November 25, 2020

Via Electronic Submission

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Docket No. FINCEN-2020-0002; Proposed Changes to Recordkeeping Rule and Travel Rule

Dear Sir or Madame,

The Clearing House Payments Company (TCH) and the Bankers Association for Finance and Trade (BAFT) (together, the Associations)[1] appreciate the opportunity to provide comments to the Financial Crimes Enforcement Network (FinCEN) and the Board of Governors of the Federal Reserve System (Board) in response to their joint proposal to revise the Recordkeeping Rule and Travel Rule (the Rules). In their joint proposal, FinCEN and the Board propose to lower the value threshold at which the Rules would apply to international transmittals of funds[2] from $3,000 to $250 and revise the definition of "money" to include convertible virtual currencies and digital assets that have legal tender status for the recipient.[3] TCH as a payment system operator and BAFT as an association focused on international transaction banking, recognize and support the important objectives of the Rules. At the same time, because the Rules require that information be included in transmittals of funds that is not typically included in retail, domestic payments[4] and that certain information be retained for five years, the Associations also believe that the proposed Rules' impact on wire payments versus new types of faster payments needs to be taken into account in the determination of value thresholds and the potential application to domestic payments.

[1] Please see Attachment 1 for descriptions of the Associations.

[2] The joint proposal also applies to funds transfers, which are specific to banks. As funds transfers are a type of transmittal of funds, for simplicity this letter refers only to transmittals of funds.

[3] Threshold for the Requirement To Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds That Begin or End Outside of 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, 85 Fed. Reg. 68,005 (Oct. 27, 2020).

[4] Specifically, retail, domestic payments do not typically include the address of the originator or the address or "other" identifiers of a recipient that may be included with the originator's payment instruction to the originator's bank. Further, some domestic payments do not include the originator's account number.

As further discussed below, the Associations

- Support the $250 threshold for payments that transfer value into or out of the United States and oppose application of the threshold to payments that begin and end in U.S. bank accounts;
- Urge FinCEN and the Board to revise the criteria for what constitutes an international payment to include a requirement that the payment must transfer value into or out of the United States;
- Suggest that with respect to account-based transmittals of funds, banks should only be deemed to have a "reason to know" that a transmittal of funds transfers value into or out of the United States based on the SWIFT bank identifier code (BIC) or other rules-based identifiers for the transmitter's or recipient's financial institution that is included in the payment message; and
- Support the proposed changes to the definition of money.

I. Threshold for International Transmittals of Funds

A. Distinguishing between Domestic and International Payments

The joint proposal would apply the proposed $250 threshold to transmittals of funds that "begin or end outside of the United States."[5] The revised Rules would specify that a transmittal of funds would be considered to begin or end out of the United States if a financial institution "knows or has reason to know that the transmittor, transmittor's financial institution, recipient, or recipient's financial institution is located in, is ordinarily resident in, or is organized under the laws of a jurisdiction other than the United States or a jurisdiction within the United States."[6] The joint proposal states that a financial institution would have reason to know "only to the extent 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 transmittor or recipient to comply with regulations implementing the BSA."[7] This detail regarding when a financial institution has a reason to know the specified information about the parties to a transmittal of funds has not been proposed to be included in the Rules.

The Associations are very concerned that under the proposed criteria domestic payments would be considered international. By looking to the location, residency, or the jurisdiction of organization of the transmitter or recipient rather than looking to whether value has moved into or out of the United States from or to another country, the criteria would capture account-based payments that begin and end in U.S. deposit accounts that are owned by foreign persons.[8] TCH believes that the categorization of payments as international based solely upon the location of the transmitter or recipient is only appropriate when payments are made outside of account-based systems, i.e., through money transmission services that result in a cash payout. For payments that are made through account-

[5] 85 Fed. Reg. 68011.
[6] *Id.*
[7] *Id.*
[8] Such foreign account holders are of course subject to due diligence, know your customer, and other compliance programs of the U.S. banks that hold the accounts.

based systems, it is the location of the accounts to and from which value is transferred that should determine whether the payments are international.

To classify payments as international based solely upon the location of the transmitter or recipient is inconsistent with how banks classify international payments for BSA and OFAC compliance purposes. It is also inconsistent with international guidance. A "cross-border wire" is defined in recommendations by the Financial Action Task Force (FATF) as a wire transfer in which "the ordering financial institution and beneficiary financial institution are located in different countries."[9] The same guidance defines a "domestic wire transfer" as one in which "the ordering financial institutions and beneficiary financial institution are located in the same country."[10] Thus, FATF also recognizes that for account-based payments, it is the transfer of value between accounts in different countries, as indicated by the location of financial institutions that hold the accounts, which makes a payment international. The Associations are concerned that if the Rules categorize international payments inconsistently with international guidance and other bank compliance programs that this inconsistency will cause confusion and unnecessary complexity for banks.

We note also that another U.S. federal regulation, the Remittance Transfer Rule[11], which provides protections to consumers in the U.S. when they send funds to foreign recipients, does not apply when value is transferred to a U.S. account. Specifically, the Consumer Financial Protection Bureau's official interpretation of the term "location in a foreign country" provides that a remittance transfer is received at a location in a foreign country "if funds are to be received at a location physically outside of any State."[12] Further, for accounts other than prepaid accounts

> ". . . whether funds are to be received at a location physically outside of any State depends on where the account is located. If the account is located in a State, the funds will not be received at a location in a foreign country."[13]

Lastly, ACH transactions are also identified by the location of the financial institutions involved. The private sector rules adopted by ACH operators in the U.S. provide, "international ACH payments are identified by focusing on where the financial agency that handles the payment is located, regardless of where any party to the transaction (e.g., the Originator or Receiver) is located."[14]

Given the joint proposal's inconsistency with the industry's longstanding understanding of what constitutes an international payment, the Associations strongly urge FinCEN and the Board to revise the criteria for what constitutes an international payment to include a requirement that the payment must transfer value into or out of the United States from or to another country.

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[9] FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (2012), Glossary of specific terms used in Recommendation 16 (Wire Transfers), pp.74-75.
[10] *Id.*, p. 75.
[11] 12 CFR § 1005.30 et seq.
[12] 12 CFR § 1005.30(c), Official Interpretation 30(c)(2)(i)
[13] 12 CFR § 1005.30(c), Official Interpretation 30(c)(2)(ii)
[14] Nacha Operating Rules and Guidelines (2020), Identification of International ACH Transactions and Formats to Comply with Applicable U.S. Legal Requirements, p. OG173.

B. "Reason to Know" Standard

The Associations support the concept articulated in the joint proposal that a bank's "reason to know" whether a payment begins or ends outside of the United States should be based on information available in the payment message itself or information a bank has as a result of its compliance with BSA regulations. It is also important that a bank's "reason to know" be based on rules-based financial institution identifiers that are used in payment messages. Identifiers, such as SWIFT BICs and Legal Entity Identifiers (LEIs), are issued by authorities that set standards for the types of entities that may receive identifiers and the formats of the identifiers. BICs are commonly used today in account-based payment messages to identify financial institutions involved in a transmittal of funds. Upon adoption of the ISO 20022 format, we anticipate that LEIs will also be commonly used to identify financial institutions. These identifiers are a much more reliable way to determine if a financial institution is outside of the United States than an address. This is because a financial institution's address may not be provided in a payment message, may not be provided in a consistent field of a payment message, or may not use a consistent country code.[15] Banks need such consistency for automated identification of international payments[16] since it is not feasible for banks to manually review every payment they send or receive to determine if it is international. Hence, the Associations suggest that the "reason to know" should specify that for account-based payments, banks may rely solely on the identifiers of the transmitter's and recipient's financial institution.

Finally, the Associations encourage FinCEN and the Board to include the "reason to know" standard in the Rules rather than in supplementary information to the rulemaking as the standard will be important to banks and their supervisors. The standard may be "lost" or forgotten over time if it is not codified in the regulation. In addition, exclusion of the standard from the regulation makes it less authoritative and, thus, leaves open the possibility that bank supervisors may impose a different standard than what FinCEN and the Board have articulated during the rulemaking.

C. Impact of Proposed $250 Threshold

The Associations note that historically the only account-based payments that have been subject to the Rules are wires. And, as a practical matter, banks generally treat all wires, including those that are less than the current $3,000 threshold as subject to the Rules. Consequently, for wires, there is no meaningful impact to banks if the threshold is lowered to $250, or even if there is no threshold at all.

The impact is different for new payment types that have developed in recent years. The RTP®[17] System, which TCH launched in 2017 as the first new payment infrastructure in the United Stated in more than 40 years, is unique in that it is neither a wire system nor (unlike all other legacy bank-based

[15] While these problems with inconsistency in payment messages should be largely addressed for wire payments with the adoption of the ISO 20022 standard, TCH believes it will be many years before the standard is adopted globally. TCH currently plans to implement ISO 20022 for CHIPS in 2023.

[16] We note that banks generally have automated means of mapping BICs (and in the future LEIs) that are included in payment messages to datasets that provide location details for the institutions associated with the identifiers.

[17] RTP is a registered trademark of The Clearing House Payments Company, LLC.

systems) is it excluded from the Rules.[18] It is also distinguishable from wire systems in that it is not primarily a wholesale system and, as a consequence, not all RTP payments that are $3,000 or more are subject to the Rules. A significant number of RTP payments are governed by the Electronic Funds Transfer Act (EFTA) and, therefore, excluded from the Rules.[19]

For the small subset of RTP payments that are subject to the current Rules (namely, business to business payments that are $3,000 or more), banks have different recordkeeping and payment origination practices. With respect to RTP payment origination, the Associations note that all RTP payments include both the originator and receiver's account numbers because they are mandatory fields. However, the fields for an originator's address, the receiver's address, and "other identifiers" of the receiver are optional. Banks have invested in processes to identify the small portion of RTP payments that are subject to the current Rules and have designed back office systems to populate the optional fields for only those covered RTP payments.

Also in contrast to U.S. wire systems that support international wires, the RTP System is a domestic payment system by virtue of the fact that RTP payments begin and end in U.S. deposit accounts.[20] Furthermore, the RTP Operating Rules prohibit correspondent activity and prohibit RTP payments from being sent or received on behalf of persons that are not residents of or domiciled in the United States.[21]

However, as discussed above, the joint proposal's proposed criteria for determining when a transmittal of funds is international would capture some RTP business to business to the extent that either the sending or receiving business is located in another country or organized under the laws of a foreign jurisdiction. The Associations oppose such an outcome. Not only would banks have to identify RTP business to business payments that are $3,000 or more, they would also need to identify the proposed, new category of international transmittals of funds: business to business payments that are $250 or more and involve a foreign business. This will add complexity and expense to their RTP processes. Further, while an originating bank would know whether its own customer was foreign, it has no reliable means of knowing if the receiver is a foreign business based upon the information that

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[18] The definition of "transmittal of funds" excludes electronic funds transfers as defined under the Electronic Funds Transfer Act (EFTA) (15 USC § 1693(a)(7)) (i.e., electronic payments to and from consumer asset accounts). It also excludes funds transfers that are made through the ACH, an ATM, and a point of sale system. 31 CFR § 1010.100 (ddd).

[19] This is so because payments subject to EFTA, as explained in the previous footnote, are not subject to the Rules. Hence, RTP payments involving consumers are not subject to the Rules. Only RTP payments that are business to business and $3,000 or more are currently subject to the Rules. In contrast, EFTA does not apply to consumer payments sent through wholesale systems. Commentary to Regulation E, which implements EFTA, provides that an electronic funds transfer does not include funds transfers through the Fedwire Funds Service or similar systems including CHIPS, SWIFT, and transfers made on the books of correspondent banks. Regulation E, Official Interpretation 3(c)(3). Hence, both business and consumer wire payments are subject to the Rules.

[20] RTP Operating Rule II.G.2. The RTP Operating Rules are available at https://www.theclearinghouse.org/payment-systems/rtp/document-library.

[21] *Id.* The same rule also requires RTP participants to inform their customers of their obligation to comply with the restriction on foreign "on behalf of" parties and to comply with OFAC regulations in the legal terms that govern their customers' use of the RTP system.

would typically be provided when the originator instructs an RTP payment. Originating banks may determine that they need to ask their business customers whether they are sending to a foreign business when the customers instruct RTP payments. Given how low $250 is, when faced with the prospect of incurring the cost and burden of identifying and applying special origination and recordkeeping practices to the two types of business to business payments, banks may opt instead to simplify their processes and incur more cost by treating all RTP business to business payments as subject to the Rules.

Hence, while the Associations have few concerns with a lower threshold for actual international payments – those in which value moves outside of the United States – the Associations would be very concerned with the proposed $250 threshold if domestic, business to business RTP payments were treated as international payments for purposes of the revised Rules due solely to the fact that one or both businesses are foreign. The Associations believes that the proposed threshold is too low for such business to business RTP payments given the costs that would be borne by RTP participants for the additional processes to identify payments that fall under the Rules and related recordkeeping and payment origination requirements. Moreover, the Associations believe that low value, RTP business to business payments that begin and end in U.S. deposit accounts are unlikely to involve the kind of terrorist financing that FinCEN and the Board cited in the joint proposal. Applying the proposed Rules to RTP payments would appear inconsistent with the low-risk nature of the system and would unfairly burden a very narrow subset of the much larger set of payments that begin and end in U.S. accounts.

We note that the Federal Reserve has also announced its intention to develop a payment system similar to the RTP System. Based on publicly available information about the future system, it appears the system will also not be excluded from the Rules and have the same mix of consumer payments and business to business payments.

II. Definition of Money

The proposed definition of money would supersede the Uniform Commercial Code (UCC) definition of money incorporated into the current Rules so that transmittal orders denominated in a convertible virtual currency or a digital asset with legal tender status to the recipient would clearly be subject to the revised Rules. The Associations support the inclusion in the Rules of transmittal orders involving these forms of value. TCH agrees that the UCC definition of money, "a medium of exchange currently authorized or adopted by a domestic or foreign government,"[22] already includes digital assets with legal tender status to the recipient and believes the clarification provided by the revised Rules would be helpful. With respect to the proposed addition of convertible virtual currency to the definition of money in the Rules, the Associations note that the Uniform Law Commission is currently considering changes to the UCC that would specifically address virtual currency.[23] FinCEN and the Board may wish

[22] Uniform Commercial Code § 1-201(24).

[23] Uniform Law Commission, Uniform Commercial Code and Emerging Technologies Committee. This committee was formed to review the Uniform Commercial Code to consider possible drafting amendments to address new technologies, including distributed ledger technology, virtual currency, and other digital assets. More information

to consider re-aligning the definition of money in the Rules to the UCC definition, if the UCC definition is changed to include convertible virtual currency in the future.

Additionally, while the current proposal contemplates the common or known use cases of digital assets that are considered legal tender, future uses of such digitized assets, including in commodity transactions, might fall under other regulatory frameworks and create uncertainty as to whether a transaction is a transmittal of funds or a commodity purchase or trade. If the proposed amendment to the definition of "money" is adopted, on-going consideration should be given to whether the revised definition creates the correct scope, and whether unintended regulatory uncertainty or compliance burdens develop in the industry.

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Thank you for your consideration of these comments. If you have any questions or wish to discuss this letter, please do not hesitate to contact either of the undersigned representatives.

Yours very truly,

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available at https://www.uniformlaws.org/committees/community-home?CommunityKey=afffb337-d599-4456-9436-a52aa5d9dcc2.

Attachment 1
Trade Association Descriptions

The Clearing House

Since its founding in 1853, The Clearing House has delivered safe and reliable payments systems, facilitated bank-led payments innovation, and provided thought leadership on strategic payments issues. Today, The Clearing House is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. It continues to leverage its unique capabilities to support bank-led innovation, including launching the RTP® system, an immediate payment system that modernizes core payments capabilities for all U.S. financial institutions. As the country's oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues facing financial institutions today. The Clearing House is owned by 23 of the country's largest commercial banks and supports hundreds of banks and credit unions through its core systems and related services.

Bankers Association for Finance and Trade

BAFT is the leading international financial services association whose membership includes large global and regional banks, service providers, and fintech companies headquartered around the world. BAFT provides advocacy, thought leadership, education, and a global forum for its members in transaction banking, including international trade finance and payments. For nearly a century, BAFT has expanded markets, shaped policy, developed business solutions, and preserved the safety and soundness of the global financial system. https://www.baft.org