

November 27, 2020

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Submitted via email: regs.comments@federalreserve.gov

Re: 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 [Docket No. FINCEN-2020-0002; Docket RIN 1506-AB41]

Dear Sir or Madam,

Thank you for the opportunity to comment on this proposed rule. I am an attorney working in the anti-fraud compliance sector, a certified bitcoin professional,¹ and a certified anti-money laundering specialist.^{2,3} Convertible virtual currencies' (aka cryptocurrencies; "CVC") usage, particularly in the US, remain nascent and have been subject to regulatory uncertainty, including potentially overly broad regulatory regimes and guidance that have not kept pace with ever-evolving technological advances.

To that extent, I am pleased to provide comment on FINCEN Docket No. 2020-0002 / RIN 1506-AB41 (the "proposed rule"). I look forward to seeing laws implemented that support the broad and legal use of CVCs, both within the US and abroad. Equally important, I hope to see the Financial Crimes Enforcement Network ("FinCEN"), the Board of Governors of the Federal Reserve System (the "Board"), and other relevant US governmental entities embrace a sophisticated regulatory understanding of CVCs.

I. Defining CVCs Outside of the UCC Requires Greater Clarity

Existing regulations under the Recordkeeping Rule require banks⁴ and nonfinancial institutions⁵ to collect and retain information related to funds transfers⁶ and transmittals of funds⁷ greater than \$3,000. The Travel Rule⁸ works in tandem with the Recordkeeping Rule by requiring entities subject to the Recording Rule to share certain information with other financial institutions where a funds transmittal involves more than one financial institution.^{9,10}

¹ CryptoCurrency Certification Consortium.

² Association of Certified Anti-Money Laundering Specialists.

³ This regulatory comment wholly reflects my opinions and views alone and do not express nor represent the views or opinions of my employer or any other corporate or organizational affiliation that I may have.

⁴ 31 CFR § 1020.410(a).

⁵ 31 CFR § 1010.410(e).

⁶ 31 CFR § 1010.100(w).

⁷ 31 CFR § 1010.1000(ddd).

⁸ 31 CFR § 1010.410(f).

⁹ See <https://www.fincen.gov/sites/default/files/advisory/advisu7.pdf>.

¹⁰ See also <https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/09>

The proposed rule seeks to define “money” as this term relates to payment orders¹¹ and transmittal orders,¹² in such a way as

to make explicitly clear that both payment orders and transmittal orders include any instruction by the sender to transmit CVC or any digital asset having legal tender status to a recipient

thereby superseding the UCC definition of “money” for purposes of the Recordkeeping Rule and Travel Rule.^{13,14} The proposed rule correctly notes that CVCs do not fit neatly into a plain text reading of the UCC’s existing definition of “money.” The relevant section of the Federal Register states that terms “that are not defined specifically in the regulation, but are defined in relevant provisions of the UCC, will have the meaning given them in the UCC, unless otherwise indicated.”¹⁵ Though the relevant regulations do not define “money,” the Board and FinCEN correctly recognize that the proposed rule’s changes cannot rely on the UCC as the relevant UCC subsection defines “money” as 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.¹⁶

Were the proposed rule not to expand the definition of “money” to include CVCs while still attempting to fully and explicitly apply both the Recordkeeping Rule and the Travel Rule to CVCs, the proposed rule would be susceptible to attack based upon an incorrect reading of the UCC since CVCs have not been embraced by the US government, though certainly some other countries have advanced laws guiding and promoting digital assets. That is to say that an amendment to the definitional change to “money” would be required (for the proposed rule’s purposes) since any regulatory application could not rely on the UCC’s definition of money and contemporaneously rely upon an expanded definitional application of “money” to encompass CVCs so long as the UCC’s definition’s second element requires a “medium of exchange *currently authorized or adopted* by a domestic or foreign government.” To date, the US government has not explicitly authorized or adopted CVCs.¹⁷

As such, the proposed rule seeks to build upon the UCC definition by defining “money,” specifically in relation to the Recordkeeping and Travel Rules’ “payment order” and “transmittal order,” to include

¹¹ 31 CFR § 1010.100(II).

¹² 31 CFR § 1010.100(eee).

¹³ <https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and#footnote-36-p68010>

¹⁴ <https://www.law.cornell.edu/ucc/1/1-201>

¹⁵ <https://www.govinfo.gov/content/pkg/FR-1995-01-03/pdf/94-31977.pdf>

¹⁶ <https://www.law.cornell.edu/ucc/1/1-201>

¹⁷ Ibid.

(1) a medium of exchange currently authorized or adopted by a domestic or foreign government, including any digital asset that has legal tender status in any jurisdiction and (2) CVC.¹⁸

Additionally, “CVC” would be defined as “a medium of exchange (such as cryptocurrency) that either has an equivalent value as currency, or acts as a substitute for currency, but lacks legal tender status.”¹⁹ Two issues arise from the proposed definitional revision to “money” and the additional definition for “CVC.”

a. “CVC” Should Not Be Used as an Acronym Ever Unless Referring to the Specific Token Of the Same Name

This comment strongly urges FinCEN and the Board reconsider the use of “CVC” when referring to cryptocurrencies, virtual assets, digital currency, or otherwise.²⁰ Various government entities have embraced the acronym CVC to mean convertible virtual currency. However, in the cryptocurrency industry, “CVC” may also refer to *Civic* which is a specific Ethereum token that can be bought and sold through various cryptocurrency exchanges.²¹ *Civic* was created by Civic Technologies, Inc., a company which has authored a whitepaper on the token and also built a website dedicated to promoting the token.^{22,23} “Government entities’ use of “CVC” as a general term suggests a poorly refined understanding of the various assets currently available and could sow mistrust with regulatory bodies viewed as not understanding the industry which they regulate.

b. The Proposed Definition of “Money” is Subject to Misinterpretation

Tacking on “including any digital asset that has legal tender status in any jurisdiction and (2) CVC” to the UCC’s definition of “money” does not insulate the definition from misinterpretation. As explained above, the UCC’s definition requires the “medium of exchange” to be “currently authorized or adopted by a domestic or foreign government.” These elements of the definition are not separable from the element whose text reads “including any digital asset” This “including any digital asset” element requires said digital asset to be “currently authorized or adopted by a domestic or foreign government.” In order for this definition to function properly, the proposed rule would be required to either (1) eliminate the UCC’s second element requiring current authorization or adoption, or (2) propose to authorize or adopt certain CVCs through official governmental recognition.

Thus, the plain meaning of the text is cause for misinterpretation. In particular, the text could be easily misinterpreted by individuals and / or entities operating in the CVC space who are not learned in the law as questions could arise including whether a CVC is subject to the Recordkeeping and Travel Rules if the CVC itself is not officially authorized or adopted by the

¹⁸ <https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and#footnote-36-p68010>

¹⁹ *Ibid.*

²⁰ This comment will continue to use the defined term “CVC” to mean cryptocurrencies or other digital assets in order to preserve consistency with the relevant proposed rule.

²¹ <https://www.coinbase.com/price/civic>

²² <https://tokensale.civic.com/CivicTokenSaleWhitePaper.pdf>

²³ <https://www.civic.com/>

US government. If the definition of “money” is to be refined in order to be clearly integrated into the Recordkeeping and Travel Rules, the UCC’s definition cannot be a starting point.

The proposed rule also seeks to define “CVC” as one of the following:²⁴

- A medium of exchange (such as cryptocurrency) that either has an equivalent value as currency; or
- Acts as a substitute for currency, but lacks legal tender status

Under subsection B titled “Definition of ‘Money,’” the proposed rule indicates that the definition of “money” as it relates to payment orders and transmittal orders would be revised so as to “explicitly apply to . . . transactions in CVC and digital assets having legal tender status.”²⁵ However, the proposed definition seeks to include in its definition of CVC “a substitute for currency, but lacks legal tender status.”²⁶ The proposed rule’s supporting argument and its proposed definition are incongruent to the extent that the former applies to “digital assets having legal tender status” while the latter folds into its definition CVCs that lack “legal tender status.”²⁷ Here, the proposed rule contradicts itself. Regulations rooted in this contradiction should not be promulgated with the existing supporting propositions reflected in the proposed rule.

II. The Proposed Definition of “Money,” in Conjunction with a Lower Reporting Threshold, is Overly Broad

FinCEN has previously issued guidance indicating that “certain business models” operating in the CVC space are subject to money services businesses (“MSBs”)²⁸ registration.²⁹ MSBs are, in turn, a subset of non-bank financial institutions (“NBFIs”).³⁰ FinCEN has previously indicated that the determination as to whether “certain business models” qualify predicates on FinCEN’s own fact-specific determinations, , thereby ensuring broad oversight into the CVC industry as a whole.³¹

The proposed rule correctly notes that NBFIs are subject to the Recordkeeping and Travel Rules. MSBs must register with FinCEN, utilize an anti-money laundering policy, designate a compliance officer, file SARS and currency transaction reports for transfers over \$10,000, and adhere to record keeping requirements.³² None of these requirements are necessarily burdensome in isolation or in combination. However, because of FinCEN’s prior guidance related to “certain business models,” which determines whether CVC transactions and operations are required to register as MSBs, the proposed rule’s threshold is far too low because it too broadly cuts across the CVC industry.

²⁴ <https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and#footnote-7-p68006>

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ <https://www.fincen.gov/money-services-business-definition>

²⁹ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>

³⁰

[https://bsaamlffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/25# ~:text=Nonbank%20Financial%20Institution s%E2%80%9494Overview,Objective.&text=NBFIs%20are%20broadly%20defined%20as,of%20entities%20as%20financial%20institutions.](https://bsaamlffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/25#~:text=Nonbank%20Financial%20Institution s%E2%80%9494Overview,Objective.&text=NBFIs%20are%20broadly%20defined%20as,of%20entities%20as%20financial%20institutions.)

³¹ <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>

³² <https://bitcoinmagazine.com/articles/op-ed-understanding-latest-fincen-guidance-cryptocurrencies>

a. Existing FinCEN Guidance is Too Broad

FinCEN has previously provided an advisory stating that “[e]ntities facilitating the transmission of CVCs are required to register with FinCEN as an MSB.”³³ According to a May 2019 *Bitcoin Magazine* article, FinCEN regulates “[a]nyone exchanging or administering a token.”³⁴ These advisory statements and third-party interpretations indicate that FinCEN’s MSB registration requirements are already broad, and arguably overly broad at that. Covered CVC MSBs include a variety of CVC business models including:³⁵

- Peer-to-peer transactions (such as LocalBitcoins/OTC)
- Custodial wallets
- Crypto ATMs
- Mixers
- Crypto payment processors
- Initial coin offerings (ICOs) issues not otherwise registered with the US Securities and Exchange Commission (SEC)

CVC participants operating outside of any conventional business models may also be covered by the existing FinCEN MSB registration requirement. Non-custodial multicurrency wallets, decentralized applications (“DApps”), and decentralized crypto exchanges (“DEXs”) in particular are subject to MSB registration. That these modes which facilitate CVC transactions are required to register as MSBs provide examples of FinCEN’s existing guidance cutting too broadly.^{36,37}

Non-custodial multicurrency wallets, DEXs and, DApps are “business models” under FinCEN’s guidance because “a person using [a software] application to accept and transmit currency, funds, or value that substitutes for currency” is “still subject to BSA obligations,” and therefore would be a business model subject to MSB registration. However, peer-to-peer (“p2p”) applications facilitating atomic swaps or similar should *not* qualify as MSBs to the extent that both provide means for p2p CVC transactions without a third-party intermediary such as a payment processor. Yet, because FinCEN conducts a fact-specific analysis to determine whether CVC participants qualify as MSBs, p2p applications are caught trying to interpret FinCEN guidance. Therefore, because MSB registration is not more clearly delineated, its fluidity and lack of clarity is cause for regulatory uncertainty amongst parties such as p2p’s who should not qualify as MSBs.

For example, if Private Individual A wants to sell a \$3,000 baseball card collection to Private Individual B, and where CVC is used as a medium of exchange via an atomic swap, both individuals could suddenly find themselves subject to MSB requirements, particularly the Recordkeeping and Travel Rules. In context, these financial controls as applied to both parties

³³ <https://www.fincen.gov/sites/default/files/advisory/2019-05-10/FinCEN%20Advisory%20CVC%20FINAL%20508.pdf>

³⁴ <https://bitcoinmagazine.com/articles/op-ed-understanding-latest-fincen-guidance-cryptocurrencies>

³⁵ *Ibid.*

³⁶ <https://blockchainhub.net/decentralized-applications-dapps/>

³⁷ <https://www.prnewswire.com/news-releases/atomex-announces-the-launch-of-atomic-swap-cross-chain-hybrid-dex-for-windows-linux-and-web-platforms-301069496.html>

make little sense because they would effectively be deemed an NBFIs even though they are private individuals engaged in a p2p transaction.

The proposed rule argues that³⁸

[g]enerally, CVCs can be exchanged instantaneously anywhere in the world through peer-to-peer payment systems (a distributed ledger) that allow any two parties to transact directly with each other with the need for an intermediary financial institution [or in this case, an NBFIs]. However, in practice, many persons hold and transmit CVC using a third-party financial institution such as a 'hosted wallet' or an exchange.

The final sentence of the above quote, in particular, demonstrates that the proposed rule's arguments predicate on an understanding of the existing CVC industry, and is not forward looking. While *arguendo* true, the statement sidesteps the reality that non-custodial multicurrency wallets, DApps, and DEXs will continue to gain popularity due to many reasons including convenience, anonymity, and the potential ability to circumvent outdated, overly broad, burdensome regulatory regimes. Further, as CVC price values continue to stabilize, use of p2p applications will continue to gain popularity because, instead of individuals holding onto CVC as a sort of long-term pseudo-stock, increased price stability will bring forth heightened user confidence in CVCs, thereby realizing a heightened prevalence of p2p transactions.

b. Any Threshold Should Not Be Applied to Peer-to-Peer Transactions

If the Recordkeeping and Travel Rules' existing \$3,000 threshold is lowered to just \$250, and coupled with the new definition of "money," the proposed rule would sweep too broadly across the CVC industry by unfairly covering individuals participating in p2p transactions.

1. A Lowered Threshold Is Overly Broad Because It Sweeps P2P Transactions into Recordkeeping Rule Requirements

This comment is particularly concerned with the implications of the proposed rule relating to NBFIs' reporting requirements under 31 CFR s 1010.410(e). This existing federal regulation states that

[e]ach agent, agency, branch, or office located within the United States of a financial institution other than a bank is subject to the requirements of this paragraph (e) with respect to a transmittal of funds in the amount of \$3,000 or more³⁹

As described above, existing FinCEN guidance has already cut too broadly across the CVC landscape by setting forth fact specific tests to determine who must register as an MSB. Without more clarifying guidance that narrows who is or is not an MSB, it is concerning that the lowered threshold would ensnare CVC users, particularly those engaged in p2p transactions, who are transmitting funds and therefore considered by FinCEN to qualify as an NBFIs. The near 92-

³⁸ <https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and#footnote-7-p68006>

³⁹ <https://www.law.cornell.edu/cfr/text/31/1010.410>

percent reduction in the reporting requirement threshold would mean that two individuals transferring \$250 worth of cryptocurrency between two digital wallets via an atomic swap would suddenly be subjected to the Recordkeeping Rule under 31 CFR s 1010.410(e) and be required to track certain information not readily available. In particular, the recording requirement under subsection (e)(1)(i)(E), which requires recording the identity of the recipient's financial institution is problematic. A key strength of CVCs, and one of its appeals, lies in anonymity. Identifying names of parties and other information are not readily known to CVC users utilizing atomic swaps or NBFIs who are only facilitating a platform for blockchain entries.⁴⁰

Under 31 CFR 1010.1000(ddd), a transmittal of funds is defined as “[a] series of transactions beginning with the transmitter’s transmittal order”⁴¹ Therefore, the recordkeeping begins with the transmitter. An individual sending cryptocurrency would not readily be able to ascertain the recipient’s financial institution. The proposed rule assumes that an intermediary exchange or similar would be utilized. However, this assumption discounts the ability for two individuals to sidestep an intermediary altogether. By lowering the reporting threshold, more individuals transacting at least \$250 would suddenly be put into a position that is best reserved for actual NBFIs who do collect certain information under the existing \$3,000 threshold in conformance with the Recordkeeping and Travel Rules.

2. P2P Transaction Participants’ Knowledge Requirement

The proposed rule provides no safe harbor for CVC users who do not know, or cannot ascertain, information that would be required under the Recordkeeping or Travel Rule. The only knowledge requirement affects financial institutions and provides that application of the two rules to transactions beginning or ending outside of the United States predicate on said institutions having a “reason to know” of the same transactions’ beginning or end point.⁴² Otherwise, the proposed rule makes various presumptions indicating that those which would be affected by the changes would have readily available access to information required to report on. This presumption might work for conventional NBFIs; however, it is much less applicable, and therefore is burdensome, when applied to p2p transactions.

Further, whereas the onus for recordkeeping in accordance with the Recordkeeping Rule lies with NBFIs, for p2p applications, without greater FinCEN clarity, the onus shifts to individuals who are not equipped, nor should be required, to conform to these requirements. NBFIs presumably have specially trained employees, technical platforms, compliance teams, and even outside counsel to ensure compliance with all applicable regulations, not the least being the Recordkeeping and Travel Rules. In contrast, individuals participating in a p2p transaction are presumably private citizens acting on their own accord without any technical or legal assistance. By reducing the Recordkeeping and Travel Rules’ threshold from \$3,000 to \$250, these individuals would be held to a standard that should be applied to NBFIs operating in the CVC space only.

⁴⁰ <https://www.investopedia.com/terms/a/atomic-swaps.asp>

⁴¹ <https://www.law.cornell.edu/cfr/text/31/1010.100>

⁴² <https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and#footnote-7-p68006>

III. Conclusion

Should the Board and FinCEN define “money” outside of the UCC in order to fit CVCs into the definition, a more nuanced definition should be embraced that will account for the unique nature of MSBs, including future application of lightning nodes and other nascent technological innovations operating in the CVC space. The genius of the CVC system does not just lie in its anonymity. It provides a streamlined and efficient means of payment. CVC is the modern-day cash equivalent except instead of cash passing hands, individuals are sitting in front of computers or quickly sharing necessary payment information, namely bitcoin addresses, on cellular phones. This is the way. Thus, because the proposed rule argues for a broad definition of CVC, and contemporaneously proposes to reduce the reporting threshold to just \$250, the proposed rule would unnecessarily catch innocent individuals into its dragnet, and even NBFIs simply recording transactions on the blockchain. Such a dragnet would reduce the effectiveness of CVC transfers and disincentivize innocent users from benefiting from its usage.

Further, 31 CFR s 1010.410(e) assumes that participating parties use some form of a financial institution. Yet, existing FinCEN guidance makes clear that any CVC users transacting CVC could be held to FinCEN’s oversight. If the recipient is participating in an atomic swap, the CVC sent might never touch the recipient’s financial institution. As anonymity is a key strength that CVC embraces, so too is its ability to circumvent conventional, and at times dated, banking systems. For example, CVCs are not subject to any one government’s fiscal or monetary policy. Therefore, CVC can act as a stable alternative to currency subject to high inflation or instability. This allows individuals in developing economies to tap into other economies by operating in a virtual, cross-border CVC payment environment, thereby increasing the economic power of both users. Indeed, this example highlights the technological achievements that CVC represents, while simultaneously highlighting the need for a nuanced regulatory regime that is more flexible than overly broad. The proposed definitional expansion misunderstands CVCs’ strength and appeal. CVCs strength lies in their ability to transcend governmental bodies, borders, and languages in order to facilitate the exchange of value. Finally, CVC usage will continue to fragment into various financial instruments mirroring securities, stock, and other short- and long-term investments as long as regulations continue to burden usage. By lowering the reporting threshold and therefore encompassing anyone transacting in at least \$250 worth of CVC, the proposed rule undercuts the very strength of CVCs.

I appreciate the opportunity to provide public comment on this proposed rule and look forward to continuing to participate in such opportunities in the future. Please do not hesitate to contact me with any questions regarding this comment.

Sincerely,

Tae Aderman, JD

