



## **Comments to the Board of Governors of the Federal Reserve System and the Financial Crimes Enforcement Network on Changes to Threshold for “Travel Rule” Obligations**

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To whom it may concern:

Coin Center is an independent nonprofit research and advocacy center focused on the public policy issues facing cryptocurrency technologies such as Bitcoin. Our mission is to build a better understanding of these technologies and to promote a regulatory climate that preserves the freedom to innovate using open blockchain technologies. We do this by producing and publishing policy research from respected academics and experts, educating policymakers and the media about blockchain technology, and by engaging in advocacy for sound public policy.

We thank the Financial Crimes Enforcement Network and the Board of Governors of the Federal Reserve System (“the Agencies”) for the opportunity to comment on their proposed rule to modify the threshold in the rule implementing the Bank Secrecy Act that requires financial institutions to collect and retain information on certain transactions by American citizens.<sup>1</sup>

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<sup>1</sup> “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

As the joint notice of proposed rulemaking states, Executive Orders 12,866 and 13,563 direct federal agencies engaged in rulemaking to assess the costs and benefits of regulatory alternatives and select a regulatory approach that maximizes net benefits. As Executive Order 12,866 states:

When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, *and the public*), flexibility, distributive impacts, and equity. (Emphasis added.)<sup>2</sup>

Further, it states:

Each agency shall tailor its regulations to impose the least burden *on society, including individuals*, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations. (Emphasis added.)<sup>3</sup>

Additionally, Executive Order 13,563 encouraged agencies' analyses to consider costs and benefits beyond easily quantifiable economic effects:

In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.<sup>4</sup>

The purpose of these requirements is self-evident. Imposing new regulatory obligations on Americans should be done only when the benefits of doing so outweigh the costs. The costs in question are costs to *society*, not merely to regulated parties. And the costs and benefits to be considered should include difficult to quantify values like human dignity, of which privacy is a paramount component. Requiring this kind of cost-benefit regulatory analysis

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Requirement To Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets With Legal Tender Status," *Joint Notice of Proposed Rulemaking*, Board of Governors of the Federal Reserve System and the Financial Crimes Enforcement Network of the US Treasury Department, 85 FR 68005, pgs. 68005-68019, October 27, 2020, <https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and>.

<sup>2</sup> Exec. Order No. 12866, 58 FR 51735, October 4, 1993,

<https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

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

<sup>4</sup> Exec. Order 13563, 3 CFR 13563, January 18,

2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

not only helps agencies choose the best regulatory alternative, but it compels policymakers to “show their work” in a way that allows the public to provide meaningful comment.

The present notice of proposed rulemaking fails to do this.

While the Agencies considered the cost that lowering the threshold for certain AML obligations would impose on financial institutions, there is no discussion whatsoever of the cost that the change would impose on individuals and society. Yes, financial institutions would bear the direct costs of a change, but the greater cost may be incurred indirectly by the thousands or millions of citizens that a change would affect.<sup>5</sup> That cost is not easily quantifiable because it is a cost in privacy forgone, but it should not be ignored.<sup>6</sup>

The government-mandated and warrantless collection, retention, and transmission of personal information by financial institutions poses a self-evident threat to individual privacy. As Justice Douglas succinctly stated in 1971:

The records of checks—now available to the investigators—are highly useful. In a sense, a person is defined by the checks he writes. By examining them, the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on ad infinitum. These are all tied to one’s social security number; and now that we have the databanks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.<sup>7</sup>

Since 1971 there has been a significant expansion in the number of transactions that an American will make through a financial institution rather than face-to-face using cash. If Justice Douglas was rightfully concerned over the erosion of financial privacy in 1971, when most small and intimate payments would have been made in person with paper currency, then we should be significantly more concerned today when almost every payment that we make, from political contributions to medical bills to book purchases, will pass through an intermediary subject to the Bank Secrecy Act’s warrantless surveillance obligations.

The imposition of these surveillance obligations has always been made in the shadow of a cost-benefit analysis that at least attempts to value human dignity, individual privacy, and the rule of law rather than merely the administrative costs to financial institutions. As Justice Douglas insisted, “I am not yet ready to agree that America is so possessed with evil

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<sup>5</sup> For example, how many more transactions (and consequently how much more private personal information of Americans) will this change put at risk? We do not know but it is the kind of data that should be included in a complete cost-benefit analysis.

<sup>6</sup> Indeed, the word “privacy” does not appear once in the notice of proposed rulemaking. Also absent is any consideration of the distributive effects that the change may have on vulnerable populations who might disproportionately depend on lower value transactions covered by the proposed change.

<sup>7</sup> *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974) (Douglas, J., dissenting)

that we must level all constitutional barriers to give our civil authorities the tools to catch criminals.”<sup>8</sup>

Justice Douglas was one of two judges who dissented from the plurality in *California Bankers Association v. Shultz*, the case that found the Bank Secrecy Act constitutional. That holding, it should be pointed out, only vindicated the law *as it was applied in 1971*.<sup>9</sup> As the deciding votes in that case, Justices Powell and Blackman offered an important caveat to the Court's finding of constitutionality:

A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.<sup>10</sup>

Alongside the proposed \$250 threshold for “travel rule” obligations there are other “significant extension[s] of the regulations' reporting requirements.” For example, today's Suspicious Activity Reporting requirements did not exist in 1971.<sup>11</sup> Further, the current threshold for “travel rule” obligations (\$3,000) was in 1971 roughly equivalent to \$20,000 in today's money adjusted for inflation. The newly proposed \$250 threshold would equate to a \$40 threshold in 1971 when these warrantless data collection mandates were last constitutionally scrutinized. Query whether any of these changes to the application of the Bank Secrecy Act are the sorts of “government intrusion” that “would implicate legitimate expectations of privacy” and place the constitutionality of the entire regime into serious doubt. These constitutional issues should inform any cost-benefit analysis, and a proper cost-benefit analysis would reciprocally inform constitutional questions, in particular

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

<sup>9</sup> See Peter Van Valkenburgh, “Electronic Cash, Decentralized Exchange, and the Constitution” *Coin Center Report* (2019)

<https://www.coincenter.org/electronic-cash-decentralized-exchange-and-the-constitution/#iii-electronic-cash-decentralized-exchange-and-the-fourth-amendment> at Section III. D. The Constitutionality of the Bank Secrecy Act.

<sup>10</sup> *California Bankers Assn. v. Shultz*, 78-79.

<sup>11</sup> See Van Valkenburgh *supra* note 9 (“The domestic reporting obligations also expanded in 1996 to include “suspicious activity reports” or SARs.” and “The inclusion of SAR reporting has spurred a massive increase in the amount of data reported under the Bank Secrecy Act to Treasury. SAR reporting has grown from around 60,000 SARs per year in 1996 when the rule was promulgated to 3,000,000 per year in 2017.”).

inherently difficult to quantify judgements over an American's reasonable expectation of privacy over her sensitive financial records.

The constitutionality of *today's* application of the Bank Secrecy Act is unknown because we have yet to see a challenge of the regime as it exists. In other arenas of personal data surveillance and technological transformation, however, the Court has already reconsidered the balance and found that past legal analysis justifying warrantless surveillance should no longer apply. As Justice Sotomayor wrote in her concurrence to 2012's *United States v. Jones*, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."<sup>12</sup>

The proposed rule change includes a significant decrease in the threshold for personal data collection, retention, and transmission that would subject far more individual transactions to surveillance and place significantly more personal financial data at risk of misuse or inappropriate disclosure. This is not merely an hypothetical concern. Just last month, for example, personal financial data contained within some 2,121 suspicious activity reports (describing over 200,000 financial transactions) was leaked to the International Consortium of Investigative Journalists.<sup>13</sup> Even if we presume that regulators and financial institutions will, in the future, faithfully obey the law and avoid the inappropriate use of sensitive data, the continued threat of leaks and cybersecurity attacks make increased data collection and retention a significant and obvious risk to the privacy of American citizens. Any appropriate cost-benefit analysis would account for these risks and also explain how risks could be minimized through improved data privacy protocols and data minimization techniques. In turn, the costs of these necessary precautions should also be quantified.

It is inappropriate that any further increase in warrantless data collection take place without even a cursory analysis of the privacy harms inherent in the expansion. It should not be incumbent upon regulated parties or the individual Americans whose privacy is at stake to make these calculations. It is and ought to be the responsibility of regulators to justify such a substantial increase in warrantless surveillance.

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<sup>12</sup> *United States v. Jones*, 565 U.S. 400 (2012) <https://supreme.justia.com/cases/federal/us/565/400/> (Sotomayor, S., concurring).

<sup>13</sup> Jason Leopold, et al., "Secret Documents Show How Criminals Use Big-Name Banks To Finance Terror And Death, And The Government Doesn't Stop It," *Buzzfeed News*, September 20, 2020, <https://www.buzzfeednews.com/article/jasonleopold/fincen-files-financial-scandal-criminal-network>. Additionally, requests for private financial records have increasingly become partisan in nature. See: Jason Leopold (@JasonLeopold), Twitter (Oct. 22, 2020, 10:21 AM) <https://twitter.com/JasonLeopold/status/1319297777038282752>, and Emma Loop, "Some Committees Have Waited 'Many Months' For The Treasury Department To Produce Records They've Requested," *Buzzfeed News*, February 20, 2020, <https://www.buzzfeednews.com/article/emmaloop/treasury-sars-request-response-congress-trump>.

Without a proper cost-benefit analysis that considers the effects that the proposed changes would have on the privacy and dignity of Americans, as well as its distributive effects, it is difficult for the public to offer meaningful comment on the merits of the proposal. The Agencies should reconsider their cost-benefit analysis. If after doing so they still believe the benefits outweigh the costs, then they should issue a further notice of proposed rulemaking detailing that analysis.

We thank you for this opportunity to comment, and look forward to continuing the discussion as the Agencies continue to explore the matter.

Sincerely,

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