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Pumping the Brakes: FinCEN Reopens Comment Period for Controversial Crypto Reporting & Recordkeeping Rules

After Widespread Market Opposition in an Expedited First Round of Comments, FinCEN Solicits More Feedback on Rule Seeking to “Close Gaps” in Virtual Currency Anti-Money Laundering Rules

On January 14, in a surprise move, the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) reopened comments on proposed reporting and recordkeeping rules for certain virtual currency transactions. The new comment window now extends past President-elect Biden’s inauguration on January 20, which means that these rules will not be finalized as part of what some critics previously described as an attempted “midnight rulemaking.”¹

The proposed rule, billed by FinCEN as bringing oversight of virtual currency transactions more in line with transfers of traditional cash, outraged industry participants when it was released just before the holidays in mid-December. They filed thousands of comment letters during an expedited two-week window allowed by FinCEN.² Virtual currency market participants of every stripe, from individuals, to major exchanges, to institutional investors, are monitoring this rule closely. FinCEN’s call for more comments is a signal that the initial comments it received had an impact—interested parties should strongly consider submitting additional feedback during the reopened comment window.

The controversial proposed rulemaking has once again focused attention on how FinCEN plans to enforce transparency-focused anti-money laundering concepts on the virtual currency ecosystem that embraces principles of confidentiality as well as advancements in financial services technology. And while it appears the work of finalizing the rule will now fall



to the incoming Biden administration, it remains quite possible the new team will move forward with the proposed rules in some form. Whether the proposed rules are applied could fundamentally change how buyers, sellers, exchanges, and other parties operate in crypto asset markets.

EXISTING FRAMEWORK AND OCTOBER PROPOSED RULES

In October 2019 and in November 2020, we wrote about proposed and final rules from FinCEN to apply the Travel Rule and the Recordkeeping Rule (both part of the Bank Secrecy Act) to virtual currencies.³ These steps were part of a larger initiative by FinCEN to establish an AML regulatory framework for virtual currencies that is comparable to fiat currencies.

More specifically, in 2019, FinCEN issued guidance describing how the Travel Rule and Recordkeeping Rule would apply to virtual currencies.⁴ Generally speaking, these rules apply when two money service businesses (MSBs), or other financial institutions covered by the rules, transfer \$3,000 or more in funds, including virtual currencies, on behalf of a client. The rules specify records to be kept by the originating business and relevant information to be provided to the receiving business. Although these rules are the same for virtual and fiat currencies, compared to traditional MSBs and banks, major crypto exchanges and other virtual currency MSBs face significant challenges complying with these rules because virtual currency transfers, compared with wire transfers for example, are typically completed with less information about the parties. These rules could be circumvented by transferring virtual currency funds from one institution to a personal wallet (*i.e.*, an unhosted wallet), and then from the unhosted wallet to the second institution.

FinCEN also issued a Notice of Proposed Rule Making in 2020 (October NPRM) that further confirmed virtual currencies would be subject to the Travel Rule and Recordkeeping Rule.⁵ The primary focus of the October NPRM was to solicit public input on FinCEN's proposal to lower the threshold for the Travel Rule and Recordkeeping Rule from \$3,000 to \$250 for international transfers—for both virtual currencies and fiat currencies. The October NPRM also solicited feedback on a change to FinCEN's definitions to distinguish them against UCC definitions that some argued suggest virtual currency transfers are not covered by the Travel Rule or the Recordkeeping Rule. Following the public comment period, these rules have yet to be finalized.

This rule and other FinCEN guidance issued over the past several years has made it clear that, especially with respect to the Travel Rule and the Recordkeeping Rule, the agency intends to apply the same standards for virtual currency transfers that apply to fiat currency transfers.

DECEMBER 2020 PROPOSAL TO EXTEND CURRENCY TRANSACTION REPORTS TO VIRTUAL CURRENCIES

On December 18, 2020, just one week before Christmas, FinCEN announced a new Notice of Proposed Rule Making (December NPRM) with recordkeeping and reporting requirements for virtual currency transfers between (1) MSBs or banks, on the one hand and (2) unhosted wallets⁶ or “otherwise covered wallets,” on the other.⁷ The December NPRM was formally published in the Federal Register on December 23, 2020, which started the clock for public comments.

The initial period for public comments on the proposed rule closed on January 7, 2021, giving concerned parties *only 15 days to respond*, instead of a more typical comment period, frequently ranging from 30 to 90 days.⁸ To explain the uncommonly quick 15-day comment period (which also included two weekends and the year-end holidays), FinCEN cited a national security exemption eliminating the Administrative Procedure Act's (APA's) notice-and-comment requirement for rules relating to foreign affairs functions of the United States.⁹ FinCEN further explained that previously solicited comments from industry participants reduced the need for additional public feedback. Many commenters, however, expressed extreme frustration and dismay with FinCEN's decision to limit the time window for public comments to 15 days. One commenter described the initial 15-day period as a sign of an “arbitrary and capricious midnight rulemaking” that was “motivated by a political deadline of January 20.”¹⁰ (It is common for new presidents to halt a range of previously ongoing rulemaking processes the day they take office.)



The two main substantive components of the December NPRM are requirements that banks and MSBs: (1) report certain virtual currency transactions with unhosted wallets and otherwise covered wallets exceeding \$10,000; and (2) maintain internal records for certain virtual currency transactions with unhosted wallets and otherwise covered wallets exceeding \$3,000. For these transactions, the proposed rule mandates the collection of:

- The name and address of the financial institution's customer;
- The type of convertible virtual currency (CVC) or digital assets with legal tender status (LTDA) used in the transaction;
- The amount of CVC or LTDA in the transaction;
- The time of the transaction;
- The assessed value of the transaction, in U.S. dollars, based on the prevailing exchange rate at the time of the transaction;
- Any payment instructions received from the financial institution's customer;
- The name and physical address of each counterparty to the transaction of the financial institution's customer;
- Other counterparty information the Secretary may prescribe as mandatory on the reporting form for transactions subject to reporting pursuant to § 1010.316(b);
- Any other information that uniquely identifies the transaction, the accounts, and, to the extent reasonably available, the parties involved; and,
- Any form relating to the transaction that is completed or signed by the financial institution's customer.¹¹

Originally, in the December NPRM, FinCEN expressed its intention to make “the amendments in the proposed rule effective as quickly as is feasible.”¹² In a surprise reversal, on January 14, 2021, FinCEN announced that it would reopen comments, with different timelines for different portions of the December NPRM. FinCEN reopened for 15 days the comment period for portions of the December NPRM requiring reports on certain virtual currency transactions exceeding \$10,000.¹³ FinCEN also reopened for 45 days the comment period for portions of the December NPRM requiring inclusion of counterparty information in reports on transactions exceeding \$10,000 and for portions of the proposed rule requiring recordkeeping on certain virtual currency transactions exceeding \$3,000. Because both of these comment periods extend beyond the end of President Trump's term on January 20, further delay is likely because, as is regular practice, the incoming administration has announced plans to issue an order immediately after the inauguration ceremony to halt all ongoing processes for non-final rules.¹⁴ Nevertheless, there remains a very real possibility that FinCEN might ultimately finalize these rules in some form during the next administration. Additional comments could be influential, particularly given the varying time periods (as explained below) allotted for comments on the proposed rules.

INDUSTRY RESPONSE DURING INITIAL COMMENT PERIOD

The first round of comments responding to FinCEN's December NPRM were *overwhelmingly negative*. Virtual currency industry members criticized FinCEN for needlessly increasing financial surveillance. They also suggested that the government would receive limited benefits under the rule due to user circumvention, and that those benefits would not outweigh the inordinate costs imposed upon virtual currency platforms to overcome significant technical barriers to achieve compliance with the proposed rule. Finally, a number of commenters, with support from members of Congress, decried inequitable regulatory treatment between virtual currencies and traditional financial systems. While many



comments recognized the need to fill potential gaps in the financial surveillance laws, *we have not identified any comments, among the thousands submitted, that were in favor of the proposed new rules.*

Invasion of Privacy and Unnecessary Financial Surveillance

Like the Travel Rule, the December NPRM would require the above referenced identifying information to be collected and recorded for a covered transaction, which received significant industry pushback. The Chamber of Digital Commerce, for example, wrote that combining information produced in accordance with the December NPRM with other information available to FinCEN “could easily spell the end of any semblance of financial privacy for Americans using blockchain technology.”¹⁵ The Electronic Frontier Foundation’s comment stated that the requirements in and of themselves present a troubling threat to civil liberties of virtual currency users, potentially violate the Fourth Amendment, fail to comply with international privacy standards, and may chill innovation.¹⁶ Although not universally held, the Fourth Amendment concerns are echoed by other commenters, including the blockchain industry research and advocacy organization, Coin Center, which stated that “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 [financial surveillance] regime into serious doubt.”¹⁷

Several platforms and industry groups argued in their comments that the proposal would drive virtual currency users to personal wallets and offshore exchanges. One prominent cryptocurrency exchange stated in its submission that the proposed rule would ultimately push more transactions away from regulated platforms—that customers would “cease using MSBs and fewer cryptocurrency service providers will provide services in the United States.” According to the exchange, this would actually diminish authorities’ ability to surveil the markets: “United States law enforcement and intelligence agencies will have less information regarding either the sender or the recipient of cryptocurrency transactions.”¹⁸

High Cost of Compliance with Proposed Rule, Limited Benefit to FinCEN

Commenters also emphasized that they anticipate incurring significant costs to comply with the December NPRM. At the same time, commenters stated that FinCEN would likely receive less benefit from the rule than it anticipates because of simple steps available to circumvent it.

In 2019, we highlighted key obstacles faced by virtual currency exchanges and other virtual currency businesses in complying with the Travel Rule and the Recordkeeping Rule. These obstacles have created and continue to create significant compliance costs. Similar barriers would exist for complying with the December NPRM.

The basic problem is that virtual currency businesses do not necessarily receive verified information about a counterparty, such as whether it is an MSB or an unhosted wallet. The Chamber of Digital Commerce stated that, “[b]anks and MSBs will have to spend considerable compliance resources, both in terms of technology and human capital, to review counterparty wallet addresses and, even after a rigorous review, may not be able to make a determination with respect to the status of a counterparty’s wallet.”

This problem does not exist for traditional financial transfers, such as wire transfers. In order for a bank customer to complete a wire transfer, the customer needs to provide her bank with information about the receiving bank and the individual customer at the receiving bank. The information to be collected and transmitted under the Travel Rule is no different from the information necessary to successfully complete a wire transfer.

Virtual currency businesses do not necessarily receive the same information from customers. Imagine a user wants to transfer 1 BTC from an account at a virtual currency exchange. From a technological perspective, the user could complete this transfer by logging into her account at the exchange and providing a public BTC address for the transfer. In order to effect the transfer, there is no technological need to identify whether the recipient BTC address is another MSB



or an unhosted wallet. Nor is there a technological need to identify the recipient BTC address's physical location. However, without these pieces of information accurately verified, an MSB may be unable to determine whether it should apply the Travel Rule or FinCEN's December NPRM. Innovative FinTech companies have discussed solutions to these issues, but no market standard has yet been identified, much less adopted. There is a clear consensus, however, among major industry participants that compliance costs to overcome this problem would be significant.

Despite anticipation of high compliance costs, commenters expressed concern that FinCEN and other government offices would receive little benefit if the December NPRM is finalized because it may be subject to easy circumvention. According to another prominent virtual currency exchange:

[I]f a customer of a bank or MSB -- who has already been subject to the entity's Know Your Customer ("KYC") protocols -- wants to send cryptocurrency to, or receive cryptocurrency from, a known bad actor, then all he or she needs to do is first send cryptocurrency to or receive cryptocurrency from a so-called "unhosted" or, more accurately defined, "self-hosted" wallet that the customer owns. The Proposed Rule would then readily permit that individual to send cryptocurrencies from his or her self-hosted wallet to the exchange or receive the cryptocurrency from the exchange to his or her self-hosted wallet. Once the cryptocurrency is in a self-hosted wallet, it can be transacted on the blockchain to or from another self-hosted wallet and not be captured by the requirements of the Proposed Rule.¹⁹

Inequitable Treatment Alongside Cash Transactions

Commenters also expressed concern that the December NPRM would require MSBs and banks "to keep records of and report certain cryptocurrency transaction information far beyond what is required for cash transactions today."²⁰ Those objections identify multiple regulatory discrepancies the December NPRM would create between cash and virtual currency transactions. First, the December NPRM would require banks and MSBs to maintain records on certain virtual currency transactions exceeding \$3,000 when comparable requirements only apply for cash transactions exceeding \$10,000. Second, it would require banks and MSBs to collect information, including name and physical address, about counterparties of their customers for certain transactions—something that is not required for financial institutions filing cash transaction reports.

Other commenters noted that the December NPRM's proposed reporting exemptions—which, as drafted, limit reporting obligations for some transactions involving banks transacting with other banks or government entities—were narrower than analogous reporting exemptions for cash transactions.²¹ For example, existing cash transaction reporting rules limit reporting obligations for certain transactions between banks and companies listed on national stock exchanges.²² Commenters contend that reporting disparities like this, which involve businesses "the reports [of] which have little or no value for law enforcement purposes," serve to undermine the ability of virtual currency platforms to serve reputable, low-risk customers.²³

Members of Congress have urged regulators implementing virtual currency regulations to maintain "parity" with existing financial regulations.²⁴ They have asked the Treasury to maintain a level regulatory playing field to avoid discouraging the public from adopting virtual currency technology which they see as promising for America.²⁵ They have suggested that regulations on private, unhosted wallets should be limited because the public would not accept comparable regulations on private cash transactions.²⁶

Based on the disparate new comment periods for different portions of the rule, it appears that FinCEN has taken this line of critique into account. For the reporting requirements on certain transactions over \$10,000, except for requirements on counterparty information, FinCEN is only giving an additional 15 days for comments because they "are essentially equivalent to the existing [Cash Transaction Report] requirements that apply to transactions in currency."²⁷ FinCEN



wrote that “such transactions would otherwise be subject to familiar and long-established reporting requirements if they were in cash.”²⁸ In contrast, FinCEN is providing 45 days for comments on the remaining portions of the proposed rule.

CONCLUSION

These proposed rules would represent a significant expansion of the collection and reporting required of banks and MSBs. If implemented in their current form, while these new rules may give government investigators additional data in their efforts to prevent financing of illicit businesses and money laundering, the benefits of such rules should be weighed against the desire to have effective and efficient blockchain networks.²⁹ These rules would come with significant costs, including the erosion of privacy of virtual currency transactions—a fundamental pillar that has drawn so many investors and technology-based companies to digital assets—and the imposition of burdensome compliance requirements.

Among the various crypto-related pronouncements from federal agencies toward the end of 2020, this is one that buyers, sellers, and crypto market intermediaries (including banks and other financial institutions providing digital asset financial services to clients) must monitor closely.

These new comment periods may be a sign that FinCEN recognizes the magnitude of these rules if implemented. And even though a new administration will be leading Treasury in a week’s time, it is entirely possible the new leadership carries on the process of finalizing these proposed rules—now based on feedback received during the extended comment period. Those who have not yet provided comments—or whose initial comments were limited due to the expedited comment period—should consider taking advantage of this new opportunity to provide feedback, which may be aided by input from counsel well-versed in the matter, to help ensure that perspectives from all categories of market participants are heard as new rules take shape.

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- ¹ Coin Center, Supplemental Comments to the Financial Crimes Enforcement Network on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 7, 2021), <https://www.coincenter.org/app/uploads/2021/01/Coin-Center-FinCEN-Second-Comment.pdf>.
- ² Nikhilesh De, *65K Comments and Counting: Crypto Industry Fights 'Arbitrary' Treasury Rule*, CoinDesk (Jan. 7, 2021), <https://www.coindesk.com/65k-comments-and-counting-crypto-industry-fights-arbitrary-treasury-rule>.
- ³ See 31 C.F.R. § 103.33(g); 31 C.F.R. § 103.29.
- ⁴ See U.S. Treasury Financial Crimes Enforcement Network, FIN-2019-G001, *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies* (2019), <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-certain-business-models>.
- ⁵ 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, 85 FR 68005 (proposed October 27, 2020) (to be codified at 31 C.F.R. parts 1010 and 1020).
- ⁶ Unhosted wallets are defined in the proposed rule as describing “when a financial institution is not required to conduct transactions from the wallet (for example, when an owner has the private key controlling the cryptocurrency wallet and uses it to execute transactions involving the wallet on the owner's own behalf).”
- ⁷ Otherwise covered wallets are defined in the proposed rule as “those wallets that are held at a financial institution that is not subject to the Bank Secrecy Act (BSA) and is located in a foreign jurisdiction identified by FinCEN on a List of Foreign Jurisdictions Subject to 31 CFR 101.316 Reporting and 31 CFR 101.410(g) Recordkeeping (the ‘Foreign Jurisdictions List’).” Initially, this list is expected to be comprised of jurisdictions of primary money laundering concern: Burma, Iran, and North Korea.
- The December NPRM includes commentary that for transactions between banks or MSBs and foreign financial institutions, the banks or MSBs would, in addition to confirming that the foreign financial institution is not in a jurisdiction on the Foreign Jurisdictions List, “need to apply reasonable, risk-based, documented procedures to confirm that the foreign financial institution is complying with registration or similar requirements that apply to financial institutions in the foreign jurisdiction.” However, it does not appear that this requirement appears anywhere in the text of the proposed rule.
- ⁸ Critics of the process have argued that FinCEN posted inconsistent information about when the 15-day window would close, leading numerous commenters to rush in their responses over weekends and holidays thinking they were due by January 4, 2021.
- ⁹ 5 U.S.C. § 553(a)(1).
- ¹⁰ Coin Center, Supplemental Comments to the Financial Crimes Enforcement Network on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 7, 2021), <https://www.coincenter.org/app/uploads/2021/01/Coin-Center-FinCEN-Second-Comment.pdf>.
- ¹¹ Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, FR 2020-29437 (proposed December 23, 2020) (to be codified at 31 C.F.R. Parts 1010, 1020, and 1022) (last accessed on January 13, 2021 at <https://beta.regulations.gov/document/FINCEN-2020-0020-0001>).
- ¹² *Id.*
- ¹³ U.S. Treasury Financial Crimes Enforcement Network, RIN 1506-AB47, Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (2021), <https://public-inspection.federalregister.gov/2021-01016.pdf>.
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- ¹⁴ See Kate Sullivan, *Biden White House to issue memo to halt or delay midnight regulations on January 20*, CNN Politics (Dec. 30, 2020), <https://www.cnn.com/2020/12/30/politics/biden-midnight-regulations-freeze/index.html>.
- ¹⁵ Chamber of Digital Commerce, Comment Letter on Proposed Rule on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 4, 2021), <https://digitalchamber.org/treasury-rule-digital-currencies/>.
- ¹⁶ Electronic Frontier Foundation, Comments to the Financial Crimes Enforcement Network (FinCEN) on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 4, 2021), <https://www.eff.org/document/2021-01-04-eff-comments-fincen>.
- ¹⁷ Coin Center, 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 (Nov. 2, 2020), <https://beta.regulations.gov/comment/FINCEN-2020-0002-0098> (citing *California Bankers Assn. v. Shultz*, 416 U.S. 21, 78-79 (1974) (Douglas, J., dissenting)).
- ¹⁸ Kraken, Comment Letter on Proposed Rule on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 4, 2021), <https://kraken.docsend.com/view/2fxvkmn77uz9bqjq>.
- ¹⁹ Gemini, Comment Letter on Proposed Rule on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 4, 2021), <https://beta.regulations.gov/comment/FINCEN-2020-0020-6616>.
- ²⁰ Square, Comment Letter on Proposed Rule on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 4, 2021), <https://squareup.com/us/en/press/fincen-letter>.
- ²¹ Fidelity Digital Assets, Comment Letter on Proposed Rule on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (Jan. 4, 2021), <https://beta.regulations.gov/comment/FINCEN-2020-0020-6014>.
- ²² 31 C.F.R. § 1020.315(b)(4).
- ²³ 31 U.S.C. § 5313(d)(1)(D).
- ²⁴ Nikhilish De, *US Lawmakers Tell Mnuchin to Back Off From Potential Crypto Wallet Regs*, CoinDesk (Dec. 9, 2020), <https://www.coindesk.com/us-lawmakers-tell-mnuchin-to-back-off-from-potential-crypto-wallet-regs>; see also Rep. Warren Davidson (@WarrenDavidson), Twitter (Dec. 9, 2020, 5:46 p.m.), <https://twitter.com/WarrenDavidson/status/1336804544320327683> (The same letter also expressed concern that onerous regulations imposed unilaterally in the U.S. could allow non-U.S. virtual currency businesses to push ahead enjoying fewer regulatory burdens. Many comment letters responding to the December NPRM have echoed this concern about the consequences of international regulatory imbalance).
- ²⁵ Rep. Warren Davidson (@WarrenDavidson), Twitter (Dec. 9, 2020, 5:46 p.m.), <https://twitter.com/WarrenDavidson/status/1336804544320327683>.
- ²⁶ *Id.*
- ²⁷ U.S. Treasury Financial Crimes Enforcement Network, RIN 1506-AB47, Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets (2021), <https://public-inspection.federalregister.gov/2021-01016.pdf>.
- ²⁸ *Id.*
- ²⁹ See Department of Justice, Global Disruption of Three Terror Finance Cyber-Enabled Campaigns, <https://www.justice.gov/opa/pr/global-disruption-three-terror-finance-cyber-enabled-campaigns> (August 13, 2020) (“‘Terrorist networks have adapted to technology, conducting complex financial transactions in the digital world, including through cryptocurrencies. IRS-CI special agents in the DC cybercrimes unit work diligently to unravel these financial networks,’ said Secretary of the Treasury Steven T. Mnuchin.”).