A new proposed rulemaking (the “NPRM”) would lower the current $3,000 threshold for the applicability of the Bank Secrecy Act (“BSA”) Recordkeeping Rule and Travel Rule to $250 for covered funds transfers that begin or end outside the United States. This proposed change would—among other things—require nonbank financial institutions, such as money transmitters, to obtain information, including Social Security number, from all consumers that initiate covered transfers in an amount of $250 or more. If finalized as proposed, the change would have a significant impact on financial services providers that offer cross-border funds transfer services. In addition, the NPRM would modify the definition of “money”—as the term is used in connection with the Recordkeeping and Travel Rules—to include convertible virtual currency (“CVC”) and to clarify that funds transfers involving CVC are also covered. This change would be the first recognition of virtual currency in the regulations implementing the BSA.

Comments on the NPRM are due on November 27, 2020.

Recordkeeping Rule and Travel Rule – Background

The Recordkeeping Rule requires bank and nonbank financial institutions to collect and retain information related to funds transfers and transmittals of funds in amounts of $3,000 or more. [1] While determining whether a transfer is covered by this rule is complex, it generally applies to transfers of funds that any person requests a financial institution make to a beneficiary unless the transfer is made “through an automated clearinghouse, an automated teller machine, or a point of sale system.” [2] For a covered transaction (i.e., a transaction of $3,000 or more), the financial institution must obtain and record information about the transaction (e.g., amount and execution date), as well as name and address. Additional information—including Social Security number and, for in-person transactions, driver’s license or other similar identification—is required if the funds transfer is for a person other than an
“established customer” of the financial institution. An “established customer” is a person that has established an account with a financial institution or from which the financial institution has otherwise “obtained and maintains on file the person’s name and address, as well as taxpayer identification number (e.g., social security or employer identification number),” and the financial institution provides financial services relying on that information.

The Travel Rule requires bank and nonbank financial institutions to include 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.

From the perspective of FinCEN, which implements the BSA, the Recordkeeping Rule “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 explains that the Travel Rule and Recordkeeping Rule “complement” each other in that the information required to be collected and retained under the Recordkeeping Rule also must be included in transmittal orders, as applicable, under the Travel Rule.

**Proposed Modifications to the Recordkeeping and Travel Rules**

The proposed rule would lower the threshold for cross-border transactions that trigger the Recordkeeping Rule and Travel Rule from $3,000 to $250. Accordingly, for any transaction of $250 or more that a money transmitter processes that originates or terminates in the United States, the money transmitter would be required to, among other things, obtain and maintain a record that includes the sender’s Social Security number. FinCEN asserts that the basis for this change is that suspicious activity report filings demonstrate that a substantial volume of potentially illicit funds transfers and transmittals of funds fall below the $3,000 threshold. The NPRM also cites examples of recent prosecutions of individuals sending and receiving funds in amounts below the current threshold to finance terrorist activity. On this basis, FinCEN—and law enforcement agencies—support lowering the threshold to an amount that would likely include the vast majority of cross-border funds transfers, meaning that money transmitters and other financial institutions would have to collect and maintain sensitive information on almost all of their cross-border transfer customers in order to service them.
Proposed Changes to Definition of “Money”

Since 2013, FinCEN has interpreted its regulations to apply to what it terms “convertible virtual currencies” or “CVCs” on the basis that the “definition of a money transmitter [under the BSA] does not differentiate between real currencies and convertible virtual currencies.” [8] That is, a “money transmitter”—which is a type of regulated money services business (“MSB”) under the BSA—is defined as a person that accepts “currency, funds, or other value that substitutes for currency from one person” and transmits “currency, funds, or other value that substitutes for currency to another location or person by any means.” FinCEN’s reasoning is that a CVC is not “currency” but a “value that substitutes for currency” and therefore a person that “accepts and transmits a convertible virtual currency or buys or sells convertible virtual currency for any reason is a money transmitter.” [9]

A person that is an MSB, because it is engaged in money transmission activity involving CVC, would generally be subject to the same registration, reporting, and recordkeeping requirements as a person engaging in money transmission activity involving fiat currency. However, the Recordkeeping Rule and Travel Rule apply to a “transmittal of funds,” and whether a transaction is a transmittal of funds depends on, among other things, whether it involves a “transmittal order.” A “transmittal order” is currently defined by BSA regulations to include a “payment order,” and the definitions of both a transmittal order and payment order pertain to an instruction to pay a “fixed or determinable amount of money.” [10] Therefore, the NPRM would clarify the meaning of “money” in this context to make it explicit that the Recordkeeping and Travel Rules apply to any instruction by a sender to transmit CVC or any digital asset having legal tender status to a recipient. As noted, this would be the first time that BSA regulations formally incorporate, and define, virtual currency.

[1] 31 CFR 1010.410(e) (for nonbanks) and 31 CFR 1020.410(a) (for banks).
[2] Id. at 1010.100(w).
[3] Id. at 1010.410(e)(2).
[4] Id. at 1010.100(p).
[5] A “transmittal order” is (in simplified terms) an instruction by a sender to a financial institution to make a payment to a recipient that meets specific criteria set forth in the rule. See id. at 1010.100(eee).

[6] The NPRM is jointly issued by FinCEN and the Board of Governors of the Federal Reserve System (the “Board”), as was the initial promulgation of the Recordkeeping Rule in 1995 (the Board has jurisdiction over depository financial institutions with respect to the rule).


[9] Id.

[10] 31 CFR 1010.100(ll) (payment order) and 31 CFR 1010.100(eee) (transmittal order). (Emphasis added.)