

# Financial Services

Providing Strategic Legal Guidance to the Global Financial Services Industry

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## FinCEN Proposes Lower Travel Rule Thresholds for Fiat and Virtual Currencies

### *Introduction*

In October of last year, [we wrote](#) about the challenges faced by virtual currency businesses in complying with the Travel Rule following new guidance from the Financial Action Task Force (FATF) and the Financial Crimes Enforcement Network (FinCEN).<sup>1</sup>

One year later, as the virtual currency industry continues to struggle with the technical challenges of Travel Rule compliance, FinCEN and the Board of Governors of the Federal Reserve (the Board) have proposed a new rule that threatens to increase the Travel Rule's regulatory burden. The proposed rule would lower the monetary threshold for application of the rule with respect to international transfers.<sup>2</sup> By focusing on international transfers, the proposed rule is likely to be more burdensome for virtual currency businesses than for traditional financial institutions.

Additionally, if there were any doubt regarding the application of the Travel Rule to virtual currency transfers, the proposed rule also reaffirms prior FinCEN guidance that such transfers are within the Travel Rule's ambit.<sup>3</sup> FinCEN's expectations are reinforced by the growing number of enforcement actions brought by the U.S. Department of Justice and FinCEN against cryptocurrency exchanges and operators for flouting Bank Secrecy Act (BSA), *i.e.*, anti-money laundering, requirements.<sup>4</sup> Ostensibly, with the rise in small dollar payments via mobile wallets and apps, this change is likely designed to ensure that the BSA keeps pace with changes in how money moves through the financial system.



## EXPANDED APPLICATION OF THE TRAVEL RULE – PROPOSAL TO LOWER THRESHOLD FROM \$3000 TO \$250

The newly proposed rule from FinCEN and the Board would lower the Travel Rule's threshold from \$3,000 to \$250 with respect to international transfers—transfers either beginning or terminating outside of the United States.

### *Travel Rule Requirements*

Under the Travel Rule, banks, money service businesses, and other financial institutions are required to collect, internally retain, and transmit the following information in a transmittal order:

- (1) The transmitter's name and address;
- (2) The transmittal amount;
- (3) The execution date;
- (4) Any payment instructions received from the transmitter; and
- (5) The identity of the recipient's financial institution.

If received, the party transmitting funds must also retain and transmit:

- (6) The recipient's name and address;
- (7) The recipient's account number; and
- (8) Any other specific identifier of the recipient.<sup>5</sup>

We have previously written about how these requirements present a limited burden for traditional banks, but a much more substantial burden for virtual currency businesses, including major cryptocurrency exchanges. In short, traditional banks and money service businesses need to collect this information for the purpose of executing a wire transfer or some other transmittal of funds. Requiring them to maintain records of this information and send a copy to the recipient financial institution is a limited additional burden. By contrast, this is far more information than is required to transfer an amount of Bitcoin or other virtual currency between two parties—given that financial institutions identify their customers in order to track fund transfers while virtual currency providers identify transactions not by a customer's name but rather by a virtual wallet.

### *Proposal to Lower Travel Rule Monetary Thresholds on International Transfers*

Currently, the Travel Rule applies to all transfers of \$3,000 or more. FATF's proposed transaction threshold for member states is lower—the equivalent of \$1,000. Under the new rule proposed by FinCEN and the Board, however, the Travel Rule documentation requirements would apply to all international transfers of \$250 or more. Comments on the proposed rule are due November 27, 2020 and FinCEN and the Board anticipate issuing a final rule at some point thereafter.



In justifying the proposed rule, FinCEN and the Board described evidence suggesting that terrorists and criminals frequently transfer funds broken into small amounts—potentially with the specific intent of circumventing the Travel Rule and other AML/CTF requirements. For example, FinCEN isolated a set of nearly 2,000 Suspicious Activity Reports (SARs) believed to be related to potential terrorist-financing—describing 1.29 million individual underlying transfers. According to FinCEN, more than 57% of these transfers were for \$300 or less, showing the potential high risk of low-value, high-frequency transfers.<sup>6</sup> In the proposed rule, FinCEN and the Board also cited multiple recent prosecutions of persons who provided material support to an entity designated as a Foreign Terrorist Organization, which included evidence of transfers below the current threshold of \$3,000.<sup>7</sup> The proposed rule invites feedback on whether the threshold should be set at a level other than \$250—or even whether the threshold should be eliminated entirely.<sup>8</sup>

If the proposed rule is adopted, it could be challenging for virtual currency businesses to determine which transfers are international and which transfers are domestic. For transfers between \$250 and \$3,000, this distinction is key for determining if the Travel Rule applies under this proposal. FinCEN and the Board state in the proposed rule that this determination can be made based on the information provided to execute the transfer and any other information collected to comply with BSA rules generally. As noted above, banks, money service businesses providing fiat transfers, and other traditional financial institutions need to collect more information to execute a transfer, and this additional information is sufficient to distinguish international and domestic transfers. In contrast, consider the instructions for a \$1,000-equivalent Bitcoin transfer between two virtual currency businesses. Based merely on the Bitcoin addresses of the transmitter and recipient, it could be unclear whether the transaction is domestic or international—and thus unclear whether the Travel Rule would apply.

### **REAFFIRMING THAT THE TRAVEL RULE APPLIES TO VIRTUAL CURRENCY TRANSFERS**

In addition to lowering the Travel Rule’s monetary threshold, the proposed rule also seeks to reaffirm prior FinCEN guidance that virtual currency transfers fall under the Travel Rule because they involve “an instruction to pay ‘a determinable amount of money to a recipient.’”

Some blockchain industry advocates have argued that the Travel Rule does not apply to virtual currency transfers because virtual currencies do not qualify under the definition of money provided by the UCC.<sup>9</sup> The Travel Rule (and a related rule called the Recordkeeping Rule) both rely substantially on various definitions from the UCC. Neither the Travel Rule nor the Recordkeeping Rule specifically defines what qualifies as money. However, the introduction to the Recordkeeping Rule notes that terms not otherwise defined have the same meaning as defined under the UCC. The UCC defines money as “a medium of exchange currently authorized or adopted by a domestic or foreign government.”<sup>10</sup> Advocates of this view argue that because virtual currencies like Bitcoin are not authorized by any government, they cannot count as money under this scheme.

To address this line of criticism, FinCEN and the Board have proposed defining the term “money” with respect to the Travel Rule and the Recordkeeping Rule to cover any government-authorized medium of exchange (including government-authorized digital assets) and to cover “convertible virtual currencies” like Bitcoin.<sup>11</sup> By adding the definitions of “money” and “convertible virtual currency” to what constitutes a “payment order” and “transmittal order” under 31 C.F.R. § 1010.100(II) and (eee), respectively, the proposed rule would severely undercut this line of criticism.



## CONCLUSION: ADDITIONAL TRAVEL RULE REQUIREMENTS CREATE ADDITIONAL BURDENS FOR VIRTUAL CURRENCY BUSINESSES

The Travel Rule presents a significantly steeper regulatory burden for virtual currency businesses than for traditional financial institutions and businesses. This newly proposed lower Travel Rule threshold for international transfers only increases those burdens—making it more difficult for virtual currency businesses to comply.

Faced with these new obligations, it is important for businesses to employ all practicable efforts to quell risks associated with virtual currencies. Industry participants should be cognizant of these new requirements and examine their own infrastructure. Companies would be well advised to obtain the advice of counsel with a broad experience in traditional AML compliance and in the burgeoning world of virtual currency compliance.

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<sup>1</sup> FATF, *Public Statement: Mitigating Risks from Virtual Assets, Draft Interpretive Note to FATF Recommendation 15* (Feb. 22, 2019), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/regulation-virtual-assets-interpretive-note.html>;

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<sup>2</sup> FinCEN, *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, and Clarification of the Requirement To Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets With Legal Tender Status* (Oct. 27, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-23756.pdf>.

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<sup>3</sup> *Id.*

<sup>4</sup> See Press Release, Department of Justice, *Founders And Executives Of Off-Shore Cryptocurrency Derivatives Exchange Charged With Violation Of The Bank Secrecy Act* (Oct. 1, 2020), <https://www.justice.gov/usao-sdny/pr/founders-and-executives-shore-cryptocurrency-derivatives-exchange-charged-violation>;

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<sup>5</sup> See 31 C.F.R. §§ 1010.410(e), (f).

<sup>6</sup> FinCEN, *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, and Clarification of the Requirement To Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets With Legal Tender Status* (Oct. 27, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-23756.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Letter from the Chamber of Digital Commerce to Kenneth Blanco, Director of FinCEN, Comments to FinCEN Guidance: “Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies,” (Nov. 26, 2019), <https://digitalchamber.org/wp-content/uploads/2019/12/Chamber-of-Digital-Commerce-Comment-Letter-to-FinCEN-Guidance1.pdf>.

<sup>10</sup> UCC 1-201(b)(24).

<sup>11</sup> FinCEN, *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, and Clarification of the Requirement To Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets With Legal Tender Status* (Oct. 27, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-23756.pdf>.