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BY ELECTRONIC MAIL AND COURIER

Steven T. Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: FinCEN Docket Number FINCEN-2020-0020; RIN 1506-AB47; Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets Convertible Virtual Currency NPRM

Dear Secretary Mnuchin:

I am writing on behalf of the Blockchain Association to respectfully request that you extend the extremely truncated notice and comment period for an extremely consequential proposed rule. Specifically, I am writing about the Financial Crimes Enforcement Network ("FinCEN") Notice of Proposed Rulemaking regarding "Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets" (the "NPRM"). *See* 85 Fed. Reg. 83,840 (Dec. 23, 2020). The NPRM addresses one of the most complex and important issues in the blockchain and cryptocurrency realms, namely, the proper regulation of self-hosted wallets. Yet in tackling this difficult and momentous issue, the NPRM gives affected stakeholders, which the NPRM acknowledges are dispersed around the globe, just days to draft their comments and to try to assemble the supporting data. The NPRM underscores the complexity of the issues by identifying at least two dozen questions that need answering. Yet the NPRM would give stakeholders far more questions than days in which to answer them. To make matters worse, the brief comment period spans multiple federal holidays. With all due respect, this is no way to proceed on a subject this complicated and consequential. The highly truncated comment period sets up the government for failure on procedural grounds in the courts. But far more important in the long run, the breakneck speed at which the proposed rule is proceeding all but guarantees a substantively flawed final product. I therefore respectfully urge you to consider substantially extending the comment period to ensure that all interested parties—including the agency itself—will be able to engage in the kind of meaningful and productive dialogue that the Administrative Procedure Act is designed to foster and that this issue deserves.

The Blockchain Association is a not-for-profit organization dedicated to improving public policy in ways that will help blockchain networks and their users develop and prosper in the United States. Its diverse membership reflects the complexity of this dynamic market and includes projects building blockchain networks, trading platforms that allow users to exchange cryptocurrencies, and early stage investors that support the entire ecosystem. The Blockchain Association comprises industry leaders who are committed to responsibly building, funding, and supporting blockchain networks fueled by cryptocurrencies. It endeavors to educate policymakers, courts, and the public about how blockchain technology works and how regulatory clarity can bring about a more secure, competitive, and innovative digital marketplace. Given its diverse membership, the Blockchain Association is well positioned to provide FinCEN and the Department of the Treasury with the valuable perspectives of those who facilitate and engage in transactions involving convertible virtual currency or digital assets with legal tender status held in self-hosted wallets. And the Association and other members of the cryptocurrency community are eager to work with FinCEN and Treasury to help craft policies that accomplish the government's important regulatory objectives without unnecessarily curbing innovation or treading on individuals' property and privacy rights. But assembling diverse perspectives and achieving regulatory balance takes time. The rushed timeframe reflected in the current NPRM severely frustrates the Association's ability to provide vital input.

The timeframe reflected in the NPRM is entirely unrealistic given the nature of the issues and the reality of the calendar. Late in the day on Friday, December 18, 2020, FinCEN released a 72-page notice of proposed rulemaking that proposes the imposition of novel reporting and recordkeeping obligations on banks and money services businesses (or MSBs) with respect to transactions between the wallets they host and self-hosted wallets, or wallets with certain foreign financial institutions. The NPRM spans 72 pages, but its length still understates the difficulty and novelty of the issues. The NPRM seeks comments on 24 separately enumerated subjects and questions, some with multiple subparts. Yet the NPRM provides just 15 days to answer those 24 questions and to respond to the balance of the 72-page NPRM. And the NPRM does not even speak clearly or consistently about when that highly truncated comment period begins to run. Ordinarily, the comment period does not commence until publication in the Federal Register—here, December 23–which would result in a due date for comments of January 7, 2021. The published NPRM reflects that January 7 deadline in one place, 85 Fed. Reg. at 83,856, but sets an even more unforgiving January 4 deadline a few pages earlier, *id.* at 83,841. The Federal Register website says that all comments must be submitted by January 4, so the benefit of the doubt does not appear to go to the public. Instead, as best one can tell, the public has been given a 12-day window to submit comments over a major holiday period that includes Christmas Eve, Christmas (a federal holiday), New Year's Eve, New Year's Day (another federal holiday), and four weekend days. Some foreign countries in which stakeholders operate observe additional national holidays, and even the business days during this particular fortnight are a notoriously difficult time to locate anyone actually focused on business. That leaves interested members of

the public with, at best, a grand total of seven "working days" to comment on an NPRM that seeks feedback on more than three times as many topics. And on top of all that, efforts to submit comments have been frustrated by technical complications with the site (including error messages) on some of the few weekdays available for submitting comments.

The notion that stakeholders could meaningfully engage with a rule that touches on more than 24 separate subjects in such a highly truncated period would be doubtful even in the ordinary course. But it is wholly untenable in the context of an effort to impose sweeping new rules on a rapidly emerging and complex industry with which the government has very little regulatory experience. The novel nature of the government's regulatory exercise only heightens the need for robust participation by the many stakeholders in the still-nascent and evolving cryptocurrency industry. Yet the NPRM does not even give stakeholders all the information they need to provide the agency with meaningful comments, let alone give them the necessary time to compile that information. For example, roughly half of the topics on which FinCEN has expressly sought comment involve the potential costs of complying with the proposed reporting and recordkeeping requirements or with various alternative proposals. *Id.* at 83,851. But setting aside the problem that stakeholders did not learn of these proposals until shortly before close of business on the Friday before Christmas, the NPRM does not even purport to identify all the information it is proposing to require banks and MSBs to retain and report. *See, e.g.*, *id.* at 83,861 (proposing that requirements will *include* "[t]he name and physical address of each counterparty to the transaction of the financial institution's customer, *as well as other counterparty information the Secretary may prescribe as mandatory*") (emphasis added). Commenting on the costs and burdens of reporting counterparty information is not feasible when the extent of the mandated information is a detail to be supplied later. Anyone who understands the cryptocurrency industry appreciates how critical such details are, as MSBs do not presently have (or even necessarily have the means to acquire) some or all of the counterparty information the Secretary may demand. FinCEN cannot seriously expect stakeholders to meaningfully assess, especially in seven business days, what it will cost to comply with regulatory obligations that have not yet been fleshed out.

Perhaps anticipating that this extraordinarily truncated comment period could not pass APA muster, the NPRM suggests that even this minimal nod to notice and comment is a matter of administrative grace, because FinCEN need not engage in any notice and comment at all. But the stated excuses for evading bedrock APA requirements will not withstand judicial scrutiny. The NPRM first posits that the rule implicates a "foreign affairs function," and so is exempt from notice and comment rulemaking entirely. *See id.* at 83,852; 5 U.S.C. §553(a)(1). But as the Administration was recently reminded, that a rule "implicates foreign affairs … is not enough to satisfy the foreign affairs function exception." *Capital Area Immigrants' Rights Coalition v. Trump*, 471 F. Supp. 3d 25, 56 (D.D.C. 2020). Instead, that narrow exception is satisfied only when a rule "clearly and directly involve[s] activities or actions characteristic to the conduct of

international relations." *Id.* at 53; *see also, e.g.*, *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010). A rule that regulates wholly private financial transactions that may (or may not) involve foreign actors undoubtedly does not satisfy that demanding standard. Indeed, if the mere fact that financial transactions may involve foreign actors were enough to take a rule outside the APA, then Congress would not have needed to amend the Bank Secrecy Act to craft special procedures (not applicable here) that allow certain types of regulations of transactions with foreign entities to take temporary effect while notice and comment is ongoing. *See* 31 U.S.C. §5318A. As that limited and inapplicable exception reflects, it has long been settled law that the foreign affairs "exception cannot apply to functions merely because they have impact beyond the borders of the United States." *Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567, 1581 (Ct. Int'l Trade 1984).

Nor would the APA's "good cause" exception apply here. *See* 5 U.S.C. §553(b)(3)(B). The good cause exception is "meticulous and demanding." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). It is "narrowly construed and only reluctantly countenanced," with the agency bearing the burden of persuasion, and doing so without the benefit of any deference. *NRDC v. NHTSA*, 894 F.3d 95, 113-14 (2d Cir. 2018). The NPRM posits that "[u]ndue delay in implementing this rule would encourage movement of unreported or unrecorded assets implicated in illicit finance from hosted wallets at financial institutions to unhosted or otherwise covered wallets." 85 Fed. Reg. at 83,852. But the key phrase in that sentence is "*undue* delay." In circumstances where some notice and comment period is feasible, the APA determines that a delay for a period to allow for meaningful notice and comment is not just due, but legally required. By allowing even an extremely truncated comment period before the proposed rule takes effect, FinCEN has acknowledged this is not the rare situation where the rule must be imposed immediately to prevent circumvention. Where some comment period is viable, the APA demands a meaningful comment period, not 15 days over the holidays. And while the NPRM notes that "the prevention of substantial financial fraud" may constitute good cause, 85 Fed. Reg. at 83,853 (citing *Disabled in Action of Metro. New York, Inc. v. Brezenoff*, 506 F. Supp. 244, 248 (S.D.N.Y. 1980)), FinCEN has identified nothing even remotely comparable to the ongoing, multimillion-dollar fraud on a federal program that justified immediate agency action in *Brezenoff*.

The procedural problems with the NPRM will almost certainly result in the final rule being tied up in the courts and invalidated on procedural grounds. But the real problem with tackling such a novel and complex issue in such haste is that the rule that emerges from this rushed process will almost certainly be substantively flawed. The NPRM claims to target money laundering, terrorism financing, and other illicit uses of convertible virtual currency or digital assets. The Blockchain Association fully supports those laudable goals. But the proposed rule would do little if anything to advance them. Virtual asset service providers already maintain "know your customer" information and records of transactions for the customers whose wallets

they host. All the rule adds as a potential law-enforcement tool is a requirement that MSBs keep records of and report information regarding the holders of the self-hosted wallets or wallets hosted by certain foreign financial institutions with which their hosted wallet customers transact. It is not even clear that MSBs will be able to comply with those requirements, as MSBs do not typically have access to personal information about the holders of the self-hosted wallets with which their customers transact. Thus, what purports to be just a reporting requirement may well operate as a *de facto* ban. But even assuming MSBs can devise some means of compliance, the rule would have extremely limited utility, for all someone would need to do to ensure that their transactions would *not* be recorded or reported is keep their digital assets in a self-hosted wallet, which can be replenished from sources outside FinCen's regulatory reach, as the requirements do not apply to transactions *between* self-hosted wallets. At most, then, the rule would just lead those who wish to keep their transactions private (whether for licit or illicit reasons) to keep their digital currency in a self-hosted wallet, thereby reducing the very transparency that FinCEN purports to be trying to foster. That kind of mismatch between an agency's objectives and the means it has chosen for trying to accomplish them is exactly what a meaningful notice and comment process can identify and remedy.

There is a better way. Rather than rush to finalize a rule that suffers deep procedural and substantive flaws, there is still time to extend the comment period and invite meaningful public comment that will both eliminate the obvious procedural flaws and create the possibility for regulation that avoids the substantive difficulties of the approach reflected in the NPRM. The alternative of pressing ahead with an NPRM that raises dozens of questions, while providing stakeholders roughly half a dozen business days over the holidays to comment has nothing to recommend it. A rule produced by that flawed process will not survive court challenge and will not redress the problems the NPRM attempts to solve. In sum, FinCEN, Treasury, and the public would all be better served by extending the comment period to ensure that both stakeholders and regulators can give these weighty matters the full and fair attention they deserve.

Sincerely,

Paul D. Clement

cc: Jeffrey A. Rosen, Acting Attorney General of the United States
Kenneth A. Blanco, Director, Financial Crimes Enforcement Network
Russell Vought, Director, Office of Management and Budget