

April 4, 2016

By electronic delivery to:
www.regulations.gov

Jennifer Shasky Calvery
Director
Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Attn: PRA Comments—BCTR Revision

Dear Director Shasky Calvery:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the Financial Crimes Enforcement Network's (FinCEN) Paperwork Reduction Act request for approval of the revised Bank Secrecy Act Currency Transaction Report (BCTR) form.²

The changes to the BCTR form include a new Part IV to capture additional information on the entity filing the BCTR and a new requirement that the filer list the amount of funds transacted at each location reported on the form. As required by the Paperwork Reduction Act of 1995 (PRA),³ FinCEN has developed an estimate of the time expended by the average bank to comply with the reporting and recordkeeping requirements of the BCTR. According to that estimate, each bank will expend an "[a]verage of 25 minutes per report and 20 minutes recordkeeping per filing," for a total of 45 minutes of estimated burden per filing.⁴

In addition, the proposed changes would include revisions to several definitions. The changes to the terms "courier service" and "teller" have potentially significant ramifications, could greatly increase regulatory burden, and should not be addressed through a PRA notice. Rather, they should be conducted using a full notice and rulemaking in accordance with the Administrative Procedure Act (APA).⁵

¹ The American Bankers Association is the voice of the nation's \$16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$12 trillion in deposits and extend more than \$8 trillion in loans.

² Notice and Request for Comments, Bank Secrecy Act Currency Transaction Report (BCTR) Revised Layout and Proposed Additional Data Fields, 81 Fed. Reg. 5518 (Feb. 2, 2016).

³ Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 et seq.

⁴ 81 Fed. Reg. at 5519.

⁵ Administrative Procedure Act, 5 U.S.C. § 551 et seq.

Even if FinCEN's estimate of the time needed simply to complete the revised BCTR form itself were accurate, that estimate does not account for the significant operational and recordkeeping changes that banks will need to implement *before* it can complete and file its first BCTR on the proposed revised form. The proposed revisions will require banks to install an upgraded and customized software system, test that system, train staff on the new system, and update its training materials. FinCEN's estimate does not account for any of this time or expense. Indeed, in January 2011, when FinCEN sought comment on the current BCTR form, it estimated that a financial institution would need to expend an "[a]verage of 20 minutes per report and 20 minutes recordkeeping per filing," for a total of 40 minutes of estimated burden per filing.⁶ This previous estimate is only five minutes lower than the new estimated time to complete FinCEN's proposed BCTR form, even though the changes required in the proposed form add time to collect and report the additional data, to say nothing of the fact that it also will require banks to make a substantial upgrade to the software systems that they use to complete and file BCTRs, in addition to providing more information on the form.

FinCEN's failure to account for this additional burden is inconsistent with the PRA's purpose to minimize information collection burdens and to improve the quality of information collected while ensuring the greatest possible benefit to the public.⁷ This statutory goal takes on added significance in light of Executive Order 13563, which emphasizes the importance of reducing regulatory burdens and costs.⁸ Moreover, according to guidance prepared by the Office of Management and Budget (OMB), the following elements *must* be incorporated by an agency in an estimate of an information collection:

1. Design, procurement, and operation of data collection, data management, and data reporting systems necessitated by the collection of information.
2. Responding to changes in the requirements of an existing collection of information where such collection requires different or more detailed information, redefines terms or concepts, or alters in any way the consequences of responding in the same manner as before.
3. Training staff or other agents about how to comply with the collection, including whatever time or money resources are necessary to ensure staff understands enough about the nature of the program and policy context to respond to the collection.
4. Time, effort, and other resources to perform all required tasks, including completion and fulfillment of the information request, as well as to certify the accuracy and/or reliability of information provided. Effort to certify compliance with any statutory or regulatory provision represents paperwork burden, generally requires intensive scrutiny by senior officers, cannot be delegated, and generally entails a comprehensive audit. Such certification burden should be evaluated within the context of the legal consequences to respondent for improper certification.

⁶ Notice and Request for Comments, Bank Secrecy Act Unified Currency Transaction Report Proposed Data Fields, 76 Fed. Reg. 4747, 4748 (Jan. 26, 2011).

⁷ 44 U.S.C. § 3501.

⁸ See Exec. Order 13563 (directing regulatory agencies to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends" and to "tailor its regulations to impose the least burden on society").

5. Time, effort, and other resources devoted to transmitting the collection of information to the federal agency or a third party.⁹

ABA believes that accurately quantifying an information collection burden is an essential part of the assessment and reduction of overall regulatory burden, and that failure to assess and understand fully that burden will impede executive agency efforts to comply with the Administration's call to reduce regulatory burden. Since this is a proposed change to the format, ABA recognizes that there will be elements that require estimation instead of precision, but taking the right steps to do that are important to achieving the proper balance. ABA urges FinCEN to conduct a more thorough assessment of the burden imposed by the proposed revisions, as required by the PRA and OMB guidance.

I. Background

On February 2, 2016, FinCEN proposed a number of revisions to the existing BCTR form. According to FinCEN, the changes are necessary because the current filing format does not sufficiently identify the filer, particularly where a holding company may be submitting the report on behalf of a subsidiary. FinCEN also believes the current format does not provide sufficient detail about where specific transactions occurred when more than one location might be involved in the BCTR.

To correct these perceived deficiencies, FinCEN has added a new Part IV to record the identity of the entity filing the BCTR. In addition, the agency has added fields to Part III to record the amounts of cash-in and cash-out at each location. The revised form also would (a) change the term "Courier Service (private)" to "Common carrier"; (b) add a checkbox for a filing to denote that the transaction occurred through a Shared Branching credit union network; and (c) revise the definition of "teller."

II. The Proposed Revisions are Likely to Impose Significant Burdens on Financial Institutions

The PRA is clear: the agency seeking approval to conduct an information collection must prepare "a specific, objectively supported estimate of burden" created by the collection.¹⁰ FinCEN has not completed this statutorily mandated task. Despite FinCEN's description of the proposed revisions as "technical matters,"¹¹ the revisions will require significant systems and software changes—as well as employee training to use the new software—that FinCEN has failed to factor into its burden estimate. Both ABA members and software vendors have affirmed that the proposed changes are more than technical and could entail significant time and effort. ABA recognizes that these costs are difficult to estimate, but that does not excuse their absence

⁹ OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE PAPERWORK REDUCTION ACT OF 1995: IMPLEMENTING GUIDANCE FOR OMB REVIEW OF AGENCY INFO. COLLECTION 42-47 (draft issued Aug. 16, 1999), available at <http://thehre.com/pdf/PRAguidenew.pdf>.

¹⁰ 44 U.S.C. § 3506(c)(1)(A)(iv).

¹¹ 81 Fed. Reg. at 5518.

from FinCEN's information collection approval request, as the responsibility for calculating burden lies with the regulator, not with the regulated.

Vendor-provided software solutions play a central role in most banks' preparation and filing of BCTRs. The set of services that a vendor provides to a client bank varies and can include hosted solutions (where the vendor hosts the bank's software system for completing BCTRs), non-hosted solutions (where the bank runs the software provided by the vendor), and different amounts of customization of those software solutions to integrate the solution within the bank's existing systems.

Regardless of the degree of customization that a vendor provides to its client bank, the aggregate costs to the vendor and bank to adapt software necessary to conform to the proposed revisions could be significant. For example, one software provider estimated it would require 33 weeks of labor—or 1,320 hours—to update its BCTR product. At this vendor's billing rate of \$200 per hour, the cost of the upgrade would be approximately \$264,000. Another software provider stated that it would need to incur "significant costs" to re-code its product systems to conform to the proposed revisions. This provider estimated it would expend approximately 500 hours to upgrade a hosted, basic teller system that could be used, with adaptation, by multiple client banks. At this vendor's billing rate of \$200 per hour, the cost of the upgrade would be approximately \$100,000.

A third software provider, which provides customized solutions to its bank clients (as opposed to a more generic product that can be used by a variety of banks), advised ABA that the proposed revisions would require at least 10-25 hours to upgrade even a small bank's software. At this vendor's billing rate of \$235 per hour, 10-25 hours of labor would result in a cost of \$2,350 to \$5,875. The amount of time needed to upgrade a larger bank's systems would be higher and, consequently, the costs for the upgrade would be higher too.

While some banks may have contractual arrangements that permit routine software updates at no charge, vendors indicated that the changes proposed by FinCEN would not be considered routine and therefore, under typical arrangements, they would generate additional charges to individual institutions. Arrangements between banks and their software providers vary, but each bank would almost certainly bear (a) a pro-rated share of the vendor's upgrades to its "generic" software solution; and (b) the costs to customize the vendor's upgraded generic software solution to conform to the bank's systems.

Importantly, the estimates above do not include the cost to the bank to customize and test the new software, costs associated with integrating the software with existing data management and reporting systems (and testing that integration), or costs to train employees to use the upgraded system. Before systems are upgraded to conform to the finalized revisions, bankers are not in a position to determine, with specificity, the amount of time that will be needed to train bank staff on the new systems. However, a large number of bank personnel—from tellers to backroom staff—will need to be trained, consuming additional bank resources. One bank expects that, because of the complexity of the BCTR reporting process, multiple training sessions may be needed to train its branch staff on the changes to the form. Plainly, this time is not reflected in FinCEN's estimated burden per filing.

In addition to making changes to the BCTR and system upgrades, changes will be needed to other parts of the bank's data management systems. For example, the information needed to complete the BCTR is often downloaded from a customer relationship file or other dataset that tracks information on customers. Banks will need to alter this file or dataset to conform to the proposed changes. Similarly, the changes have to be integrated with systems that track possible suspicious activity, entailing additional costs in both time and money. Additional capacity will be needed to store the new information required in new Part IV and the cash-in and cash-out required to be listed for each location where a transaction occurred. All of these costs constitute "time, effort, or financial resources" that the PRA appropriately factors into the regulatory burden that an agency must estimate.¹²

III. FinCEN Has Not Demonstrated the Need for the Proposed Revisions to Part III of the BCTR Form, and these Changes Would Impose Additional Burden on Banks and Necessitate a Clarification by FinCEN on Banks' Reporting Requirements for Withdrawals at ATMs

Part III of the revised BCTR form would add new fields to report the total cash-in and cash-out for each location.¹³ FinCEN did not explain why this information is needed or why existing mechanisms are inadequate, or estimate the burden imposed by this information collection requirement—all of which are required by the PRA. These steps are important to ensure that resources are expended in ways that best meet the needs of law enforcement without unduly burdening the financial sector; failure to take these steps contravenes the PRA's requirements that the agency evaluate the need for the collection of information and provide a specific, objectively supported estimate of the burden imposed by these new fields.¹⁴

In explaining the cash-in and cash-out listing requirement, FinCEN noted its "inability to record the dollar value of the transaction in Part III when multiple transactions were reported."¹⁵ However, FinCEN never clearly articulated the need for having dollar value of the transactions at each location, even though the PRA requires an agency to "evaluat[e] the need for the collection of information."¹⁶ Moreover, there are other existing steps that can be taken to obtain this information. It is also unclear how often this level of detail is needed by law enforcement for investigation and prosecution or why this level of detail, which will be burdensome and costly to provide, is needed to every BCTR. FinCEN, in order to comply with its PRA requirements, must explain why these alternative means to obtain the desired information are insufficient.

Moreover, it does not appear that FinCEN included the burden associated with listing the cash-in and cash-out at each location. ABA's discussions with our members suggest that this new requirement has the potential to increase significantly the time required to complete the form because of the number of transactions that, at times, are aggregated in a single BCTR. This

¹² 44 U.S.C. § 3502(2); *see supra* notes 8 & 9 and accompanying text.

¹³ 81 Fed. Reg. at 5519.

¹⁴ 44 U.S.C. § 3506(c)(1)(A); *see also* Exec. Order 13563, *supra* note 8 (directing agencies to use the "least burdensome tools for achieving regulatory ends").

¹⁵ 81 Fed. Reg. at 5519.

¹⁶ 44 U.S.C. § 3506(c)(1)(A)(i).

additional work clearly is not captured in FinCEN's 25-minute estimate for completing the form.¹⁷ For example, one ABA member bank stated that, in one of its filings, it reported 875 separate transactions conducted by a money services business. Under the proposed changes, this bank would be required to list hundreds of cash-in and cash-out figures. This step not only represents burden, but also increases the opportunity for error and the need for an amended filing. For some banks, reporting the cash-in and cash-out transacted at each location could only be accomplished by a *manual* accounting, as these banks' BCTR systems are not currently able to capture and report this information.

IV. FinCEN Should Address Other Problematic Aspects with its Proposed Changes to the BCTR Form

There are at least three other problematic aspects to FinCEN's proposed changes to the BCTR form that must be addressed.

First, it is inconsistent with the PRA and the APA for FinCEN to seek to make significant changes to the BCTR process through an information collection renewal request under the PRA. FinCEN's proposed re-definition of the term "teller" may significantly expand BCTR filing requirements beyond their current scope. Under the proposed re-definition, a bank's "teller" may capture an armored car service that the bank contracts with to transport cash. If FinCEN wants to consider altering its approach to these activities, it should initiate a rulemaking, with opportunity for notice and comment, and not make these changes through a PRA request. Only by following appropriate rulemaking procedures will FinCEN be able to collect adequate feedback from all affected parties and be able to base public policy on adequate information; making this change through a PRA information collection renewal request does not allow the necessary feedback to be obtained and frustrates statutory requirements for public transparency.

Apart from the issue of the expanded definition of teller, another element raised by the proposal that should be addressed concerns transactions conducted at a non-proprietary Automated Teller Machine (ATM). Under current guidelines, there are questions about which entity bears the responsibility for reporting these ATM transactions—the customer's bank or the entity administering the ATM—and differing interpretations have created confusion. The proposal underscores the need for clarification. Again, this issue should be addressed through rulemaking to ensure that the final resolution represents good public policy.

Another proposed change that is inappropriate for a PRA notice and that should instead be addressed through APA rulemaking is FinCEN's proposed change to the definition in item 2(d) of the BCTR form from "Courier Service (private)" to "Common carrier." This issue has raised serious concerns by many industry parties. Without sufficient attention to the issue, including a proper rulemaking procedure, there is serious potential that application of this revision to the BCTR form would fail to serve law enforcement needs.

¹⁷ 81 Fed. Reg. at 5519.

V. Adequate Transition Time Is Needed to Implement Required Changes to Avoid Even Greater Burden on Banks

As with any change that affects software and systems processing, ABA urges FinCEN to provide banks with ample time to make the transition to any new reporting requirements. Both banks and their vendors need sufficient time to upgrade software systems to reflect revisions to the BCTR form, as well as sufficient time to integrate changes with other systems, test the upgraded systems, and train bank staff on the revisions.

Equally important is the need to recognize that systems changes do not occur in isolation. There are many regulatory demands on software programmers and changes must be scheduled and budgeted, requiring ample lead time to account for the added work. For some institutions, at least six to twelve months lead time is necessary. Therefore, we recommend that FinCEN allow no less than one year for the financial sector to implement any changes that are finalized.

VI. Conclusion

ABA recognizes the important role banks play in the fight against terrorist financing, money laundering, and other financial crimes, and we support FinCEN's efforts to enhance the utility of the information it collects on the BCTR. As recognized by the PRA, however, the utility of an information collection also considers the costs imposed by the collection and the agency's need for the information. Therefore, it is essential that FinCEN accurately quantify the *overall* burden imposed and the agency's need for each piece of new information requested by the BCTR before submitting the PRA request to OMB. Only then can FinCEN achieve the appropriate balancing needed to obtain the right outcome.

If you have questions about ABA's comments or would like to discuss them, please contact the undersigned at jthessin@aba.com or 202-663-5016.

Sincerely,

A handwritten signature in black ink, reading "Jonathan Thessin". The signature is written in a cursive, flowing style.

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance