America's Credit Unions

January 22, 2024

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

RE: Proposal of Special Measure Regarding Convertible Virtual Currency Mixing, as a Class of Transactions of Primary Money Laundering Concern (RIN: 1506–AB64)

Dear Sir or Madam:

On behalf of America's Credit Unions, we are writing in response to the Financial Crimes Enforcement Network's (FinCEN) proposed rule to require domestic financial institutions and domestic financial agencies to implement certain recordkeeping and reporting requirements relating to transactions involving convertible virtual currency (CVC) mixing.[1] America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their nearly 140 million members nationwide.

America's Credit Unions supports FinCEN's objective of improving the tracking of money laundering and terrorist financing. In addition, we support reasonable protections, including those under the Bank Secrecy Act (BSA) and others related to anti-money laundering and countering the financing of terrorism (AML/CFT), aimed at reducing financial crimes. However, we urge FinCEN to ensure any regulatory changes it pursues are as minimally burdensome on credit unions as possible. Credit unions are forced to devote increasing levels of human and financial capital in order to comply with numerous new and amended regulatory requirements from federal regulators, including FinCEN.

Compliance with BSA and AML requirements remains a substantial regulatory issue for many credit unions and other financial institutions, especially as criminals become more sophisticated in their tactics. Credit unions are concerned with existing and new regulatory burdens in this area. As such, we offer below suggestions on how FinCEN can reduce the reporting burden on covered financial institutions—possibly through a trigger threshold or other safe harbor—while still achieving FinCEN's objective of better understanding the prevalence of CVC mixing. FinCEN should use the information it receives in response to this proposed rulemaking as a basis for reproposing a CVC mixing rule that includes an appropriate safe harbor or other exemption criteria for credit unions and certain other covered financial institutions. FinCEN should revisit this rulemaking in order to avoid sweeping the vast majority of financial institutions into a rule that should be targeted at a relative few.

[1] 88 Fed. Reg. 72,701 (Oct. 23, 2023).

FinCEN Notice of Proposed Rulemaking

The proposed rule would categorize transactions involving CVC mixing as a class of transactions of "primary money laundering concern."[2] A designation of primary money laundering concern authorizes the Department of the Treasury to institute certain measures related to such transactions.[3] Under this proposal, financial institutions—including credit unions—would be required to collect and report to FinCEN specific information about transactions in CVC that the institutions know, suspect, or have reason to suspect involve CVC mixing activities outside of the United States.[4]

The proposal provides a definition of "covered financial institution" that would include credit unions.[5] As such, credit unions would be subject to the reporting and recordkeeping requirements described in the proposed rule. Credit unions would be required to comply with the proposal to the extent they conduct a "covered transaction," which is defined as a transaction ". . . in CVC by, through, or to the covered financial institution that the covered financial institution knows, suspects, or has reason to suspect involves CVC mixing within or involving a jurisdiction outside the United States."[6]

It is important to note that the limitation to transactions "in CVC" means that the reporting obligations under this proposal apply to covered financial institutions that directly engage with CVC transactions, such as a CVC exchange. Further, this means that covered transactions do not include transactions that are only indirectly related to CVC, such as when a CVC exchanger sends the non-CVC proceeds of a sale of CVC that was previously processed through a CVC mixer from the CVC exchanger's financial institution account to the financial institution account of the customer selling CVC.

Given that credit unions do not engage in CVC transactions, the proposed requirements would not currently impact the nation's state and federally chartered credit unions. In fact, it is our understanding that the proposed requirements would not impact the vast majority of financial institutions in the United States. However, it is possible that the National Credit Union Administration (NCUA) could update relevant regulations at some point to allow federal credit unions to become active in this space.[7] Thus, credit unions could ultimately be impacted by the recordkeeping and reporting requirements included in this proposed rule.

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[2] 88 Fed. Reg. 72,702.
[3] 88 Fed. Reg. 72,701.
[4] 88 Fed. Reg. 72,707.
[5] Per the proposal, the term "covered financial institution" has the same meaning as "financial institution" in 31 C.F.R. § 1010.100(t), which includes state and federally chartered credit unions.
[6] 88 Fed. Reg. 72,722.
[7] In the context of CVC authority for state-chartered credit unions, while some state supervisory authorities have taken action, states often follow the lead of the NCUA and expand, reduce, or otherwise modify regulations impacting the credit unions in their state following similar activity at the federal level.

Throughout the proposal, FinCEN notes that the vast majority of financial institutions are already subject to various FinCEN reporting requirements, such as those included in regulations promulgating the BSA, which are applicable to credit unions. FinCEN also notes that the majority of the information that would be collected under the proposal is already collected by financial institutions as part of their compliance with BSA/AML regulations. While this may, to an extent, be accurate, we stress that the proposed requirements associated with identifying transactions that utilize a CVC mixer would be new and potentially burdensome for covered financial institutions to comply with. Further, it is crucial that if FinCEN proceeds with a final CVC mixing rule, any reporting requirements should not be duplicative of existing requirements, such as those associated with Suspicious Activity Reports (SAR).

Statutory Factors FinCEN Must Consider

Section 311 of the USA PATRIOT Act grants the Treasury authority, upon finding that a class of transactions is of primary money laundering concern, to require financial institutions to take certain "special measures."[8] Through special measure one, the Treasury may require financial institutions to track and report information to FinCEN regarding certain transactions. Among the factors Treasury must address when considering to implement a special measure is "whether imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions[.]"[9]

The notice of proposed rulemaking provides a thorough assessment of the potential illicit activities that may be reduced in a world where CVC mixing is controlled. However, as part of its review of the potential costs and burdens, we believe categorizing all covered financial institutions together is misguided.

Again, we wholeheartedly support the objectives of FinCEN in its tireless pursuit to reduce money laundering and terrorist financing worldwide. Further, while there are certain legitimate purposes for CVC mixing (such as by individuals seeking complete privacy in their transactions), we recognize that CVC mixing is often used by illicit foreign actors, as detailed in the proposed rulemaking.[10] As such, we believe there is some value in pursuing information related to CVC mixing. However, we disagree with an approach that would potentially impact all covered financial institutions equally, particularly when it is the CVC exchanges that will be the most helpful in FinCEN's pursuit of identifying transactions involving CVC mixing.

Therefore, we ask FinCEN to consider some type of a trigger threshold before any requirements, including those related to reporting and recordkeeping, apply. FinCEN and financial institutions have experience with various reporting thresholds, such as those associated with Currency Transaction Report (CTR) and SAR filings.

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[8] 31 U.S.C. § 5318A.
[9] 31 U.S.C. § 5318A(4)(B).
[10] 88 Fed. Reg. 72,703 - 72,704.

FinCEN has made clear in the notice of proposed rulemaking that CVC mixing has been seen at the very largest scale, noting for example, that in 2021, individuals acting for or on behalf of the North Korean government laundered more than 65 percent of stolen CVC through CVC mixers.[11] Further, FinCEN referenced a report citing that mixers processed a total of $7.8 billion in 2022, 24 percent of which came from illicit addresses.[12] The report goes on to state that, "Four deposit addresses cracked $100 million in illicit cryptocurrency received in 2022, and combined received just over $1.0 billion, while the 1.2 million deposit addresses receiving under $100 in illicit funds account for $38 million in total."[13]

While this highlights the overall magnitude of illicit funds being transferred using CVC mixers, it more importantly makes clear that in order to be most impactful, while not unduly burdening all market participants, FinCEN should limit the application of its reporting and recordkeeping requirements to certain transactions. As noted, FinCEN has extensive experience with various thresholds. However, we refrain from offering a specific threshold, or even opining on whether such a threshold should be a transactional dollar amount given the complex nature of CVC mixing and the various methods that may be employed to obfuscate the source, destination, or amount involved. Perhaps a safe harbor based on the frequency of transactions might be appropriate. This is something FinCEN should analyze and work with the industry on, ultimately pursuing such changes through a subsequent proposed rulemaking. We suggest working directly with America's Credit Unions and others in the financial services industry to determine an appropriate threshold.

It is important to keep in mind that, regardless of the fate of this proposed rule, financial institutions continue to have suspicious activity reporting requirements. Educating those responsible for flagging suspicious transactions and filing SARs with FinCEN on what CVC mixing is and how it could potentially be employed could be effective in enhancing FinCEN's overall database on CVC mixing as seen across the nation. America's Credit Unions is willing to work with FinCEN and the NCUA to educate credit unions, including through webinars and training sessions. This has the potential of achieving FinCEN's objective of better understanding the prevalence of CVC mixing without the unduly burdensome impact of a regulation establishing extensive reporting and recordkeeping requirements.

Conclusion

America's Credit Unions appreciates the opportunity to comment on FinCEN's proposed rule regarding CVC mixing. As noted above, while credit unions are not currently involved in transactions that would subject them to the reporting and recordkeeping requirements in the proposal, this could change at some point in the future. We believe it is important not to dissuade

[11] 88 Fed. Reg. 72,705.
[12] Chainalysis, Crypto Money Laundering: Four Exchange Deposit Addresses Received Over $1 Billion in Illicit Funds in 2022 (Jan. 26, 2023), https://www.chainalysis.com/blog/crypto-money-laundering-2022.
[13] *Id*.

financial institutions from offering CVC services, as consumers are increasingly demanding greater options in the financial services sector. As such, FinCEN should revisit this rulemaking in order to avoid sweeping the vast majority of financial institutions into a rule that should be targeted at a relative few. As suggested, this could possibly be achieved through expanded exemptions from the proposed requirements. Should you have any questions or require any additional information, please contact Luke Martone, Senior Director of Advocacy & Counsel at LMartone@americascreditunions.org or (202) 508-6743.

Sincerely,

Luke Martone
Senior Director of Advocacy & Counsel