Banking and Finance Law Daily Wrap Up, BANK SECRECY ACT—Fed, FinCEN propose amendments to BSA Recordkeeping and Travel Rule, (Oct. 26, 2020)

Banking and Finance Law Daily Wrap Up

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The regulation amendments would lower the applicable threshold for collecting and keeping information.

The Federal Reserve Board and the Financial Crimes Enforcement Network have issued a joint Notice of Proposed Rulemaking to amend the recordkeeping and travel rule regulations under the Bank Secrecy Act. The proposed rule would lower the applicable threshold under which financial institutions must collect, retain, and transmit certain information related to funds transfers and transmittals of funds from $3,000 to $250 for international transactions. The threshold for domestic transactions would remain unchanged at $3,000. The proposed rule also further clarifies that those regulations apply to transactions above the applicable threshold involving convertible virtual currencies, as well as transactions involving digital assets with legal tender status, by clarifying the meaning of "money" as used in certain defined terms. Comments are requested and are due by Nov. 27, 2020.

The agencies are proposing amendments to the recordkeeping rule jointly, while FinCEN, pursuant to its sole authority, is proposing amendments to the travel rule.

History of Recordkeeping Rule. The Recordkeeping Rule was jointly issued on Jan. 3, 1995, requiring banks and nonbank financial institutions to collect and retain information related to funds transfers and transmittals of funds in amounts of $3,000 or more. It is "intended to help law enforcement and regulatory authorities detect, investigate, and prosecute money laundering, and other financial crimes by preserving an information trail about persons sending and receiving funds through the funds transfer system."

FinCEN's separate rule, the Travel Rule, was issued at the same time. The Travel Rule requires banks and nonbank financial institutions to transmit information on certain funds transfers and transmittals of funds to other banks or nonbank financial institutions participating in the transfer or transmittal. The Recordkeeping Rule is codified at 31 CFR 1020.410(a) and 1010.410(e)10, and the Travel Rule is codified at 31 CFR 1010.410(f).

Under the Recordkeeping Rule, the originator's bank or transmittor's financial institution must collect and retain the following information: (a) name and address of the originator or transmittor; (b) the amount of the payment or transmittal order; (c) the execution date of the payment or transmittal order; (d) any payment instructions received from the originator or transmittor with the payment or transmittal order; and (e) 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 that information from the originator or transmittor: (a) name and address of the beneficiary or recipient; (b) account number of the beneficiary or recipient; and (c) any other specific identifier of the beneficiary or recipient. The originator's bank or transmittor's financial institution is required to verify the identity of the person placing a payment or transmittal order if the order is made in person and the person placing the order is not an established customer.

Under the Travel Rule, the originator's bank or transmittor's financial institution is required to include information, including all information required under the Recordkeeping Rule, in a payment or transmittal order sent by the bank or nonbank financial institution to another bank or nonbank financial institution in the payment chain. An intermediary bank or financial institution is also required to transmit this information to other banks or nonbank financial institutions

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in the payment chain, to the extent the information is received by the intermediary bank or financial institution.

Purpose of proposal. FinCEN and the Fed believe that the effect of lowering the $3,000 threshold on financial institutions and on the cost and efficiency of the payments system is likely to be low. Additionally, some financial institutions are already collecting information on at least a portion of transactions taking place under the current threshold for purposes of reporting suspicious transactions to FinCEN.

Before determining the original threshold of $3,000, the agencies balanced the value of data on funds transfers and transmittals of funds with the burden that the Recordkeeping Rule and Travel Rule imposed on both bank and nonbank financial institutions. Now, the agencies believe that "the current threshold may no longer represent the appropriate balance for transmittals originating or terminating outside the United States."

Comments requested. Comments are requested from financial institutions and members of the public on the following:

1. To what extent would the proposed rule impose a burden on financial institutions, including with respect to information technology implementation costs? To what extent would the burden be different for thresholds such as $0, $500, or $1,000 for funds transfers and transmittals of funds that begin or end outside the United States? What would be the impact on the burden if the proposed threshold change were extended to all transactions, including domestic transactions?

2. To what extent would the burden of the proposed rule on financial institutions and the public be mitigated were the agencies to select a threshold of $250 but not require nonbank financial institutions to collect a social security number or employer identification number for non-established customers engaging in transmittals of funds between $250 and $3,000 that begin or end outside the United States?

3. To what extent would the burden of the proposed rule be reduced if the agencies issued specific guidance about appropriate forms of identification to be used in conjunction with identity verification, including in regards to whether there are circumstances in which verification may be done remotely and what documents are acceptable as proof?

4. To what extent would the burden of the proposed rule on financial institutions and the public be mitigated if the agencies were to include in the regulation the standard described in Section IV.A for determining when an institution would be subject to the $250 threshold for cross-border transfers, i.e., that "reason to know" that a transaction begins or ends outside the United States exists when such information could be determined based on the information the financial institution receives in the transmittal order, collects from the transmittor to effectuate the transmittal of funds, or otherwise collects from the transmitter or recipient to comply with regulations implementing the BSA?

The proposal also requests comments on clarifying the meaning of "money" in the definitions of "payment order" and "transmittal order" in 31 CFR 1010.100.

RegulatoryActivity: BankSecrecyAct

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