as include certain information on funds

¹*The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, over \$4.4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.*

² 31 CFR 1020.410(a)

transfers and transmittals of funds sent to other banks or nonbank financial institutions (“travel rule”).³ The current threshold for both rules is \$3,000. The proposed rules seek to decrease the threshold to \$250.

The Agencies also seek to clarify the definition of “money” under these proposed rules to provide that the rules apply to domestic and cross-border transactions involving convertible virtual currencies (CVCs) and digital forms of fiat money.

The recordkeeping rule applies to funds transfers and transmittals of funds. The term “funds transfer” is defined, as in Article 4A of the Uniform Commercial Code (“UCC”), to include “[t]he series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order.”⁴ The recordkeeping rule defines “payment order” as “an instruction of a sender to a receiving bank . . . to pay, or to cause another bank or foreign bank to pay, a fixed or determinable amount of money to a beneficiary.”⁵ The recordkeeping rule’s definition of “transmittal of funds” aligns with UCC Article 4A’s definition of “funds transfer.” Specifically, the recordkeeping rule defines transmittal of funds as “a series of transactions beginning with the transmitter’s transmittal order, made for the purpose of making payment to the recipient.”⁶

The recordkeeping rule’s definition of “transmittal order” in turn aligns with UCC Article 4A’s definition of payment order, stating that “the term transmittal order includes a payment order and is an instruction of a sender to a receiving financial institution to pay, a fixed or determinable amount of money to a recipient.”⁷ Funds transfers and transmittals of funds involve an instruction to pay a “fixed or determinable amount of money.”

Currently, the rules do not define the term “money.” They instead defer to the definition in the UCC, which defines “money” as “a medium of exchange currently authorized or adopted by a domestic or foreign government.”⁸ Pursuant to the UCC’s definition, CVCs would not be included.

Both rules refer to a “payment order” and a “transmittal order.” These terms, in turn, use the term “money.” These proposed rules would clarify the meaning of money to include (1) 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 jurisdiction⁹ and (2) 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.

ICBA Comments

Threshold

Community banks fully support the fight against terrorist financing and money laundering activities and are committed to supporting balanced, effective measures that will prohibit these offenders from using the

³ 31 CFR 1010.410(f)

⁴ 31 CFR 1010.100(w); see also U.C.C. 4A-104(a).

⁵ 31 CFR 1010.100(ll); see also U.C.C. 4A-103(a)(1).

⁶ 31 CFR 1010.100(ddd)

⁷ 31 CFR 1010.100(eee).

⁸ U.C.C. 1-201(b)(24)

⁹ *Ibid*

financial system for illegal gains. While banks are eager to do their part, community banks spend significant resources — in terms of both direct and indirect cost — complying with BSA and anti-money laundering (“AML”) laws and regulations. The cumulative impact of these regulations places a burden on community banks that is often disproportionate to the benefits of the additional regulatory requirements. Decreasing the threshold from \$3,000 to \$250 for funds transfers and transmittals of funds that begin or end outside the United States will deepen the cumulative impact. The impact includes the cost for new technologies needed to comply, additional personnel and time to collect information, costs associated with creating new or adjusting processes, and costs associated with retention, and transmission. The ripple effect of this change will make payment services less affordable for those transferring smaller dollar amounts abroad.

Additionally, lowering the threshold will be counterproductive. The Agencies cite a benefit to national security and law enforcement¹⁰ as justification for lowering the threshold. The proposal states that “malign actors are using smaller-value cross-border wire transfers to facilitate or commit terrorist financing, narcotics trafficking, and other illicit activity, and that increased recordkeeping and reporting concerning these transactions would be valuable to law enforcement and national security authorities.”¹¹ However, criminals find new ways to avoid detection, such as conducting transactions underground, in order to achieve unlawful goals. Their ability to outmaneuver detection-related regulations makes it difficult to track the activity, and yet banks are left saddled with the additional burdens. Piling on additional BSA obligations, by decreasing the threshold, reinforces the notion that banks are effectively deputized to identify, investigate, and report on criminal activity, and maintain records that may never be requested.

The Agencies’ belief that “there has been an increase in the ability of small institutions to rely on third-party vendors to reduce their costs of handling compliance with a revised threshold”¹² is an assumption that does not always bear out because reliance on vendors comes with additional costs. Additionally, institutions remain obligated for the vendors’ oversights. A significant swath of small community banks continues to rely on manual in-house processes because their limited resources are tied up in compliance which makes it difficult for them to commit resources to third party vendors.

ICBA is a staunch advocate for efficient regulatory requirements that effectively support law enforcement, which is why we have consistently advocated for threshold increases in BSA compliance. In response to this proposal, we maintain our stance.

Definition of Money

Through this proposal, the Agencies seek to clarify the meaning of “money” as used in these rules to ensure that they apply to domestic and cross-border transactions involving CVC or any digital asset having legal tender status to a recipient. The development and use of virtual currencies are rapidly growing.

ICBA supports the intent behind this definition change. Transactions involving virtual currency are becoming commonplace and the entities involved oftentimes need access to banking services. However,

¹⁰ <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201023a.pdf> p.8-9

¹¹ Ibid.

¹² <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201023a.pdf> p.16

many CVCs, as acknowledged by FinCEN¹³, are based in anonymity making it nearly impossible for originating, intermediary and receiving banks to properly satisfy the recordkeeping and travel rules. Eventually, this may ease as the virtual currency industry and regulatory landscape continue to evolve; however, as it stands many community banks do not bank any virtual asset service providers for the reasons stated above.

ICBA appreciates the opportunity to provide comments in response to this request. If you have any questions, please do not hesitate to contact me at Rhonda.Thomas-Whitley@icba.org or (202) 659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley
Vice President and Regulatory Counsel

¹³ Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies, FIN-2019-G001, Section 4.5, (May 9, 2018)