
STATEMENT FOR THE RECORD

United States Senate

Committee on the Judiciary Hearing

“S. 1241: Modernizing AML Laws to Combat Money Laundering and Terrorist Financing”

November 28, 2017

The Chamber is the world’s largest trade association representing the digital asset and blockchain industry. Our mission is to promote the acceptance and use of digital assets and blockchain-based technologies. Our membership is comprised of over 130 companies innovating with and investing in blockchain-based technologies, including financial institutions, investment firms, leading edge start-ups, software companies, consultancies, and law firms.

We believe that modernizing anti-money laundering (AML) laws is an important goal, particularly in light of the advances in technology that enable people and industry to engage in commerce in new and important ways. We recognize that, like any industry and any currency, these technologies can be used for incredibly important purposes; but also, in some cases, to engage in unlawful activity. Nevertheless, we believe that the provisions relating to “digital currencies” in Section 13 of the bill are misplaced, have already been addressed by agency action, and do not correctly interpret the nature and use of virtual currencies.

Specifically, Section 13(a) of the bill seeks to amend the Bank Secrecy Act (BSA) to include “digital currency” and “any digital exchanger or tumbler of digital currency” within the definition of “financial institution” (namely, within the category of money orders and check cashers) within the BSA, 31 U.S.C. 5312(a). This action: 1) is unnecessary; 2) is contrary to existing precedent established by the Financial Crimes Enforcement Network (FinCEN), the agency within the Department of Treasury vested with administration and enforcement of the BSA;¹ 3) creates confusion in an already existing compliance and enforcement environment; and 4) is contrary to Congressional intent that the Department of Treasury implement regulations to give effect to the BSA. **As a result, the provisions relating to “digital currency” do not further the objectives of the Committee and should be removed from Section 13(a).**

I. The Proposed Amendment Is Unnecessary Because FinCEN Has Already Acted to Include Virtual Currency Exchangers and Administrators within the Coverage of the BSA

The provisions in Section 13 were originally introduced in 2011 in proposed bill S. 1731. Since then, in 2013 FinCEN declared that virtual currency administrators and exchangers are subject to the BSA as money transmitters.² At that time, FinCEN stated that

¹ FinCEN is the agency vested with authority to administer the BSA. See Treas. Order 180-01 (July 1, 2014).

² FIN-2013-G001, Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (Mar. 18, 2013) (the “Guidance”).

“[a]n administrator or exchanger that (1) accepts and transmits a convertible virtual currency or (2) buys or sells convertible virtual currency for any reason is a money transmitter under FinCEN’s regulations, unless a limitation to or exemption from the definition applies to the person.”³ Money transmitters are a category of money services business (MSB) under the BSA,⁴ which is a category of financial institution subject to BSA recordkeeping and reporting requirements, including an anti-money laundering program.⁵ Therefore, **virtual currency administrators and exchangers have been subject to the recordkeeping and reporting requirements of the BSA since 2013.**

II. The Proposed Amendment Is Contrary to Existing FinCEN Guidance and Enforcement

The proposed amendment seeks to include “digital currency” within a category of “money orders” and “check cashers.” This is contrary to existing FinCEN guidance and legal precedent in two ways. First, FinCEN – and the Financial Action Task Force (FATF), an intergovernmental body that sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing, and other related threats to the integrity of the international financial system – use the term “virtual currency” when regulating these entities.⁶ Using the term “digital currency” will be confusing for U.S. businesses and industry who are already assessing their activity under “virtual currency” requirements. Further, it is unclear what will be covered within the term “digital currency” – the process to define it would create additional confusion and uncertainty in this industry.

Second, the proposed amendment seeks to include this new category within money orders and check cashers, which is not the category under which FinCEN has placed, examined, and enforced them. Instead, these companies are already subject to the BSA as money transmitters, a category of MSB under the BSA with its own anti-money laundering compliance program and recordkeeping and reporting requirements, as well as a requirement to register as a MSB with FinCEN.⁷ **Creating this new terminology and architecture will disrupt both compliance efforts by industry and enforcement efforts by FinCEN** as it attempts to harmonize its regulatory structure.

III. The Placement and Language of the Proposed Amendment Creates Confusion In an Already Robust Compliance and Enforcement Environment

FinCEN has already successfully examined and enforced its current stance on virtual currency exchangers and administrators. For example, FinCEN and the Department of Justice have brought enforcement actions against: 1) Ripple, including a civil money penalty of \$700,000, a settlement of criminal charges, forfeiture, and other required actions;⁸ and 2) BTC-e, a non-U.S. exchanger, including a civil money penalty of \$110 million, seizure of the BTC-e website, and the arrest of one of its operators in Greece along with a \$12 million penalty against that operator.⁹ Clearly, the current regulatory framework allows for successful enforcement against and prosecution of wrongdoers.

³ *Id.*

⁴ 31 C.F.R. § 1010.100(ff)(5).

⁵ 31 U.S.C. § 5312(a)(2)(R).

⁶ See e.g., *Guidance for a Risk-Based Approach – Virtual Currencies*, FIN. ACTION TASK FORCE (June 2015), <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf>.

⁷ 31 C.F.R. § 1022.100 *et seq.*

⁸ See Press Release, U.S. Dep’t of Justice, Ripple Labs Inc. Resolves Criminal Investigation (May 5, 2015), <https://www.justice.gov/opa/pr/ripple-labs-inc-resolves-criminal-investigation>.

⁹ See Press Release, U.S. Dep’t of Justice, Russian National and Bitcoin Exchange Charged in 21-Count Indictment for Operating Alleged International Money Laundering Scheme and Allegedly Laundering Funds from Hack of Mt. Gox (July 26, 2017), <https://www.justice.gov/usao-ndca/pr/russian-national-and-bitcoinexchange-charged-21-count-indictment-operating-alleged>.

IV. The Proposed Amendment Is Contrary to the Congressional Intent of the BSA.

The BSA is not self-executing; that is, it requires implementing regulations promulgated by the Secretary of the Treasury to give it effect. In fact, Congress repeatedly left the determination as to which financial institutions should be subject to the requirements of the BSA to the Secretary of the Treasury.¹⁰ FinCEN currently implements, administers, and enforces these regulations.

Further, the categories of financial institution are intentionally broad to give FinCEN discretion to define the categories to achieve its law enforcement objectives in an evolving landscape. For example, the category “loan or finance company” is quite broad, and can include a large swath of industry. FinCEN has thus far limited the scope of this definition to residential mortgage lenders and originators due to its analysis of the scope of mortgage fraud and other money laundering activities in this category.¹¹ When implementing this requirement in 2012, FinCEN determined that the new rules were part of an “incremental approach” to regulating the loan or finance company sector, choosing to “defer regulations for ... other businesses and professions until further research and analysis can be conducted to enhance our understanding of the operations and money laundering vulnerabilities of these businesses.”¹²

The category of dealer in precious metals, stones or jewels is also broad; in this case, FinCEN has determined that it should apply to “dealers” that have purchased and sold at least \$50,000 worth of “covered goods” during the preceding year.¹³ In issuing the rule, FinCEN stated that, “The dollar threshold is intended to ensure that the rule only applies to persons engaged in the business of buying and selling a significant amount of these items, rather than small businesses, occasional dealers and persons dealing in such items for hobby purposes.”¹⁴ As demonstrated above, the BSA allows the agency to use its discretion in determining which classes of financial institutions present risks prompting the need for regulation and oversight. Consequently, FinCEN should retain its discretion to define those activities that constitute money transmission, for which it has already done in 2013 for administrators and exchangers of virtual currencies. **The proposed amendment is contrary to the model of agency discretion that has been established and in effect for over 45 years.**

¹⁰ See Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, §101 (Oct. 26, 1970) (“Where the Secretary of the Treasury . . . determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.”) (emphasis added). See also *id.* at §123: “Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution or person - (1) to require, retain or maintain, with respect to its functions as an uninsured bank or uninsured institution, or its functions referred to in subsection (b), any records or evidence of any type which the Secretary is authorized in section 21 of the Federal Deposit Insurance Act to require insured banks to require, retain or maintain; and (2) to maintain procedures to assure compliance with requirements imposed under this chapter . . . (b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions: (1) Issuing or redeeming checks, money orders, travelers checks, or similar instruments . . . (2) transferring funds or credits domestically or internationally . . .” (emphasis added). Likewise, the “Secretary of the Treasury may prescribe such regulations as he may deem appropriate to carry out the purposes of this Title [Reports of Currency and Foreign Transactions]... The Secretary shall have the responsibility so assure compliance . . . [and] may, by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title.” *Id.* at §§ 204-205 (emphasis added).

¹¹ 31 C.F.R. § 1010.100(III).

¹² Anti-money Laundering Program and Suspicious Activity Reporting Requirements for Residential Mortgage Lenders and Originators, 77 Fed. Reg. 8148, 8149-50 (Feb. 14, 2012).

¹³ Press Release, Fin. Crimes Enf’t Network, Dealers in Precious Metals, Stones or Jewels Required to Establish Anti-Money Laundering Programs (June 3, 2005), <https://www.fincen.gov/news/news-releases/dealersprecious-metals-stones-or-jewels-required-establish-anti-money-0>.

¹⁴ *Id.*

V. The Required DHS/CBP Report Does Not Correctly Interpret How Virtual Currencies Are Stored or Used

Section 13(c) seeks to require the Department of Homeland Security and Customs and Border Protection to detail a strategy to interdict and detect digital currencies at border crossings and ports of entry to the United States, and lumps digital currencies in with prepaid access devices in this context. Virtual currencies are not and cannot be prepaid access devices – FinCEN expressly stated so in its 2013 Guidance.¹⁵ They have different structures and transaction models. In addition, virtual currencies are by design digital assets – they are not physically carried across borders or through ports. Both FinCEN and the FATF have focused on identifying these assets at entry and exit points to the traditional financial system – what FATF terms the “gateways to the regulated financial system.”¹⁶ Trying to identify how much virtual currency a person holds when he/she physically crosses a U.S. border could violate privacy rights, potentially exposing all financial holdings of the traveler, and setting dangerous precedent. As a result, digital (or virtual) currencies should be excluded from the report required at Section 13(c).

¹⁵ Guidance, *supra* note 2 at pg 5 and fn 18.

¹⁶ *Guidance for a Risk-Based Approach – Virtual Currencies*, FIN. ACTION TASK FORCE (June 2015), <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf>.