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Via Email  
(Kenneth.Blanco2@FinCEN.Gov)

Mr. Kenneth Blanco  
Director  
Financial Crimes Enforcement Network  
U.S. Department of the Treasury  
2070 Chain Bridge Road  
Vienna, VA 22182

**Re: Comments to FinCEN Guidance: “Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies,” FIN-2019-G001 (May 9, 2019)**

Dear Director Blanco,

The Chamber of Digital Commerce (the “**Chamber**”) welcomes the opportunity to submit this letter for consideration by the Financial Crimes Enforcement Network (“**FinCEN**”) with respect to its guidance regarding the “Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies” (the “**2019 Guidance**”).<sup>1</sup> The Chamber is the world’s largest blockchain trade association. Our mission is to promote the acceptance and use of digital assets and blockchain technology, and we are supported by a diverse membership that represents the blockchain industry globally.

Through education, advocacy, and close coordination with policymakers, regulatory agencies, and industry across various jurisdictions, our goal is to develop a pro-growth legal environment that fosters innovation, job creation, and investment. We represent the world’s leading innovators, operators, and investors in the blockchain ecosystem, including leading edge start-ups, software companies, global IT consultancies, financial institutions, insurance companies, law firms, and investment firms. Consequently, the Chamber and its members have a significant interest in blockchain and distributed ledger technology.

## **I. Introduction**

Blockchains provide an unprecedented ability to track and trace transactions historically, both by token and by wallet/account. Chamber members Chainalysis, Elliptic, CipherTrace, CoolBitX, and others are performing cutting-edge analytics with blockchain technology and helping

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<sup>1</sup> FIN. CRIMES ENF’T NETWORK, “Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies,” FIN-2019-G001 (May 9, 2019) (hereinafter, 2019 Guidance).

governments and businesses (including financial institutions and governments) to identify and mitigate risk and enable companies to alert law enforcement. Unlike cross-border wire transfers, blockchains perfectly preserve the provenance of financial transactions and do not suffer from data integrity issues.

Additionally, the Blockchain Alliance, co-founded by the Chamber of Digital Commerce in 2015, is an important medium for sharing information and education between the public and private sector to support law enforcement objectives. With more than 100 members, it continues to serve an important function. Policy makers should take note of the proactive work being done by this industry to ensure that law enforcement is knowledgeable about the industry and the technology, and that it can achieve its objectives, thus creating an orderly functioning of the marketplace. This work is being utilized by multiple agencies within the government and can be further enhanced to reach and assist more participants.

The ability to trace transactions back through time is a technological advancement and has already provided a boon to law enforcement and its efforts to detect and prosecute criminals. Specifically, with respect to Bank Secrecy Act (“**BSA**”) and Office of Foreign Assets Control (“**OFAC**”) compliance obligations, it can support Know Your Customer (“**KYC**”) management in ways that ensure the characteristics of the customer, including beneficial ownership, are well-established on a blockchain. Further, blockchain-enabled KYC, customer due diligence (“**CDD**”), and transaction monitoring can enhance the Section 314 process – both under Section 314(a) as well as 314(b) (communications between institutions and law enforcement as well as among institutions, respectively) to ensure accurate, comprehensive data. It can also strengthen (real time) auditability of financial transactions between counterparties; facilitate lookbacks given the transparency and immutability of the ledger; and facilitate practical, technology-enabled KYC/CDD efforts, ongoing transaction monitoring, transaction tracking, and auditability/reporting.

Our members are committed to compliance with AML and sanctions laws and regulations, as applicable. We have been active participants in the Financial Action Task Force (“**FATF**”) process to adopt Recommendations applicable to virtual assets and virtual asset service providers. Our members have also dedicated significant resources to developing, implementing, and effectively maintaining AML compliance programs committed to promoting law enforcement objectives. We look forward to collaborating with FinCEN in further endeavors to enhance its law enforcement objectives in a meaningful and effective way.

## **II. Executive Summary**

Recently, FinCEN issued the 2019 Guidance on existing regulation for various business models involving Convertible Virtual Currencies (“**CVCs**”) with the goal of assisting certain financial institutions in complying with their existing obligations under the Bank Secrecy Act (“**BSA**”) and its amendments and implementing regulations. The 2019 Guidance itself purports not to establish any new regulatory expectations or requirements, but rather claims simply to consolidate current

guidance, rulings, and interpretations, including prior guidance issued in 2013 (the “**2013 Guidance**”),<sup>2</sup> that FinCEN believes apply to certain businesses using CVCs.

A close reading of the 2019 Guidance, however, reveals that FinCEN has introduced a number of new concepts, some of which have significant implications for entities that utilize CVCs as part of their business model. This letter, first, provides suggestions for FinCEN to consider when issuing more detailed guidance on these topics in the future. In addition, it addresses the assertion that the Funds Transfer Rule<sup>3</sup> and Funds Travel Rule<sup>4</sup> (collectively, the “**Rules**”) apply to entities involved in a number of types of CVC transactions.

These comments provide the following:

- Commentary on the description of custodial and non-custodial wallets;
- Suggestions for the treatment of DApps;
- Analysis of the applicability of the Funds Transfer and Funds Travel Rules, finding that they do not apply to transactions involving convertible virtual currencies, and urging FinCEN to correct this circumstance by promptly issuing a notice of proposed rulemaking and seek industry input and comment; and
- Additional considerations to enhance BSA/CFT objectives.

### III. Description of Wallets (Section 4.2)

As a threshold matter, we generally agree with the distinction between hosted and unhosted wallets. FinCEN's focus on custodial versus non-custodial solutions is the correct prism through which to conduct this analysis. Nevertheless, we suggest that FinCEN refine the use of terminology like “store” and “transfer.” While these are helpful industry colloquialisms to make the technology more accessible to laypeople, they are not accurate representations of how wallets or blockchains/distributed ledgers work. A wallet is a piece of software that someone uses in order to access the private key necessary to transfer ownership of a CVC that constitutes record of ownership and is maintained using a blockchain or other distributed ledger. The participant can use his or her wallet to transfer ownership over the CVC but does not transfer the CVC itself because CVCs are not tangible items that can be transferred. Nor are they stored anywhere—perhaps one could argue that they are stored on each copy of the ledger, but even then they only exist insofar as every copy of the ledger reaches a consensus that they exist, and so any single copy doesn't actually store it.

Rather than discuss storage and transfer, we suggest that access to the wallet's private key is the determining factor—it provides a more clear line that still addresses FinCEN's policy concerns while providing more accurate guidance for industry that is more likely to stand the test of time and the pace of innovation.

Further, we are observing an increasing blending of the concepts as to what constitutes a hosted and unhosted wallet, where the hosted wallet has the ability to freeze or return funds

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<sup>2</sup> FIN. CRIMES ENF'T NETWORK, “Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies,” FIN-2013-G001 (Mar. 18, 2013) (hereinafter, 2013 Guidance).

<sup>3</sup> 31 C.F.R. § 1010.410(e).

<sup>4</sup> 31 C.F.R. § 1010.410(f).

(and backed by insurance) but allows the user full autonomy on how they spend their funds. A focus on access to the private key, and therefore the authority to spend funds or otherwise authorize the transfer of funds' ownership, provides greater clarity in this scenario than the distinction that appears in the 2019 Guidance.

#### **IV. Refinements to the Discussion of DApps (Section 4.4)**

The development and use of DApps is increasing and will deserve more detailed guidance. Much like the discussion around hosted and unhosted wallets, FinCEN's Guidance regarding DApps can be improved by focusing on whether a DApp is custodial or non-custodial and the importance of access to the private key.

If a DApp is custodial and allows users to engage in money transmission services, FinCEN should analyze it through the same lens as a crypto ATM and a hosted wallet. Such a centralized and custodial solution would more appropriately be called a "CApp" ("centralized application").

If a DApp is non-custodial and allows users to engage in money transmission activity, FinCEN should analyze it through the same lens as an unhosted wallet (where BSA obligations depend on how a user uses the DApp) or a Decentralized Exchange (where the network services exemption applies for permissionless, non-custodial solutions).<sup>5</sup>

#### **V. Applicability of the Funds Travel and Funds Transfer Rules (Section 2.1)**

As discussed below, the Rules, as currently written, do not apply to transactions involving CVC. The express language of the Rules excludes their application to CVC transactions, and the assertions made in the 2019 Guidance are contradicted by law and prior statements of FinCEN officials. Moreover, **any attempt to expand the scope of the Rules to cover CVC transactions should not be made through interpretive guidance, but instead should be done through formal notice-and-comment rulemaking to ensure industry perspectives are heard.** We therefore urge FinCEN to correct this circumstance immediately by issuing a notice of proposed rulemaking so that industry may participate to ensure a travel rule is meaningful and effective for relevant transfers of CVC as expeditiously as possible.

##### **A. The Rules Do Not Apply to CVC Transactions**

###### **1. The Text of the Rules Does Not Permit Their Application to CVC Transactions**

The text of the Rules does not extend to transactions involving CVCs. Both FinCEN's prior analysis on this point and a comparison to a relevant section of the Uniform Commercial Code (the "**UCC**") demonstrate that the Rules apply only to transactions involving fiat currencies.

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<sup>5</sup> See FIN-2014-R001 (Jan. 30, 2014) (explaining how a Bitcoin miner will not have MSB registration obligations if he or she uses the bitcoin mined for "purchasing goods or services for [his or her] own use"); see also FIN-2014-R002 (Jan. 30, 2014) (what is material to FinCEN's BSA analysis is how [a] person "uses the convertible virtual currency [], and for whose benefit").

Broadly speaking, the Rules require financial institutions, which include entities that qualify as money services businesses,<sup>6</sup> to record certain information relating to a “transfer of funds” and to transmit certain information relating to a “transfer of funds” to the recipient financial institution, respectively.

While “funds” is not itself defined in FinCEN’s regulations, the plain language of the regulations clearly state—as FinCEN itself has repeatedly recognized—that CVCs fall outside the definition of “funds.” Specifically, as the 2013 Guidance explained, “[a] person’s acceptance and/or transmission of convertible virtual currency cannot be characterized as providing or selling prepaid access *because prepaid access is limited to real currencies.*”<sup>7</sup> In a footnote, FinCEN elaborated:

FinCEN’s regulations define “prepaid access” as “access to *funds* or the value of *funds* that have been paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number.” 31 C.F.R. § 1010.100(ww). Thus, “prepaid access” under FinCEN’s regulations is limited to “access to *funds* or the value of *funds.*” If FinCEN had intended prepaid access to cover funds denominated in a virtual currency or something else that substitutes for real currency, it would have used language in the definition of prepaid access like that in the definition of money transmission, which expressly includes the acceptance and transmission of “other value that substitutes for currency.” 31 C.F.R. § 1010.100(ff)(5)(i).<sup>8</sup>

Put another way, because money transmission (which does apply to CVCs) is defined to mean “the acceptance of currency, funds, *or other value that substitutes for currency* from one person and the transmission of currency, funds, *or other value that substitutes for currency* to another location or person by any means,”<sup>9</sup> then “funds” *must* have a different meaning than “other value that substitutes for currency”—otherwise, “other value that substitutes for currency” would be surplusage.<sup>10</sup> As FinCEN explained in the 2013 guidance, CVCs are “other value that substitutes for currency.”<sup>11</sup> They therefore cannot be “funds.”

Further, the Rules use terms that deliberately parallel those used in Article 4A of the Uniform Commercial Code (“**UCC 4A**”).<sup>12</sup> Specifically, as FinCEN noted in its FAQs regarding the Rules:

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<sup>6</sup> See 31 C.F.R. § 1010.100(t)(3). As discussed below, FinCEN has previously indicated that certain businesses involved in CVC transactions qualify as money services businesses. See 2013 Guidance *supra* note 2 at 3.

<sup>7</sup> *Id.* at 5 (emphasis added).

<sup>8</sup> *Id.* at 5 n.18 (emphasis added).

<sup>9</sup> 31 C.F.R. § 1010.100(ff)(5)(i)(A) (emphasis added).

<sup>10</sup> See “Surplusage canon,” Black’s Law Dictionary (11th ed. 2019) (“The doctrine that, if possible, every word and every provision in a legal instrument is to be given effect.”).

<sup>11</sup> 2013 Guidance *supra* note 2 at 1.

<sup>12</sup> FIN. CRIMES ENFT NETWORK, “Funds ‘Travel’ Regulations: Questions & Answers,” FIN-2010-G004 (Nov. 9, 2010); see also Amendment to the Bank Secrecy Act Regulations Relating to Recordkeeping for Funds Transfers and Transmittals of Funds by Financial Institutions, 60 Fed. Reg. 220, 221 (Jan. 3, 1995) (“A number of these new definitions [introduced into the Rules] applicable to banks were identical to the terms used in Uniform Commercial Code Article 4A (UCC 4A).”).

[The Funds Travel Rule] uses terms that are intended to parallel those used in UCC Article 4A, but that are applicable to all financial institutions, as defined within the Bank Secrecy Act's implementing regulations.

Terms for all financial institutions

Transmittal of funds

Transmittal order

UCC 4A terms

Funds transfer

Payment order<sup>13</sup>

Significantly, the term “funds transfer,” as used in UCC 4A, is defined as “the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order.”<sup>14</sup> In turn, a “payment order” is “an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money.”<sup>15</sup> “Money” is “a medium of exchange currently authorized or adopted by a domestic or foreign government” and therefore is limited to fiat currency.<sup>16</sup> Because FinCEN does not consider virtual currency to have legal tender status,<sup>17</sup> fiat currency or money cannot be virtual currency. Because virtual currency is not “money” as defined under UCC 4A, and the terms “funds transfer” and “payment order” in UCC 4A directly correspond to the terms “transmittal of funds” and “transmittal order” under the Rules (which expressly apply to “money”), the Rules as currently drafted cannot apply to transactions involving CVC.<sup>18</sup>

## 2. The 2019 Guidance Does Not Support FinCEN’s Conclusions

In asserting the applicability of the Rules to transactions involving CVC, the 2019 Guidance claims: “Because a transmittal order involving CVC is an instruction to pay ‘a determinable amount of money,’ transactions involving CVC qualify as transmittals of funds, and thus may fall within the Funds Travel Rule.”<sup>19</sup> FinCEN provides no analysis for this conclusory assertion. Nor could it—even setting aside the contextual and legal analysis above, the conclusion is inconsistent on its face.

First, the supposition of “a transmittal order involving a CVC” necessarily assumes that there could be a “transmittal order,” as that term is defined,<sup>20</sup> “involving a CVC.” As discussed above, a CVC transaction cannot involve a “transmittal order” under the Rules. The 2019 Guidance attempts to ignore this problem by simply asserting it is so, without providing legal analysis.

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<sup>13</sup> FIN. CRIMES ENFT NETWORK, “Funds ‘Travel’ Regulations: Questions & Answers,” FIN-2010-G004 (Nov. 9, 2010).

<sup>14</sup> UCC § 4A-104(a).

<sup>15</sup> UCC § 4A-103(a)(1).

<sup>16</sup> UCC § 1-201(b)(24).

<sup>17</sup> See 2013 Guidance *supra* note 2 at 1 (“[V]irtual currency does not have legal tender status in any jurisdiction.”); 2019 Guidance at 7 (“The term ‘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 C.F.R. § 1010.100(m), including legal tender status.”).

<sup>18</sup> See FIN-2010-G004, *supra* note 7.

<sup>19</sup> *Id.* The quoted section, referencing “a determinable amount of money,” does not appear in the Funds Travel Rule, but rather is from the definition of “transmittal order.” See 31 C.F.R. § 1010.100(eee).

<sup>20</sup> 31 C.F.R. § 1010.100(eee).



Second, it is in no way evident that “a transmittal order involving a CVC” is “an instruction to pay ‘a determinable amount of money.’” “Money” is not a term that is defined anywhere in the Rules or otherwise in the relevant FinCEN regulations. As noted above, “money” is defined in UCC4A, however, as “a medium of exchange currently authorized or adopted by a domestic or foreign government.”<sup>21</sup> This definition would exclude any CVC not “authorized or adopted by a domestic or foreign government”—which is to say, essentially all of them. Moreover, if “funds” cannot include convertible virtual currency as stated by FinCEN in its 2013 Guidance, how can “money” now include convertible virtual currency, when “funds” is a broader term than “money”?

Third, not all transmittal orders are transmittals of funds. While the 2019 Guidance assumes this to be the case, the text of the definitions of the two terms and the text of the Rules themselves both provide otherwise. The definitions of the two terms in FinCEN’s regulations describe distinct features, with “transmittal order” forming a piece of the definition of “transmittal of funds.”<sup>22</sup> Additionally, the Travel Rule, by its text, applies to “any transmittal order *for a transmittal of funds*,”<sup>23</sup> necessarily recognizing a category of transmittal orders that are *not* transmittals of funds;<sup>24</sup> the Transfer Rule similarly applies to a transmittal order “with respect to a transmittal of funds.”<sup>25</sup> Accordingly, even if a “transmittal order involving a CVC” could exist, it does not necessarily follow that a “transmittal of funds” involving a CVC always exists. The 2019 Guidance again assumes otherwise, applying the Rules to all CVC transactions, yet fails to explain how this is possible or to provide the basis for this analytic leap.

### **3. While the BSA and its Implementing Regulations Applicable to Money Transmitters Apply to Certain Persons Transacting in CVC; Not All Requirements Apply to All Transactions**

It is important to note that, while the 2013 Guidance expressly applied AML program requirements under the BSA to certain money transmitters transacting in CVC, not all AML program requirements apply to all CVC transactions. For example, a money transmitter must file suspicious activity reports (“**SARs**”) when it “knows, suspects, or has reason to suspect” that the transaction involves funds derived from illegal activity, is designed to evade AML requirements, services no business or apparent lawful purposes, or otherwise is using the business to facilitate illicit activity.<sup>26</sup> Necessarily, not all transactions will be suspicious, and thus not all transactions will necessitate the filing of a SAR.

Perhaps even more telling, CVC transactions are not subject to the currency transaction reporting (“**CTR**”) requirement. CTRs must be filed for “each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than \$10,000.” As above, currency or other payment does not

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<sup>21</sup> UCC § 1-201(b)(24) (“‘Money’ means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.”).

<sup>22</sup> See 31 C.F.R. § 1010.100(ddd), (eee).

<sup>23</sup> 31 C.F.R. § 1010.410(f) (emphasis added).

<sup>24</sup> See “Surplusage canon,” Black’s Law Dictionary (11th ed. 2019) (“The doctrine that, if possible, every word and every provision in a legal instrument is to be given effect.”).

<sup>25</sup> 31 C.F.R. §§ 1010.410(e), (e)(1)(i)

<sup>26</sup> 31 C.F.R. §§ 1022.320(a).

include CVC. Under Secretary of the Treasury Cohen expressly recognized this fact in a speech in March of 2014 when he said:

The regulations for the two [cash and CVC], however, diverge when it comes to transactions over a certain dollar or dollar-equivalent threshold. Vendors processing cash transactions are required to report transactions involving more than \$10,000 in cash to FinCEN, while those processing virtual currency transactions are not.<sup>27</sup>

Virtual currency is not considered “cash,” currency, or other payment, and thus is not subject to the CTR filing requirement. How, then, can CVC be considered funds or money, when it is not considered currency or payments or funds? The answer is that it cannot be simply deemed to be funds or money without appropriate regulatory process under the Administrative Procedure Act.

## **B. FinCEN’s Prior Statements Are Inconsistent with the Application of the Rules to CVC Transactions**

FinCEN needed to amend its regulations to capture CVCs within the definition of money transmitter. Prior to 2011, the definition of money transmitter was:

(A) Any person, whether or not licensed or required to be licensed, who engages as a business in accepting *currency, or funds denominated in currency*, and transmits *the currency or funds, or the value of the currency or funds*, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or

(B) Any other person engaged as a business in the transfer of funds.<sup>28</sup>

On July 21, 2011, FinCEN amended the definition of money transmitter, among other things, to include “or other value that substitutes for currency.”<sup>29</sup> In public statements, FinCEN officials have stated that, prior to these amendments in 2011, it did not have the capacity to regulate entities transacting in CVCs. For example, then-director of FinCEN, Jennifer Shasky Calvery, recognized in 2013 testimony before the Senate Committee on Homeland Security and Government Affairs that the term “funds” did not include CVCs. Her testimony defended the proposition that *only* through rule changes promulgated in July 2011 had FinCEN been able to regulate CVCs: “Specifically, the new rule on money services businesses added the phrase ‘other value that substitutes for currency’ to the definition of ‘money transmission services.’ And since a convertible virtual currency either has an equivalent value in real currency, or acts a substitute for real

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<sup>27</sup> Statement of David Cohen, Undersecretary of the Treasury for Terrorism and Financial Intelligence, “Addressing the Illicit Finance Risks of Virtual Currency” (Mar. 18, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl236.aspx>.

<sup>28</sup> Transfer and Reorganization of Bank Secrecy Act Regulations, 75 Fed. Reg. 65,806, 65,815 (Oct. 26, 2010) (emphasis added).

<sup>29</sup> Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 Fed. Reg. 43,585, 43,592 (July 21, 2011).



currency, it qualifies as ‘other value that substitutes for currency’ under the definition of ‘money transmission services.’”<sup>30</sup>

As expressly acknowledged by the Director of FinCEN, “currency, funds, or the value of funds” cannot include CVC. This, in combination with the fact that “funds” are limited to “money” and “real currencies” pursuant to FinCEN rulemaking tying these terms to UCC Article 4A, the 2013 Guidance, FinCEN FAQs, and multiple statements by senior officials at the Department of Treasury, confirm that prior to the issuance of the Guidance, Treasury did not consider the Rules as applying to transfers of CVC. Because such application required a rule change, a rule change is likewise necessary for the Rules which currently apply to transfers of funds.

### **C. FinCEN Cannot Apply the Rules to CVC Transactions Solely Through Publishing Guidance**

Section 2.1 of the 2019 Guidance represents the first published articulation of the assertion that the Rules apply to CVC transactions. The 2019 Guidance asserts: “Because a transmittal order involving CVC is an instruction to pay ‘a determinable amount of money,’ transactions involving CVC qualify as transmittals of funds, and thus may fall within the Funds Travel Rule.”<sup>31</sup> Notably, the 2019 Guidance does not cite to any prior FinCEN pronouncements or binding authority.<sup>32</sup> Thus, in addition to the substantive deficiencies discussed above, the 2019 Guidance suffers from the procedural shortcoming that federal agencies cannot make new law through guidance.

If FinCEN seeks to expand the definitions in the Rules to encompass CVC transactions, it must do so – and we urge it to do so - through notice-and-comment rulemaking dictated by the Administrative Procedure Act (the “**APA**”), to include formal notice in the Federal Register of the legal authority under which the rule is being made<sup>33</sup> and the inclusion of interested parties in the rulemaking process through the submission of written data, views, or arguments.<sup>34</sup> These requirements are for the benefit of both the agencies themselves and the public, so that agency regulations that carry the force of law are the product of reasoned and well-informed deliberations.

Recently, the White House issued two Executive Orders on precisely this issue. The first, EO 13891, requires agencies to set up processes for issuing and publicizing guidance, emphasizing

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<sup>30</sup> Statement of Jennifer Shasky Calvery, Director, Financial Crimes Enforcement Network, United States Department of the Treasury, before the United States Senate Committee on Homeland Security and Government Affairs (Nov. 18, 2013), at 9, <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Calvery-2013-11-18.pdf>. The Undersecretary of the Treasury for Terrorism and Financial Intelligence, under whose purview FinCEN sits, has noted at a more general level that “Existing BSA regulations do not require any recordkeeping or reporting requirements for everyday purchases in either cash or virtual currency. The regulations for the two, however, diverge when it comes to transactions over a certain dollar or dollar-equivalent threshold. Vendors processing cash transactions are required to report transactions involving more than \$10,000 in cash to FinCEN, while those processing virtual currency transactions are not.” Statement of David Cohen, Undersecretary of the Treasury for Terrorism and Financial Intelligence, “Addressing the Illicit Finance Risks of Virtual Currency” (Mar. 18, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl236.aspx>.

<sup>31</sup> *Id.* Note that an order or settlement does not constitute a binding statement of law.

<sup>32</sup> *Id.*

<sup>33</sup> 5 U.S.C. § 553(b)(2).

<sup>34</sup> *Id.* § 553(c).

that guidance should not be substituted for APA rulemaking.<sup>35</sup> The second, EO 13892, states explicitly that, “Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract,” and articulates limitations on agency enforcement actions that rely on previously-issued guidance, among other things.<sup>36</sup>

Interpretive guidance, of the sort the 2019 Guidance purports to be, “lack[s] the force of law”<sup>37</sup> and is appropriate solely for clarifying ambiguous language, not introducing new substantive requirements. Allowing an agency to modify the meaning of the language of a regulation, as the 2019 Guidance attempts to do, would “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”<sup>38</sup> Indeed, the Office of Information and Regulatory Affairs (“OIRA”) has expressly noted:

concern about whether agencies are properly observing the notice-and-comment requirements of the APA . . . . The courts, Congress, and other authorities have emphasized that rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with the APA’s notice-and-comment requirements, regardless of how they initially are labeled.”<sup>39</sup>

To that end OIRA has mandated that:

when an agency prepares a draft of an economically significant guidance document, the agency shall:

- a. Publish a notice in the Federal Register announcing that the draft document is available;
- b. Post the draft document on the Internet and make it publicly available in hard copy (or notify the public how they can review the guidance document if it is not in a format that permits such electronic posting with reasonable efforts);
- c. Invite public comment on the draft document; and
- d. Prepare and post on the agency’s Web site a response-to-comments document.<sup>40</sup>

A “significant guidance document” is defined as one that may be reasonably anticipated to “adversely affect in a material way the economy, a sector of the economy, productivity,

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<sup>35</sup> Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

<sup>36</sup> Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 15, 2019).

<sup>37</sup> *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This principle has been reflected in recent statements by the Administration. See, e.g., Department of Justice, Memorandum: Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> (“[G]uidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department [of Justice] will determine compliance with existing regulatory or statutory requirements.”).

<sup>38</sup> *Id.* at 588.

<sup>39</sup> Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,433 (Jan. 25, 2007).

<sup>40</sup> *Id.* at 3,440.

competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”<sup>41</sup> Given the impact on companies leveraging blockchain solutions—a category that encompasses an increasing number of industries and sectors across the domestic and global economies—FinCEN’s announcement that it believes the Rules apply to CVC transactions appears to constitute an economically significant guidance document. For that reason alone, FinCEN should not seek to expand the applicability of the Rules through guidance, as it has done in the 2019 Guidance, but should seek to formally amend the Rules through the APA notice-and-comment process, thus allowing the affected industry actors to participate in developing effective compliance requirements to achieve FinCEN’s objectives.

#### **D. Considerations When Transferring Data to Non-Compliant Exchanges**

While the FATF has adopted Recommendations that include a requirement to implement the Wire Transfer provisions contained at FATF Recommendation 15, we believe that specific details must be thought through before requiring U.S. exchanges to transfer personally identifiable information to non-U.S. exchanges that are not yet required to receive it, and may not be capable of receiving or protecting from unlawful exposure such information.

The banking sector had decades to construct the SWIFT system as a mechanism for governance over the correspondent banking industry. While the virtual currency industry likely will not need decades to construct a similar system, the monumental importance of this obligation as well as the need to protect the financial and personal privacy of consumers, dictates careful consideration over the government structure that all participants will have to follow. We cannot create a system whereby some participants collect and transfer information to entities in countries that can not, or do not, protect such information or use it consistent with U.S. principles and objectives. As a result, we urge that, through the notice-and-comment process, industry and FinCEN work together to develop a system that is consistent with the ideals of the Rules, but perhaps works even more effectively to help deter crime.

### **VI. Additional Considerations Not Raised in the Guidance**

We appreciate that the 2019 Guidance is intended to provide detailed perspective on the numerous developments in the industry. We would like to take this opportunity to provide additional perspectives around AML/CFT objectives to help further FinCEN’s own deliberations on BSA obligations in this quickly evolving industry.

#### **A. Implications for Financial Institutions Broadly**

Advancements in technology have other implications for AML/KYC obligations, and numerous institutions are engaging in this new marketplace. Financial institutions such as banks lack meaningful guidance to engage in this area and offer CVC-related financial products and services. FinCEN and the prudential financial regulators will need to consider how to apply these AML and associated KYC requirements to regulated financial institutions engaging in virtual currency-related activities, and the Chamber urges them to engage with market participants in doing so.

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<sup>41</sup> *Id.* at 3,439.

## B. Modernization of KYC

Technological developments are rendering traditional notions of KYC obsolete and ineffective. These developments can enable the creation of a digital KYC utility that would serve to verify identity of customers across financial institutions, rather than the current approach requiring financial institutions to obtain and verify the name, date of birth, physical address, and telephone number before onboarding a client. For many, these data points no longer authenticate that a customer is who they say they are. A KYC utility could greatly enhance compliance by financial institutions and permit them to elevate more swiftly potential indicia of fraudulent or illicit behaviors. As a result, we recommend permitting such a solution, which could require modification to current agency guidance.

## C. Sanctions Compliance

The OFAC designation of individuals and their associated Bitcoin and Litecoin addresses raises questions in the context of OFAC sanctions.<sup>42</sup> Sanctions obligations are imposed more broadly than traditional notions of AML because they prohibit transactions or dealings in all property or “interests in” property of a designated person. It is through this extensive authority that OFAC has made clear that U.S. persons cannot transact or deal in the Venezuelan petro.<sup>43</sup> Still, these issues merit your attention because of the interplay at a practical implementation level between AML and OFAC sanctions compliance.

However, the new guidance with respect to blocking property needs further consideration. For example, if a transaction involving a virtual currency indicates in its transaction history that the specific asset at one point in the past was held by a prohibited Iranian entity (or wallet), must that financial institution block the current transaction? Arguably they should not; however, businesses tend to (and should) take a very cautious approach when it comes to sanctions compliance. This approach, not possible with fiat currency because fiat cannot be traced as directly as some virtual currencies, nevertheless could restrict adoption of these product/service offerings by financial institutions. This and other consequences of OFAC’s recent guidance need to be further explored to prevent unintended consequences in a digital environment.

The standards determined around these issues will have a large impact on fungibility in the token market, and ultimately the widespread adoption of tokens as a means of exchange or evidence of value or ownership. The Chamber and the government alike share the goal of preventing illicit finance and bad actors from accessing the financial system. We should strive to achieve these goals in a manner that does not impede the market’s development or disincentivize the use of digital tokens and doing this requires industry and regulator cooperation. The Chamber recommends a forum like the Bank Secrecy Act Advisory Group (BSAAG) or similar arrangement to enable a thorough discussion and consideration of these issues.

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<sup>42</sup> Press Release, Treasury Designates Iran-Based Financial Facilitators of Malicious Cyber Activity and for the First Time Identifies Associated Digital Currency Addresses (Nov. 28, 2018), <https://home.treasury.gov/news/press-releases/sm556>.

<sup>43</sup> Exec. Order No. 13,827, 83 Fed. Reg. 12,469 (Mar. 21, 2018).

## VII. Conclusion

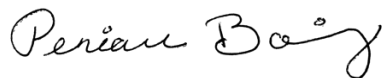
Compliance with AML obligations is of utmost importance to our members. Those whose activities trigger AML compliance programs and associated recordkeeping and reporting requirements have and will continue to vigorously maintain the appropriate programs to deter illicit activity from entering their platforms. FinCEN has been a key partner in this effort – developing early and adaptable guidance over time that has helped the industry better understand when its obligations are triggered under the BSA. The 2019 Guidance is another example of the agency’s measured approach to delivering important feedback as the industry develops.

In one discreet area, however, the Funds Travel and Transfer Rules, the agency must take additional steps to ensure the appropriate application of those Rules. We urge FinCEN to develop and publish a notice of proposed rulemaking to begin that process as expeditiously as possible. We are fully aware that the FATF has already adopted the wire transfer recommendations for virtual asset service providers, and the industry will continue to actively pursue governance and technological solutions to meet those objectives which will be adopted and applied around the globe. Nevertheless, the APA exists to ensure the industry is aware of its obligations and that those obligations are promulgated appropriately – not through enforcement actions and settlement agreements but through amendment to regulations. The industry is a valuable voice in developing a regulation that will achieve law enforcement objectives, perhaps even more effectively, during a rulemaking process. We look forward to achieving even better policy and enforcement objectives.

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Thank you for your consideration of these issues. We are available to discuss these at your convenience.

Very truly yours,



Perianne Boring

cc: Jamal El-Hindi, Deputy Director