Supplemental Comments to the Financial Crimes Enforcement Network on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets

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FinCEN Docket No. FINCEN-2020-0020, RIN 1506-AB47

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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 previously filed a comment letter in this proceeding and are now filing this second letter as a supplement to address events that have transpired since then. As in our previous comment letter, we will first focus on procedural deficiencies in the current rulemaking and then we will address issues with the substance of the proposed rule—in particular the Treasury Department's lack of authority to issue the proposed rule.

The Public Was Misled Into Filing Comments Earlier Than Necessary

In our previous comment letter we outlined the deficiencies inherent in the Treasury Department's justifications for an abnormally truncated public comment period. Since we filed that comment, Treasury has added insult to injury. Despite promising in the notice of proposed

rulemaking[1] that the public would be afforded 15 days to comment, the Department took actions that shortened that effectively shortened that period to only 12 days, of which only six were work days.

The notice of proposed rulemaking (NPRM) in this proceeding was published in the Federal Register on December 23, 2020.[2] At the top of that notice, after a bolded heading titled "DATES:", the notice states, "Written comments on this proposed rule may be submitted on or before January 4, 2021."[3] Later, in the body of the text, by way of justifying the short comment period, the notice states, "FinCEN is providing a 15-day period for public comments with respect to this proposed rule. FinCEN has determined that such a comment period is appropriate for several reasons."[4] It also states in a footnote that "the formal comment period concludes 15 days after filing at the Federal Register[.]"[5] Additionally, during most of the comment period the top of the page on Regulations.gov, the official portal for online comment submissions, a deadline notice read, "Due Jan 4 2021, at 11:59 PM ET."

The problem is that January 4, 2021 is not 15 days from December 23, 2020. It seems that in the NPRM the Treasury Department began counting the 15-day comment period from December 18, 2020, the date of the press release announcing the rule making.[6] Intentionally or nor, by printing at the top of the Federal Register notice an erroneous January 4 deadline, and by including that same deadline at the top of Regulations.gov, the Treasury Department misled the public about when comments were due.

Normally a mistake that leads to three fewer days to comment is not a grave matter. But this is not a normal rulemaking. Normal proceedings afford 60 days of public comment. In this case only 15 days were given, over the Christmas and New Year holidays, in the middle of a global pandemic. As we explained in our previous comment letter, the rushed process in this proceeding is not justified by any emergency but is instead motivated by a political deadline of January 20, when the Secretary will leave office. This is an arbitrary and capricious midnight

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[1] "Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets," *Notice of Proposed Rulemaking*, Financial Crimes Enforcement Network of the U.S. Treasury Department, 85 FR 83840-62, RIN 1506-AB47, https://www.federalregister.gov/public-inspection/2020-28437/requirements-for-certain-transactions-involving-convertible-virtual-currency-or-digital-assets.

[2] *Id*.

[3] *Id*.

[4] *Id*. at page 83841.

[5] *Id*. at footnote 1.

[6] "The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions," U.S. Department of the Treasury, December 18, 2020, https://home.treasury.gov/news/press-releases/sm1216.

rulemaking and the decision to truncate the normal comment period is an abuse of the agency's discretion.

A mistake that misled some of the public to take fewer days to comment than they needed to in such a rushed process would be bad enough, but it gets worse. At some point before January 4, Treasury recognized its mistake. However, rather than make an announcement to the public that the deadline printed in the Federal Register and listed at the top of Regulations.gov was in error (perhaps with a press release similar to the one it issued announcing the rule making), the Department instead chose only to change the deadline listed at the top of Regulations.gov to January 7. It did so at some point on January 4 but it is not clear at what time the change was made as, again, there was no announcement of the change and few if anyone in the public noticed until the next day.[7] As of this submission midday on January 7, no announcement of the mistake or the change has been made by the Treasury Department.

The Department's actions are unconscionable. Members of the public relied on Treasury's statement of a January 4 deadline to their detriment. And when it became clear that this was happening, Treasury did not seek to disabuse the public of the misunderstanding. Instead it merely sought to quietly change the online filing date (and cure a potential ground for legal challenge), even though it should have been clear that the public was under the impression that the deadline was January 4.[8] As a result, hundreds of commenters who could have used more time (and who say as much in their comment letters) nevertheless raced to meet the deadline printed in the Federal Register.

Notable commenters who filed on January 4 in order to honor the deadline include cryptographers from Johns Hopkins University and Tel Aviv University, legal and technical experts from Harvard University and MIT, the Electronic Frontier Foundation, former NSA General Counsel Stewart A. Baker, and industry participants such as Andreessen Horowitz, the Blockchain Association, Chainalysis, cLabs, CMT, Coinbase, the Electric Coin Company,

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[7] The first public record of someone noticing the change we could find was at 4:44 AM ET on January 5, 2021. *See*: Rich Kleinbauer (@RMKOutFront), *Twitter* (Jan. 5, 2021, 4:44 AM) https://twitter.com/rmkoutfront/status/1346392077962256384.

[8] Press accounts make clear the cryptocurrency ecosystem was racing to meet the noticed January 4 deadline. *See:* Lydia Beyoud, "Crypto Companies Gear Up for Battle on Digital Wallet Proposal," *Bloomberg Law*, December 28, 2020, https://news.bloomberglaw.com/banking-law/crypto-companies-gear-up-for-battle-on-digital-wallet-proposal; Aislinn Keely, "As FinCEN's comment window on crypto wallet rule comes to a close, uncertainty on path forward remains," *The Block*, January 4, 2021,https://www.theblockcrypto.com/post/90021/fincen-crypto-wallet-rule-deadline-feature; Turner Wright, "Heavy hitters of crypto call for users to comment on proposed FinCEN wallet rule," *Cointelegraph*, December 30, 2020, https://cointelegraph.com/news/heavy-hitters-of-crypto-call-for-users-to-comment-on-proposed-fincen-wallet-rule.

Fidelity, Kraken, Paradigm, Paxos, Square, and the U.S. Chamber of Commerce. These are among the most knowledgeable interested parties from whose comments the Treasury Department would most benefit, yet they were afforded only 12 days during the holidays to respond. The Department could have cleared up the misunderstanding by making an announcement of the erroneous deadline, but the fact that it chose not to signals that it is less interested in receiving good comments than it is in rushing the process.

At this point, the only thing that can truly cure the many procedural deficiencies in this proceeding is for the rulemaking to be withdrawn and restarted with a 60-day comment period.

Dubious Statutory Authority

Upon further review conducted throughout the meager period of time allowed within this rushed rulemaking process, we believe that the Treasury Department does not have the statutory authority to promulgate this regulation. As we shall describe below, the Treasury likely did not have the statutory authority to treat CVCs as monetary instruments under § 5312(a)(3)(B)[9] (although the rulemaking disclaims reliance on this authority in either case[10]), and does not have the authority to require extraordinary reports on CVC transactions under § 5313(a). Moreover, a new law enacted 9 days after this NPRM was published alters the Secretary's authority to redefine the term "monetary instruments" in a specific process not followed by this rulemaking.[11] Furthermore, if—as a last resort—Treasury is relying upon its general powers articulated at § 5318(a)(2) for authority to promulgate this rulemaking, then it is interpreting § 5318(a)(2) in such a way as to create an unconstitutional delegation of legislative authority from Congress to itself.[12]

To explain our statutory authority argument we shall proceed in steps. First, we will show that Treasury has chosen not to create these new recordkeeping and reporting requirements under either (1) the existing well-established authority to amend the definition of "monetary instruments" in the Bank Secrecy Act at § 5312(a)(3)(B) or under (2) new authority found in an amendment to the BSA that days ago became law at § 5312(a)(3)(D). Instead, it has chosen to

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[9] 31 U.S.C. § 5312(a)(3)(B) ("as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material").

[10] *Supra* footnote 1, at pages 83846 and 83860 and footnotes 36, 53, 54, and 57.

[11] National Defense Authorization Act for Fiscal Year 2021, H.R.6395, 116th Congress (2019-2020) at 1166 *available at* https://www.congress.gov/bill/116th-congress/house-bill/6395/text (amending 31 USC 5312 at (a)(3)(D)) ("'(d) VALUE THAT SUBSTITUTES FOR CURRENCY.—(1) DEFINITIONS.—Section 5312(a) of title 31, United States Code, is amended—...in paragraph (3) ... by adding at the end the following: '(D) as the Secretary shall provide by regulation, value that substitutes for any monetary instrument described in subparagraph (A), (B), or (C).'.").

[12] *Infra* section 3.

promulgate this rule under (3) dubious authority found in a parenthetical statement at § 5313(a) and general powers found at § 5318(a)(2).

1. Existing Authority to Define "Monetary Instruments"

Under existing authority at 31 U.S.C. § 5312(a)(3)(B), the Secretary may provide by regulation a new, expanded regulatory definition of "monetary instrument."[13] Classification of an asset as a monetary instrument would trigger reporting and recordkeeping obligations similar to those proposed in this rulemaking.[14] However, 31 U.S.C. § 5312(a)(3)(B) cabins the extent to which the definition of monetary instruments can be expanded at the discretion of the Secretary. Specifically, it limits the types of assets which can fall into the category of "monetary instruments" to "coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material."[15]

While convertible virtual currencies (CVC) may indeed be *substitutes* for these items they are not the same or even similar. Unlike coins and currency, CVC is not issued by a foreign nation, and is not legal tender.[16] Unlike travelers checks, bearer negotiable instruments, and bearer investment securities, CVCs do not entitle the bearer to any obligation by any third party. CVCs are not "instruments" as that term is understood in law;[17] CVCs are not written documents evidencing a contract or shared obligation. One cannot go to the Bank of Bitcoin and have her bitcoin redeemed in dollars or for some other valuable consideration. Bitcoin may be "bearer" in the sense that the value is "owned" by the person with physical control over the asset, but it is not an "instrument." It does not direct anyone to credit the bearer or honor an obligation to the bearer. Instead, it is a commodity, like gold, that is capable of being exclusively possessed and capable of being traded at a market rate (if liquid markets are available) but, unlike bearer *instruments*, neither gold nor bitcoin entitle the bearer to any legally enforceable right.

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[13] *Supra* footnote 9.

[14] For example, monetary instruments are subject to currency transaction reporting under 31 CFR § 1010.410(b) and (c).

[15] § 5312(a)(3)(B)

[16] For example, FinCEN's own guidance on convertible virtual currency explains that "'virtual currency' refers to a medium of exchange that can operate like currency but does not have all the attributes of 'real' currency, as defined in 31 CFR § 1010.100(m), including legal tender status. CVC is a type of virtual currency that either has an equivalent value as currency, or acts as a substitute for currency, and is therefore a type of 'value that substitutes for currency.'" *See*: "Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies," Financial Crimes Enforcement Network, FIN-2019-G001, May 9, 2019, https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf.

[17] "A written document; a formal or legal document in writing, such as a contract, deed, will, bond, or lease." *Instrument*, Blacks Law Dictionary 719 (5th Ed. 1979).

Accordingly, it is debatable whether CVC can be included within the definition of "monetary instrument" because it may be outside of the statutorily confined range of assets. Indeed, the proposed rulemaking appears to recognize this limitation and seeks to rely on *other* authorities that purportedly allow Treasury to treat CVCs *as if* they were monetary instruments without adding them to the regulatory definition of monetary instruments. From the NPRM:

> This proposed rule would not modify the regulatory definition of "monetary instruments" at 31 CFR 1010.100(dd), although it would prescribe that CVC and LTDA are "monetary instruments" pursuant to 31 U.S.C. 5313 for the purposes of the issuance of the proposed reporting requirement added at 31 CFR 1010.316.[18]

2. New Authority to Define "Monetary Instruments"

On Jan, 1, 2021 (9 days after the proposed rule was published) a new law was enacted by Congress that would expand the Secretary's power to redefine the term "monetary instruments" via a new passage at 31 U.S.C. § 5312(a)(3)(D).[19] Under this new authority, the Secretary could, through regulation, add currency substitutes, such as CVCs, to the definition of "monetary instruments."[20] This new section (D) is, for self-evident reasons given the timing, also not the statutory authority upon which the Secretary relied to create this proposed rule nor is it analogous to that authority. The new law creates a standard by which the Secretary's actions in expanding the definition can be judged: the Secretary can add to the definition of monetary instruments any "value that substitutes" for the otherwise defined instruments at 31 U.S.C. § 5312(a)(3)(A)-(C).[21] That Congress found it necessary to explicitly add a new category of assets ("currency substitutes") to the range of assets that can be treated as monetary instruments further supports the argument that CVC could not have been included in the definition as it existed previous to this change in the law.

Again, this rulemaking explicitly disclaims that it is altering the regulatory definition of "monetary instruments" (as the new section D would otherwise enable)[22] and, instead, seeks to impose reporting and recordkeeping arrangements by utilizing other authority. The newly passed law certainly affords the Secretary new authority to accomplish a result similar to that proposed in this rulemaking, but it does not validate the existing rulemaking's divergent and unsupported approach *ex post*. Again, new language from Congress suggests that the Secretary may, after January 1, 2021, undertake a rulemaking to add CVCs or other valuable items to the

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[18] *Supra* footnote 1, at footnote 37.
[19] *Supra* footnote 11.
[20] *Id.*
[21] *Id.*
[22] "This proposed rule would not modify the regulatory definition of "monetary instruments" at 31 CFR 1010.100(dd)"

definition of "monetary instruments," but must show that these items are, in fact, used as substitutes for other instruments defined in the statute. The rulemaking, aside from being begun before this new power was even passed into law, does not undertake that substitution analysis and does not, by its own admission, seek to add CVCs to the regulatory definition of "monetary instruments." Prudence and basic respect for the rule of law and the express will of Congress would dictate that FinCEN and Treasury should abandon the current rushed and ill-supported rulemaking in favor of a fresh process with a full 60-day comment period based on the newly passed legal authority from Congress.

3. Dubious Authority Purportedly Grounding this NPRM

Now that we have explained where the authority for this rulemaking does not come from, let us turn to the purported authority on which it is based. With precious little explanation, Treasury grounds this rulemaking in authority found at 31 U.S.C. § 5313 (emphasis added):

> This proposed rule would not modify the regulatory definition of "monetary instruments" at 31 CFR 1010.100(dd), although it would prescribe that CVC and LTDA are "monetary instruments" *pursuant to 31 U.S.C. 5313* for the purposes of the issuance of the proposed reporting requirement added at 31 CFR 1010.316.[23]

The text of the NPRM insists that the Treasury is not redefining "monetary instruments" but that it is instead prescribing that CVC and LTDA are "monetary instruments" for § 5313 reporting purposes. It appears the Treasury would like to have its cake and eat it too. Where does this authority to "prescribe" rather than redefine the term monetary instruments lie? At § 5313(a) the Secretary is empowered to order certain reports as follows (emphasis added):

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency *(or other monetary instruments the Secretary of the Treasury prescribes)*, in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

Apparently, the rulemaking is relying on this passage for a "prescribing" authority apart from the redefining authority at § 5312(a)(3)(B). In the passage at § 5313(a), it is true, there is a parenthetical statement modifying the term United States coins or currency: "(or other monetary instruments the Secretary of the Treasury prescribes)." Presumably Congress included this statement to be clear that anything defined by the Secretary as a monetary instrument (under the Secretary's statutory authority to redefine that term through

[23] *Supra* footnote 1, at footnote 37.

rulemaking) could be subject to the extraordinary reporting requirements found at § 5313. It is, however, absurd to suggest that Congress intended this parenthetical to be a new, separate, and unconstrained power.[24] It would be a reach to read this authority as license for the Secretary to prescribe that valuable objects can be treated as monetary instruments without the need to redefine that term (as the secretary otherwise has some limited power to do at § 5312(a)(3)(B)). Why would Congress grant the secretary the power to treat effectively anything as a monetary instrument at § 5313(a) while simultaneously limiting the range of things that the Secretary can officially define as a monetary instrument at § 5312(a)(3)(B)? To treat the parenthetical at § 5313(a) as a new prescribing power unbounded and capable of extending to CVCs would be to make surplusage of the otherwise clear limitations and process of redefining "monetary instruments" created by Congress at § 5312(a)(2)(B). We need look no further than the recently passed legislation, which loosens those limitations by adding a new subsection (D) dedicated to enabling the inclusion of CVCs, for evidence that Congress found (and continues to find) that the prior limitations at (B) were prohibitive of including CVCs in the definition of monetary instruments.

Perhaps sensing the flimsy nature of § 5313(a)'s support for this rulemaking, the NPRM also frequently alludes to the "general powers of the Secretary" under 31 U.S.C. § 5318(a)(2).[25] That section allows the Secretary to "require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures to ensure compliance with this subchapter and regulations prescribed under this subchapter or to guard against money laundering."[26] If the Secretary does not have power under the Bank Secrecy Act (as it existed before the recent amendment) to classify CVCs as monetary instruments, then it cannot be the case that doing so under § 5318(a)(2) would "ensure compliance with" the Bank Secrecy Act. In other words, the Secretary cannot use his power to ensure compliance with the law to order regulated parties to do things that the law does not require or even permit.

Perhaps we can read § 5318(a)(2) as an even broader authorization, however. If we omit the clause "ensure compliance with this subchapter" the passage reads as follows: "require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures … to guard against money laundering." This, indeed, sounds like broad authority. This could probably be used to impose upon regulated parties all manner of procedures not described within the Bank Secrecy Act and never contemplated by Congress. The Secretary could, perhaps, insist that § 5318(a)(2) empowers him to require that banks maintain a

[24] Again, 5312(a)(3)(B) limits the range of instruments that can be added to the definition of "monetary instrument" whereas this parenthetical does not.
[25] Immediately after highlighting the parenthetical at 5313(a) the NPRM simply recounts these general powers without a clear explanation of whether and how the Secretary is or is not relying upon them for authority.
[26] 31 U.S.C. § 5318(a)(2)

procedure for denying financial services to all persons convicted of a crime or all illegal immigrants. Who is to say that these hypothetical procedures are not "appropriate" to "guard against money laundering?" Perhaps the Secretary could allege that convicts and migrants pose a money laundering risk owing to past offenses or connections with persons seeking to launder money overseas. There is a good Constitutional doctrine under which such unbounded discretion to craft policy would not be acceptable: nondelegation.[27] Interpreting § 5318(a)(2) as an unbounded authority to require any "appropriate procedures" to "guard against money laundering" would create an impermissible delegation of legislative authority from Congress to the Executive in contravention of the constitutional nondelegation doctrine because that language on its own does not create an intelligible principle limiting the power of the Secretary to, effectively, legislate policy. "Appropriate" is not defined in the statute, and no further standards are specified. Merriam-Webster defines "appropriate" as "especially suitable or compatible," but Merriam-Webster cannot tell us what the statute also neglects to specify: Suitable or compatible with whom? To what?

We accept that § 5318(a)(2) can be reasonably interpreted to afford the Secretary with gap-filing authority necessary to "ensure compliance" with black letter law obligations already articulated within the four corners of the Bank Secrecy Act. As found in a lineage of non-delegation holdings from the Supreme Court, and as summarized by Justice Gorsuch in his dissent in *Gundy v U.S.*, the nondelegation doctrine requires that any executive rulemaking must occur in the shadow of an intelligible principle articulated by Congress:

> To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?[28]

Using § 5318(a)(2) merely as a means to fill in the details with respect to procedures that regulated parties should maintain in order to further the policies Congress articulated in the Bank Secrecy Act would not be inappropriate. That form of gap-filling power is not legislative.[29] But, if the Secretary was to use § 5318(a)(2) to order private citizens to comply with rules not found within the BSA, or even clearly authorized by the BSA, then surely that interpretation of § 5318(a)(2) would be an unconstitutional delegation. Else, how could any order granted under that broad authority be judged by "Congress, the courts, and the public" to determine whether Congress's instructions are being followed?[30] As with the plurality in *Gundy*, we would have to

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[27] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[28] *Gundy v. United States*, 588 US _ (2019), Gorsuchs, N., dissenting.
[29] *Id.*
[30] *Id.*

search elsewhere in the statute for a meaningful limitation on this power for a gloss on what is meant by "appropriate." Short of finding one, this is legislative power pure and simple: it is the power to arbitrarily and at will impose upon private parties surveillance obligations to which they would otherwise not be subject under the law.

If the rulemaking is not, as it purports, grounded in authority to redefine the term "monetary instruments" at 31 U.S.C. § 5312(a)(3)(B), and if it can not be grounded in some fanciful parenthetical authority at 31 U.S.C. § 5313(a) to prescribe that certain things are "monetary instruments" even when they are not defined as such, and if it cannot therefore be justified with reasonable gap-filling powers afforded the secretary at 31 U.S.C. § 5318(a)(2), then there is no stated authority for this rulemaking in the NPRM. Adding the lack of clear statutory authority to the other procedural issues we have highlighted, we respectfully request that FinCEN withdraw this rulemaking and if it wishes start anew with an appropriate comment period.

Sincerely,

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