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November 27, 2020

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

Re: Threshold for the Requirement to Collect, Retain and Transmit Information for International Funds Transfers and Clarification of Treatment of Convertible Virtual Currencies and Digital Assets With Legal Tender Status; Docket Number FINCEN–2020–0011/RIN1506-AB44

Dear Secretary Misback:

On behalf of the nation’s credit unions and their more than 120 million members, the Credit Union National Association (“CUNA”) appreciates the opportunity to submit comments to the Board of Governors of the Federal Reserve System (“Board”) and the Financial Crimes Enforcement Network, U.S. Department of the Treasury (“FinCEN,” and together with the Board, the “Regulating Agencies”) in response to their joint notice of proposed rulemaking (“JNPRM”) on the above-captioned issues.¹

Background

The Currency and Foreign Transactions Reporting Act of 1970, as amended, in relevant part, by the Annunzio-Wylie Anti-Money Laundering Act of 1992 and the USA PATRIOT Act of 2001 (hereinafter the “Bank Secrecy Act” or “BSA”), requires financial institutions to, *inter alia*, collect and retain information on certain funds transfers and transmittals.² The BSA also requires the provision of certain reports or records that are deemed to have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism. These BSA provisions are enforced by the Board and the Department of Treasury,³ and the Director of FinCEN has been delegated the authority to adopt and enforce certain regulations related to the BSA.⁴

¹Threshold for the Requirement To Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds That Begin or End Outside the United States, 85 Fed. Reg. 68005 (Oct. 27, 2020) available at <https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-23756.pdf>.

² See 31 U.S.C. 5311; See also <https://www.govinfo.gov/content/pkg/FR-1995-01-03/pdf/94-31982.pdf>.

³ See 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, 85 Fed. Reg. 68005, 68006.

⁴ See Treasury Order 180–01 (re-affirmed Jan. 14, 2020).

In 1995, the Regulating Agencies adopted rules for banks (defined to include credit unions) and nonbank financial institutions to collect and retain information related to certain transfers and transmittals of funds in amounts of \$3,000 or more (the “Recordkeeping Rule”).⁵ FinCEN concurrently issued a rule requiring covered institutions to transmit information on certain funds transfers and transmittals to other banks or nonbank financial institutions that are in the payment chain of the transfer or transmittal (the “Travel Rule”).⁶ In sum, the Recordkeeping Rule requires financial institutions to “collect and retain the information that, under the Travel Rule, must be included with transmittal orders . . .”⁷

In this JNPRM, the Regulating Agencies state that “malign actors are using smaller-value cross-border wire transfers to facilitate or commit terrorist financing, narcotics trafficking, and other illicit activity.”⁸ The notice cites to anecdotal criminal cases involving amounts below the \$3,000 threshold, but the primary data underpinning this analysis comes from 2,000 “Suspicious Activity Reports (SARs) filed by money transmitters, which indicate that a substantial volume of potentially illicit funds transfers and transmittals of funds occur below the \$3,000 threshold.”⁹ In addition, the JNPRM describes the increased use of convertible virtual currencies (“CVCs”) and digital assets that have legal tender status in these cross-border transfers and transmittals.¹⁰

In response to these issues, the Regulating Agencies are proposing modifications to BSA regulations that will: (i) reduce the reporting threshold from \$3,000 to \$250 for funds transfers and transmittals of funds that begin or end outside the United States; and (ii) clarify that the Recordkeeping and Travel Rules apply to CVCs and digital assets that have legal tender status.¹¹

General Comments

Although CUNA strongly supports FinCEN’s efforts to detect, investigate, and prosecute money laundering and other financial crimes undertaken to facilitate criminal enterprises or finance terrorist activities, we oppose this proposed reduction of the funds transfer/transmittal recordkeeping threshold. As we have stated on numerous occasions, it is critically important to strike the right balance between the imposition of compliance costs on leanly staffed, community-oriented credit unions and the potential benefits that BSA regulatory requirements may provide to law enforcement. In its current form, this proposed rule fails to strike that balance.¹²

The JNPRM states that the proposed regulatory revisions would impact *at least* 5,236 credit unions, 4,681 of which are federally regulated small credit unions.¹³ Because the proposed rule contemplates a

⁵ See 31 CFR §§ 1020.410(a) and 1010.410(e).

⁶ 31 CFR § 1010.410(f); See also 60 Fed. Reg. 234 (Jan. 3, 1995), available at <https://www.govinfo.gov/content/pkg/FR-1995-01-03/pdf/94-31982.pdf>

⁷ 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, 85 Fed. Reg. 68005, 68007.

⁸ Id.

⁹ Id. at 68008.

¹⁰ Id. at 68010.

¹¹ Id. at 68008-68011.

¹² CUNA also notes that, unlike other recent BSA rulemakings, this JNPRM was made with only 30-day comment period. Without an advance notice of proposed rulemaking, industry and consumers groups do not have time to collect data that would have helped the Regulating Agencies better analyze and improve this proposal.

¹³ 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, 85 Fed. Reg. 68005, 68013.

dramatic 91% reduction in the collection, retention and transmission threshold, CUNA believes that it will burden a larger number of credit unions, particularly those serving disadvantaged immigrant communities.

The JNPRM does not adequately consider alternative approaches. CUNA has consistently advocated for minimizing the duplication of various BSA regulations and improving feedback on SARs to ensure they are truly beneficial to law enforcement.¹⁴ This JNPRM uses a data set of 2,000 SARs out of the millions submitted from 2016-2019 to determine that low dollar cross-border transfers and transmittals require this dramatically lower threshold.¹⁵ Nevertheless, the notice also states that “FinCEN has been able to analyze some records of transmittals of funds below \$3,000 . . . because money transmitters have retained records for those transmittals of funds after recognizing the underlying activity as suspicious.”¹⁶ Thus, it appears from the record that data involving low-dollar transactions is available at the current threshold. This proves that the existing regulatory regime is sufficient, and does not justify the proposed requirement to gather, retain and remit information about all cross-border transactions at a reduced threshold of \$250.

For these reasons, and those described in more detail below, CUNA opposes the reduction in the threshold and suggests that targeted reforms to the existing SARs processes could ensure that available data for low dollar transactions is useful to law enforcement. CUNA has no objection to the clarification that the Recordkeeping and Travel Rules apply to CVCs and digital assets that have legal tender status.

Specific Comments

Question 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?

The proposed threshold would substantially burden credit unions. In order to implement these changes in their current BSA compliance regimes, credit unions will have to update IT system thresholds and vendor contracts, analyze, implement the changes, train staff and conduct months of compliance testing prior to it even taking effect. In addition, there is cost associated with all data collection and storage. The JNPRM inaccurately discounts all of that time and expense when purporting to measure the effect of this change.

We agree with the JNPRM’s conclusion that a \$0 threshold would “. . . impose a substantial burden on small financial institutions . . .”¹⁷ Given that agreement, we are unable to discern how the Regulating Agencies determined that the impact on these same small institutions arising from reduction in the

¹⁴ See, e.g., CUNA comment letter, *Anti-Money Laundering Program Effectiveness; Docket Number FINCEN–2020–0011/RIN1506-AB44* (November 16, 2020), p. 4, available at https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment_Calls_Letters_and_Testimonies/2020/Comment_Letters/CUNA%20Comment%20Letter%20-%20FinCenAML-FINAL.pdf; See also <https://www.cuinsight.com/press-release/cuna-to-senate-banking-bsa-aml-regulations-must-be-tailored-and-proportioned-for-credit-unions>.

¹⁵ 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, 85 Fed. Reg. 68005, 68008.

¹⁶ *Id.*

¹⁷ 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, 85 Fed. Reg. 68005, 68009.

threshold from \$3,000 to \$250 is “low.”¹⁸ The JNPRM attempts to minimize the impact by mentioning that “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.”¹⁹ As discussed in the General Comments above, the existence of relevant transactional data under the SAR regime indicates that this additional regulatory change is not necessary. In fact, the low-value transaction data contained in SARs is arguably more helpful to law enforcement since it arose in the context of suspicious activity as opposed to the routine collection of almost every cross-border transfer/transmittal.

A small credit union that provides money transfer services to members who are immigrants that wire small amounts to relatives in their countries of origin would be hit particularly hard. These smaller credit unions get to know their members in alignment with both the historic mission of credit unions and FinCEN’s Customer Identification Program (CIP) requirements. Under existing regulations, they would not be required to collect, retain or transmit that information unless the member’s activities reach a substantial dollar threshold or trigger the SARs process. Under this proposal, that same credit union would be responsible for collecting, retaining and reporting on all of those activities – a change that could result in a substantial increase in costs and burden on personnel hours.

Question 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 (“EIN”) for non-established customers engaging in transmittals of funds between \$250 and \$3,000 that begin or end outside the United States?

The relief afforded to nonbank financial institutions by this provision would not prevent this regulation from substantially burdening credit unions.

Question 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 regard to whether there are circumstances in which verification may be done remotely and what documents are acceptable as proof?

Any guidance on identity verification, acceptable proof and use of technology would be greatly appreciated and the reduction in ambiguity could relieve some amount of the burden imposed by the rule. That said, the amount and efficacy of that reduction would greatly depend on the details of that guidance, including the types of identification required and their accessibility to relevant credit union members.

(5) With respect to the effect of clarifying the meaning of “money” in the definitions of “payment order” and “transmittal order” in 31 CFR 1010.100, describe the additional costs, if any, from complying with the Recordkeeping Rule and Travel Rule in light of the clarification included in the proposed rule, including with respect to information technology costs.

¹⁸ Id.

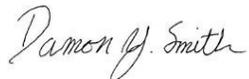
¹⁹ Id.

While there may be additional costs associated with this clarification for some covered institutions, CUNA agrees with the JNPRM's recognition that the cost of this proposed change has likely been absorbed by industry already since it is a codification of existing sub-regulatory guidance.²⁰

Conclusion

We thank you for your consideration of CUNA's comments and look forward to working with FinCEN to improve BSA regulations in a manner that benefits law enforcement, credit unions and their members. If you have any questions, please feel free to contact me at (202) 235-3390 or dsmith@cuna.coop.

Sincerely,



Damon Y. Smith
Senior Director of Advocacy & Counsel

²⁰ See, e.g., <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>