BLOCKCHAIN ASSOCIATION

January 22, 2024

Via electronic submission: http://www.regulations.gov

Director Andrea M. Gacki
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 Director Gacki:

Blockchain Association (the "Association") submits this letter in response to the request for comments by the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") on its Proposal of Special Measure Regarding Convertible Virtual Currency Mixing, 88 Fed. Reg. 72,701 (Oct. 23, 2023) (the "Proposed Rule").

The Association is the leading nonprofit membership organization dedicated to promoting a pro-innovation policy environment for the digital asset economy. The Association endeavors to achieve regulatory clarity and to educate policymakers, regulators, courts, and the public about how blockchain technology can pave the way for a more secure, competitive, and consumer-friendly digital marketplace. The Association represents more than 100 member companies reflecting the wide range of the dynamic blockchain industry, including software developers, infrastructure providers, exchanges, custodians, investors, and others supporting the public blockchain ecosystem.

Introduction

The Association's members share FinCEN's interest in combating illicit finance, especially where the digital asset industry is being exploited for illegal purposes. The Association's members are active and trusted partners with law enforcement and regulators across the globe in order to identify, prevent, and deter illicit activity within the digital assets ecosystem. Moreover, many of the Association's members are developing innovative solutions to more effectively and efficiently implement anti-money laundering and countering the financing of terrorism regulations. The highly technical and varied nature of businesses operating in the cryptocurrency space, however, presents unique challenges that must be considered to ensure that any rulemaking in furtherance of these ends does not improperly and counterproductively impact good actors in this space.

That is particularly so in the context of Section 311 designations. The Proposed Rule is FinCEN's first-ever use of the Section 311 authority to designate a class of transactions as of primary money laundering concern. A Section 311 designation carries serious legal and practical consequences. It gives FinCEN authority (within constitutional and statutory limits) to impose burdensome recordkeeping and reporting requirements on the designated class of transactions and to prohibit U.S. financial institutions from opening or maintaining accounts for foreign financial institutions, if the account may be used for the class of transactions. It is therefore critically important that FinCEN respect the limitations Congress put on the breadth with which FinCEN can impose special measures and adequately substantiate any designation. FinCEN also must observe the procedural requirements of the APA to enable the digital asset industry to give fully informed comments on FinCEN's findings and reasoning. And FinCEN must appreciate that there could be a tipping point at which overbroad and inappropriate anti-money laundering requirements could drive digital asset businesses to other less regulated countries, where there would be no requirement to file suspicious activity reports (SARs) to FinCEN and therefore limit U.S. law enforcement's access to valuable information.

FinCEN has not heeded these requirements in the Proposed Rule. FinCEN's failure to consider the many legitimate uses of its targeted class of transactions—"CVC mixing"—makes it impossible for the agency to rationally conclude that the class is of primary money laundering concern.[1] CVC mixing protocols help law-abiding individuals achieve on the otherwise public blockchain the privacy typical of transactions in the traditional banking system. There is nothing inherently suspicious about desiring the same degree of privacy available for traditional financial transactions. What's worse, FinCEN has defined "CVC mixing" so broadly that it captures lawful and legitimate conduct. FinCEN's erroneous finding, and its decision to impose reporting requirements on CVC mixing transactions, will stigmatize broad swathes of legitimate digital asset activity, impose significant costs on the digital asset industry, and drive illicit digital asset transactions abroad where they may be subject to reduced or no regulatory oversight and are less accessible to U.S. law enforcement.

The Proposed Rule is fundamentally flawed as a matter of law and public policy for several reasons:

- First, FinCEN's failure to adequately consider important issues raised by the Proposed Rule as well as a number of statutorily mandated factors—including the many legitimate uses of CVC mixing, the competitive harms the rule will cause, and the significant costs it will impose—renders the Proposed Rule arbitrary and capricious.
- Second, the Proposed Rule's overly broad definition of CVC mixing is unconstitutional and arbitrary and capricious.

[1] FinCEN defines "CVC" as "a medium of exchange that either has an equivalent value as currency or acts as a substitute for currency, but lacks legal tender status," and "Bitcoin," despite its legal tender status in some jurisdictions. 88 Fed. Reg. at 72,702 n.10. As FinCEN itself recognizes, its definition of "CVC" does not capture all digital assets, or even all virtual currencies, so the Proposed Rule would apply only to a subset of digital assets. Although the Association agrees that not all digital assets are subject to the Bank Secrecy Act, FinCEN's definition of CVC forces industry members to scrutinize each digital asset for its functions and features to determine if it constitutes a "value that substitutes for currency."

- Third, the Proposed Rule is unnecessary because existing suspicious-activity-reporting regulations already require financial institutions to report the transactions of principal concern to the agency.
- Fourth, FinCEN lacks statutory authority to target a class of transactions worldwide; instead, Section 311 authorizes it to target a class of transactions within specific jurisdictions.
- Fifth, the rule cannot constitutionally be promulgated by the FinCEN Director, because only a principal officer can promulgate a legislative rule.
- Sixth and finally, FinCEN's reliance on nonpublic information violates the Administrative Procedure Act.

The Association welcomes the opportunity to engage in ongoing dialogue with FinCEN to provide additional information regarding the issues discussed in this letter and the legal flaws in the Proposed Rule. We would be pleased to meet with FinCEN as rulemaking efforts continue to assist FinCEN in further understanding the digital asset industry and more appropriate regulatory alternatives to the approach reflected in the Proposed Rule.

FinCEN's Legal Obligations Under Section 311 And The APA

Section 311. This rulemaking arises under Section 311 of the Patriot Act, 31 U.S.C. § 5318A. Section 311 authorizes FinCEN to impose certain "special measures" on "1 or more classes of transactions within, or involving, a jurisdiction outside of the United States" if FinCEN "finds that reasonable grounds exist for concluding" that the class of transactions "is of primary money laundering concern, in accordance with subsection (c)." *Id.* § 5318A(a)(1).[2]

Subsection (c), in turn, directs FinCEN to decide whether a class of transactions is of primary money laundering concern by considering the extent to which the transactions "are used to facilitate or promote money laundering in or through the jurisdiction," the extent to which the transactions "are used for legitimate business purposes in the jurisdiction," and "the extent to which such action is sufficient … to guard against international money laundering and other financial crimes." 31 U.S.C. § 5318A(c)(2)(B).

In deciding which of the statutorily enumerated special measures to impose, FinCEN must also consider whether "other nations or multilateral groups" have taken "similar action"; whether the special measure "would create a significant competitive disadvantage … for financial institutions … in the United States"; "the extent to which" the measure, or its timing, would "have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on

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[2] In Section 311, Congress directed the Secretary of the Treasury to consider these factors and granted the Secretary the rulemaking authority. Because the Secretary has subdelegated her authority to the FinCEN director and is not exercising supervisory authority—an approach that violates the Appointments Clause—this comment discusses FinCEN's responsibilities under the statute, rather than the Secretary's responsibilities.

legitimate business activities"; and the special measure's effect on "national security and foreign policy." 31 U.S.C. § 5318A(a)(4)(B).

Administrative Procedure Act. Under the Administrative Procedure Act ("APA"), an agency rulemaking is "unlawful" if it exceeds the agency's constitutional or statutory authority or is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A)–(C). A rulemaking is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency." *Cboe Futures Exch., LLC v. SEC*, 77 F.4th 971, 980 (D.C. Cir. 2023) (quotation marks omitted). Agency action likewise is arbitrary and capricious if the agency acts without considering "significant and viable and obvious alternatives," or if its action contains "unexplained inconsistencies." *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (quotation marks omitted).

The APA also prohibits agency action "without observance of procedure required by law," 5 U.S.C. § 706(2)(D), and requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* § 553(c). "Integral to these requirements is the agency's duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules." *Owner-Operator Independent Drivers Association v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007) (quotation marks omitted).

Comments On The Proposed Rule

I. The Proposed Rule fails to consider the legitimate uses of CVC mixing and the downsides of burdensome reporting requirements.

In the Proposed Rule, FinCEN has neglected to adequately consider multiple issues that Section 311 and the APA require the agency to consider before imposing special measures. First and foremost, it failed to consider the "legitimate business purposes" for using CVC mixing, an error that infected both its conclusion that CVC mixing is of primary money laundering concern and its decision to impose special measures. 31 U.S.C. § 5318A(a)(4)(B)(iii), (c)(2)(B)(ii). It also neglected to consider the competitive disadvantages the rule will cause, as well as the Proposed Rule's putting the United States out of step with other countries. These failures to consider "important aspect[s] of the problem" violate the APA. *State Farm*, 463 U.S. at 43; *see also Cboe Futures Exch.*, 77 F.4th at 980; *see also, e.g.*, *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (striking down SEC rule because the agency failed "adequately to assess the economic effects of a new rule").

A. <u>FinCEN failed to consider the extent to which CVC mixing is used for legitimate business purposes</u>.

FinCEN largely ignores the statutory factors that it must consider before determining that CVC mixing is of primary money laundering concern. For example, FinCEN has given no meaningful consideration to the "extent to which" CVC mixing, as broadly defined by the Proposed Rule, is "used for legitimate business purposes." 31 U.S.C. § 5318A(c)(2)(B)(ii). Instead of actually considering the full extent of legitimate purposes for CVC mixing, FinCEN says it "cannot fully assess the extent to which, or quantity thereof, CVC mixing activity is attributed to legitimate business purposes." 88 Fed. Reg. at 72,707. But the same sources FinCEN relies on to estimate the amount of CVC mixing for illicit purposes also show that between 75% and 90% of the use of CVC mixing protocols is done for legitimate reasons. *See id.* at 72,706 & nn.68, 69. FinCEN cannot simply throw up its hands and pretend that the data does not exist. Instead, Section 311 requires it to grapple with that data and explain why, despite the significant legitimate uses, CVC mixing is of primary money laundering concern. Put differently, FinCEN has a statutory obligation to "determine as best it can" the consequences of its rule on legitimate activities and cannot adopt a final rule premised on a gripe that the task assigned to the agency by Congress is too difficult or indeterminate. *Business Roundtable*, 647 F.3d at 1148 (quotation marks omitted). In addition, most illicit finance flows through offshore, centralized exchanges that will not be subject to reporting requirements under the Proposed Rule, further demonstrating that most of the CVC mixing actually captured by the Proposed Rule will be legitimate, which bolsters the point that the Proposed Rule is not narrowly tailored; it is far too broad given the limited actual expected reporting. *See 2024 Crypto Crime Trends: Illicit Activity Down as Scamming and Stolen Funds Fall, But Ransomware and Darknet Markets See Growth*, Chainalysis (Jan. 18, 2024), https://www.chainalysis.com/blog/2024-crypto-crime-report-introduction/.

FinCEN's failure to consider the extent of legitimate business purposes of CVC mixing is particularly problematic because there are many legitimate reasons to engage in CVC mixing. The CVC mixing protocols at the heart of FinCEN's concern can help law-abiding individuals and businesses achieve financial privacy on the blockchain. Unlike most fiat transactions, which are private by default, transactions on public blockchains generally can be viewed and tracked by anyone—and, through the use of blockchain analytics and other techniques, often can be traced to particular persons. This means that to the extent a user is deanonymized, anyone can see the core components of every transaction that the user has ever executed—the sender's public key, the receiver's public key, and the amount, type of asset, and time transmitted. This is akin to publishing an individual's entire credit card transaction history online. Tools like CVC mixers allow users to reclaim privacy that would be available as a matter of course in the traditional financial system, while retaining the benefits that come with blockchain technology.

The Proposed Rule recognizes that financial privacy is beneficial for those living under repressive regimes. 88 Fed. Reg. at 72,706. But it altogether ignores the many other legitimate reasons for seeking financial privacy on a blockchain. For example, when a user's digital asset transaction history or wallet balance indicates that the user is wealthy, the public nature of those details puts the user at risk of victimization. Malicious actors, such as hackers or thieves can target the individual with a range of techniques, including social engineering, malware, or even physical assault. There are many examples of this in recent years. *See, e.g.*, David Marsanic, *Coinbase User Loses $4.2M to "Spear Phishing:" How to Spot It*, DailyCoin (July 5, 2023), https://dailycoin.com/coinbase-user-loses-4-2m-to-spear-phishing-how-to-spot-it/; *Known Physical Bitcoin Attacks*, https://github.com/jlopp/physical-bitcoin-attacks/blob/master/README.md (last visited Jan. 18, 2024). This privacy-security problem is unique to digital assets, and mixers are a ready-made solution. Digital asset users may also desire privacy for certain types of sensitive or personal transactions, such as donating to politically charged causes or paying for certain medical expenses.[3] FinCEN has failed to consider, let alone attempt to quantify, these and other legitimate uses of CVC mixers or the legitimate privacy interests of all users, not just those living under repressive regimes.

The legitimate uses of CVC mixing and the problems created by the Proposed Rule increase exponentially when mixing is defined as broadly as it is in the Proposed Rule. As explained below, the Proposed Rule defines CVC mixing to include transactions far afield from the core of CVC mixing, and those transactions have many legitimate purposes. For example, there are many legitimate reasons to "pool[] … CVC from multiple persons." 88 Fed. Reg. at 72,709. Centralized and decentralized exchanges, staking pools, and multi-signature wallets—to name just a few examples—pool CVC from multiple persons for different, but equally legitimate business or personal reasons. For instance, pooling CVC may be necessary to enable staking functions, to match trades, to protect customer assets following a hack, or to move digital assets to and from cold storage. Although transactions through some of these institutions may be exempt from the definition of CVC Mixing, the burden on covered financial institutions to determine whether foreign exchanges are subject to the recordkeeping and reporting obligations that the exception requires does not cure this overbreadth and indeed, makes it more likely that covered financial institutions will default to assuming that an exception does not apply.

Similarly, decentralized finance apps involve smart contract rules that may result in CVC splitting, pooling, or moving in a manner that could be seen as mixing but is essential for the functioning of those protocols. For example, account abstraction protocols enable "smart contract wallets" (or "smart contract accounts"), which provide mechanisms for "social recovery" in the event private keys are lost, allow decentralized applications to pay user "gas" costs, and reduce transaction costs by bundling multiple operations together in a single transaction. Account abstraction can also enable private withdrawals from smart contract pools to wallets that would otherwise require a deposit of ETH in order to pay gas costs (and would therefore create an on-chain link between a deposit and a withdrawal address), which may be viewed as "using programmatic or algorithmic code to coordinate … the structure of a transaction." 88 Fed. Reg. at 72,709.

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[3] *See, e.g.*, Leigh Cuen, *Sexual Assault Survivor Uses Crypto to Crowdfund Anonymously*, CoinDesk (Sept. 13, 2021), https://bit.ly/3IhWmfV.

In each of these situations, digital asset holders likely would be treated by the Proposed Rule as if they were purposefully using a traditional mixer to obscure the source of digital assets for illegitimate purposes. And although the Proposed Rule would "except[] the use of internal protocols or processes to execute transactions by" virtual asset service providers, the scope of that exception is unclear, and even providers falling within the exception would be forced to comply with novel and burdensome recordkeeping requirements. *Id.*

The Proposed Rule also does not distinguish between functions and technological layers. For instance, the Proposed Rule could be interpreted to capture certain Layer 1 blockchains, which essentially serve as the infrastructure layer. But Layer 1 blockchains do not inherently provide mixing services; they offer a ledger of transactions, upon which activities that could be deemed "CVC mixing" may be developed by separate parties. By not distinguishing the aforementioned activities from traditional CVC mixing services developed and provided specifically to obscure information relating to digital assets, the Proposed Rule could negatively impact and destabilize the crucial infrastructure that underlies all blockchain transactions.

The other types of transactions included in the definition of CVC mixing similarly have a host of legitimate uses. It is commonplace for digital asset holders to "exchange[] between types of CVC" for legitimate purposes, including to diversify holdings or to obtain non-monetary benefits associated with certain tokens. 88 Fed. Reg. at 72,709. Indeed, every crypto-for-crypto trade—the vast majority of which are legitimate—involves exchanging between types of CVC. *See 2024 Crypto Crime Trends: Illicit Activity Down as Scamming and Stolen Funds Fall, But Ransomware and Darknet Markets See Growth*, Chainalysis (Jan. 18, 2024), https://www.chainalysis.com/blog/2024-crypto-crime-report-introduction/ (only 0.34% of 2023 crypto transaction volume was associated with illicit activity, down from 0.42% in 2022). And "transmitting the CVC through a series of independent transactions" is a common method for trading firms to keep confidential their proprietary trading activity. 88 Fed. Reg. at 72,709.

FinCEN must consider the quality and quantity of these and other legitimate transactions before concluding that CVC mixing is "of primary money laundering concern."

B. <u>FinCEN ignored multiple statutory factors it must weigh in deciding whether to impose special measures</u>.

FinCEN ignored multiple statutory factors that it must consider in deciding whether to impose special measures.

Competitive disadvantages. Congress directed FinCEN to consider "whether the imposition of any particular special measure would create a significant competitive disadvantage" for U.S. firms, 31 U.S.C. § 5318A(a)(4)(B)(ii), but FinCEN failed to do so in the Proposed Rule, which contains only a single paragraph under a heading listing that factor, 88 Fed. Reg. at 72,708 ("Whether the Imposition of Any Particular Special Measure Would Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated With Compliance, for Financial

Institutions Organized or Licensed in the United States"). And even that paragraph lacks any meaningful analysis of competitive disadvantages that will be created by the Proposed Rule. *See id.* Instead, the Proposed Rule jumps ahead to whether the measure creates an "undue cost or burden associated with compliance," even though the statute lists that as only one non-exclusive example of a "significant competitive disadvantage." *Id.*

In addition to the undue burden imposed by the Proposed Rule, there are numerous other competitive disadvantages that it will create if adopted, which FinCEN does not address. Those include the likelihood of the Proposed Rule impeding technological innovation. Overly burdensome reporting requirements on CVC mixing transactions and de-risking efforts by U.S. financial institutions may cause some entities to stop doing (or reduce) business with anything that plausibly falls under the definition of CVC mixing. Knowing this, digital asset companies may be hesitant to innovate in the U.S. out of fear that a novel and well-intentioned business model might fall under the Proposed Rule's arbitrarily broad definition of CVC mixing. FinCEN also ignores that the Proposed Rule would likely result in U.S. persons choosing to keep digital assets outside the United States at foreign exchanges as a result of the privacy concerns created by the Proposed Rule.

With respect to derisking efforts, financial institutions will often cease doing business with certain high-risk customers in order to avoid the higher compliance costs and regulatory exposure associated with continuing those relationships. Digital asset holders that are deemed to have engaged in CVC mixing, as broadly defined by the Proposed Rule, will likely be treated as high risk and more likely to have their banking and other financial institution relationships terminated as a standard derisking measure. Indeed, many U.S. financial institutions already include CVC mixers—as that term is traditionally understood, which, as discussed, is far narrower than the Proposed Rule's definition—as a prohibited customer type and treat customer transactional activity involving CVC mixers (again, as traditionally defined) as a red flag for potentially suspicious activity involving that customer. Digital asset firms also might become less likely to begin operations in the U.S. and more likely to cease existing operations in the United States for these same reasons, as well as to avoid the significantly higher compliance costs and regulatory scrutiny caused by the Proposed Rule.

All of this would not only impede the competitiveness of U.S. firms, but also would frustrate the asserted purpose of the Proposed Rule by making it harder for U.S. law enforcement and regulators to obtain information about digital asset activity. And that, in turn, would result in less oversight of digital asset businesses and increased risks to consumers keeping digital assets in jurisdictions with reduced AML regulatory requirements and safeguards.

FinCEN's discussion of the "undue cost or burden associated with compliance" is flawed. 31 U.S.C. § 5318A(a)(4)(B)(ii). FinCEN incorrectly asserts that there would not be undue cost or burden to financial institutions that must comply with the Proposed Rule because they likely already collect the required information pursuant to existing regulations and can identify when their customers engage in CVC mixing. 88 Fed. Reg. at 72,708. While financial institutions with

Consumer Identification Program and Customer Due Diligence requirements may already have a large amount of the data required by the Proposed Rule, money services businesses, which are not subject to those regulatory requirements, may not. The vast majority of covered financial institutions subject to the Proposed Rule will presumably be money services businesses, as they make up the majority of financial institutions that accept digital assets. These financial institutions are generally required only to collect and verify identification information for transactions above $3,000 that implicate the funds transmittal rule. 31 C.F.R. § 1010.410. Accordingly, these institutions may not have the customer information required by the Proposed Rule.[4]

In addition, because the Proposed Rule requires entities to report transactions "indirectly" related to CVC mixing, the Proposed Rule would require financial institutions to analyze the blockchain history of particular digital assets in order to determine whether it reflects "CVC mixing." 88 Fed. Reg. at 72,717 n.122. This is not an activity that financial institutions are currently required to engage in and will require new resources, processes, and systems to conduct. This is particularly true considering that the Proposed Rule does not include any limitation on how far back in the blockchain history a financial institution must look for "CVC mixing" activity.

Moreover, requiring digital asset firms to conduct this historical lookback of blockchain activity, particularly in the absence of any minimum monetary threshold, would impose costs well beyond those imposed by existing regulations. Since covered financial institutions would be able to identify "CVC mixing" only by using public blockchain data that is equally available to law enforcement, it is particularly unclear why imposing these costs on financial institutions is warranted. Similarly, since in many cases, financial institutions will be receiving digital assets for their customers that originated from unknown third parties that would have been involved in the "CVC mixing" activity covered by the rule, it is unclear what benefit would arise from recordkeeping and reporting requirements relating to their customers for such transactions. Indeed, in many situations, the customers whose identification information will be reported are unlikely to have any involvement or knowledge of the CVC mixing activity, yet they are the ones most likely to be subject to decreased privacy and potential derisking as a result of the Proposed Rule.

Accordingly, the Proposed Rule is likely to require many financial institutions to collect information and engage in monitoring activities that they otherwise are not required to do, and without any legitimate law enforcement justification for doing so. FinCEN's assertion that only between 0.010 percent and 0.234 percent of daily CVC transaction volume at major exchanges will be directly or indirectly exposed to CVC mixing, as FinCEN has broadly defined it, is implausible. *Id.* at 72,717. But because that estimate is based on nonpublic information, *see infra*

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[4] Although many account-based money services businesses in practice collect additional types of customer information to satisfy their suspicious activity monitoring and reporting and sanctions compliance requirements, they are not formally subject to Customer Identification Program and Customer Due Diligence requirements like banks, mutual funds, broker-dealers, and futures commission merchants. They generally only have affirmative customer identification and verification requirements under the funds transmittal rules for transactions over $3,000.

at 16–18, there is no way for anyone to meaningfully evaluate this critical component of FinCEN's cost estimate.

Impact on Legitimate Business Activities. FinCEN did not address the adverse impact the special measures would have on legitimate business activities involving CVC transactions. 31 U.S.C. § 5318A(a)(4)(B)(iii). As explained above, FinCEN ignored the legitimate uses of CVC mixing in concluding that CVC mixing is of primary money laundering concern, and those same failures infect its decision to impose special measures. The statute expressly requires FinCEN to consider that factor, and the APA requires the agency to explain its thinking in the Proposed Rule so that the public can respond. But FinCEN gave it no analysis, merely stating that "the proposed special measure would have minimal impact … on legitimate business activities involving CVC transactions." 88 Fed. Reg. at 72,708. That conclusory assertion fails to comply with the requirements of Section 311 and the APA.

Similar actions by other nations or multilateral groups. Finally, the Proposed Rule does not adequately consider the lack of "similar action [that] has been or is being taken by other nations or multilateral groups." *Compare* 31 U.S.C. § 5318A(a)(4)(B)(i) *with* 88 Fed. Reg. at 72,708. For this statutory factor, FinCEN acknowledges that the Proposed Rule is unprecedented. 88 Fed. Reg. at 72,708. But FinCEN then describes how a handful of countries have instead published guidance regarding red flags associated with mixers and have brought enforcement actions against mixers. *Id.* FinCEN does not explain why these other approaches—which are "generally not as expansive"—are insufficient alternatives to the Proposed Rule or consider whether the lack of precedent for FinCEN's Proposed Rule should weigh against its imposition. *Id.* Similarly, FinCEN does not consider how the international publications it cites include similar definitions of "mixer" that are all significantly narrower than the Proposed Rule's definition. *See id.* at 72,708 nn.71–72 (citing Australian, Canadian, EU, and Japanese publications that define "mixer" more narrowly).

II. The Proposed Rule's overly broad definition of "CVC mixing" violates Section 311, is arbitrary and capricious, and contravenes principles of fair notice.

The Proposed Rule defines CVC mixing in a manner that goes far beyond what is reasonable or necessary to achieve the agency's purposes. In fact, the six examples of CVC mixing included in the proposed definition are far removed from the core of CVC mixing. The Proposed Rule defines CVC mixing to include "[p]ooling or aggregating CVC," "[u]sing programmatic or algorithmic code to coordinate… the structure of a transaction," "[s]plitting CVC … and transmitting [it] through a series of independent transactions," "[c]reating and using single-use wallets," "[e]xchanging between types of CVC," "[f]acilitating … delays in transactional activity," or any other unspecified conduct that "facilitate[es] … CVC transactions in a manner that obfuscates the source, destination, or amount involved in one or more transactions." 88 Fed. Reg. at 72,722. This overly broad definition raises a host of legal problems.

To start, the Proposed Rule violates Section 311 by imposing special measures on classes of transactions that FinCEN has not found to raise money-laundering concerns. FinCEN's bespoke, never-before-seen definition of CVC mixing is not a single “class[] of transactions … of primary money laundering concern.” 31 U.S.C. § 5318A(a)(1). Rather, the definition encompasses multiple distinct classes of crypto-asset transactions, including “[p]ooling or aggregating CVC” and “[e]xchanging between types of CVC.” 88 Fed. Reg. at 72,722. Yet in determining that CVC mixing is “of primary money laundering concern,” FinCEN analyzed only one of the distinct classes covered by its broad definition of CVC mixing—transactions involving mixing protocols such as Tornado Cash. *See id.* at 72,704–07. For example, FinCEN considered the use of CVC mixing protocols in “foreign jurisdictions including DPRK, Russia” and other jurisdictions, but did not consider whether activities such as “pooling” CVC are done there for illicit purposes. *Id.* at 72,704–05. FinCEN likewise asserted that “CVC mixing services often deliberately operate opaquely and advertise their services as a way to pay anonymously for illicit items such as illegal narcotics, firearms, and child sexual abuse material.” *Id.* at 72,706. That assertion is not adequately supported, but even taking the statement on its own terms, FinCEN did not purport to make similar findings for other categories of transactions within the proposed definition of CVC mixing.

FinCEN cannot bootstrap that finding to impose special measures on other distinct classes of crypto-asset transactions without doing the work and making a reasonable, evidence-based determination that those classes of transactions also raise money-laundering concerns. Nor can the agency jump up a level of generality and define the class as “the facilitation of CVC transactions in a manner that obfuscates the source, destination, or amount involved in one or more transactions.” 88 Fed. Reg. at 72,722. FinCEN has only purported to find—through inadequate reasoning, as explained above, *supra* at 5–7, and without making the underlying evidence and data available to the public, as explained below, *infra* at 16–18—that only a small and discrete subset of transactions with those characteristics raises money-laundering concerns. Even assuming that finding could withstand scrutiny (and it cannot), at minimum FinCEN would still be required to limit the class to that subset of transactions. Otherwise, there would be no meaningful limit on FinCEN’s class-designation authority. FinCEN could conclude, for example, that money laundering using cash justifies designating all dollar-denominated transactions as of primary money laundering concern.

Second, FinCEN’s conclusion that “CVC mixing,” is a “class[] of transactions … of primary money laundering concern” is itself arbitrary and capricious under the APA. All of FinCEN’s examples of CVC mixing being used for money laundering involve actual mixing protocols such as Tornado Cash—a tiny subset of the “class” it has defined. As explained above, *supra* at 5–6, those examples do not justify designating even core CVC mixing as of primary money laundering concern, given that those protocols are overwhelmingly used for legitimate purposes. The possibility that this conclusion could be used to designate protocols that are not mixers but nevertheless meet FinCEN’s definition, such as DeFi protocols, is even more problematic.

Even setting aside those problems, FinCEN has failed to explain why a narrower definition of “CVC mixing” limited to actual mixing protocols would not achieve its law enforcement interests while imposing far lower costs on regulated parties.[5] FinCEN also has not explained how several categories of "CVC mixing," including "single-use wallets" and "exchanging between types of CVC or other digital assets," pose money-laundering risks when divorced from crypto-mixing protocols. Nor has it explained its failure to distinguish between technological layers (e.g., Layer 1 blockchains) and functions that could provide mixing services (e.g., applications built on those blockchains). FinCEN's decision to regulate with an axe instead of a scalpel is therefore arbitrary and capricious, in addition to being foreclosed by Section 311.

Third, the uncertain scope of the definition of "CVC mixing" deprives covered financial institutions of fair notice of the kinds of transactions that trigger reporting. The Proposed Rule's general definition of "CVC mixing"—as any "facilitation of CVC transactions in a manner that obfuscates the source, destination, or amount involved in one or more transactions"—is itself broad and ill-defined. 88 Fed. Reg. at 72,722. That there might be "some conduct that clearly falls within the provision's grasp" does not mean the provision is sufficiently clear. *Johnson v. United States*, 576 U.S. 591, 602 (2015).

Making matters worse, the six illustrative, non-exhaustive examples of "CVC mixing" in the Proposed Rule do not invariably "obfuscate" the source, destination, or amount involved in a transaction. For example, transacting parties often "exchang[e] between types of CVC" on the blockchain with full transparency as to the destinations, sources, and amounts involved. It is therefore unclear whether the general definition of "CVC mixing" extends beyond transactions that obfuscate the destination, source, or amount involved, or instead whether the definition's specific examples (despite their plain terms) are limited to transactions that obfuscate the destination, source, or amount involved. That lack of clarity violates the Due Process Clause, because it does not provide "the kind of notice that will enable ordinary people to understand" what transactions must be reported, and because it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). That violating Section 311 can carry criminal penalties only worsens the due process problem. *See* 31 U.S.C. § 5322(d); *Bittner v. United States*, 598 U.S. 85, 101 (2023) (Gorsuch, J.) ("Under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals.") (citation omitted).

III. The Proposed Rule is unnecessary because financial institutions are already required to report suspicious CVC transactions to FinCEN.

FinCEN has failed to substantiate the need for the Proposed Rule in light of the fact that existing SAR regulations already require covered institutions to report suspicious transactions. FinCEN acknowledges that financial institutions likely already collect the required information pursuant to existing regulations; indeed, that is the agency's principal explanation for why the Proposed Rule

[5] Simply narrowing the definition of CVC Mixing to cover digital asset anonymizing services as traditionally understood by that term would still not, however, resolve the other reasons the Proposed Rule cannot be implemented that are described herein.

would not impose undue cost or burden on affected institutions. 88 Fed. Reg. at 72,708. FinCEN asserts, however, that the Proposed Rule is nonetheless necessary because covered institutions do not always report the information to the agency, as the Proposed Rule would require. *Id.* FinCEN has the authority to levy enforcement actions against covered entities that are not complying with SAR reporting requirements. FinCEN should use its enforcement authority, rather than require a reporting requirement that will not demonstrably help FinCEN or law enforcement.

But FinCEN does not provide data to support these assertions, and there is reason to doubt that there exists any material reporting gap. All institutions covered by the Proposed Rule are required to have risk-based suspicious activity monitoring and reporting systems and must consider available customer information as part of those processes. If financial institutions already have the information the Proposed Rule requires, they should be filing SARs with FinCEN under existing regulatory requirements when they detect suspicious activity involving these transactions—that is, whenever they know or believe a transaction "is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets)." 31 C.F.R. § 1020.320(a)(2)(i). Indeed, FinCEN has identified the use of mixers – as traditionally and more narrowly defined – as a red flag for suspicious activity in its guidance to financial institutions, and financial institutions are required to block and report transactions involving sanctions mixers, Blender.io and Tornado Cash. *See, e.g.*, FIN-2019-A003, Advisory on Illicit Activity Involving Convertible Virtual Currency (May 9, 2019); U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash (Aug. 8, 2022), *available at* https://home.treasury.gov/news/press-releases/jy0916; U.S. Treasury Issues First-Ever Sanctions on a Virtual Currency Mixer, Targets DPRK Cyber Threats (May 6, 2022), *available at* https://home.treasury.gov/news/press-releases/jy0768. Accordingly, financial institutions are already monitoring for and reporting suspicious mixing activity. FinCEN acknowledges that the Proposed Rule will result in some "duplicative" reporting due to "overlap" with existing SAR regulations, but it does not meaningfully grapple with the extent of the overlap or explain why the SAR regulations do not already require reporting to FinCEN for the activity the Proposed Rule purports to be principally targeting. 88 Fed. Reg. at 72,718. Finally, to whatever extent there is unreported suspicious activity, FinCEN did not consider the alternative of using their authority to enforce the existing SAR rules, rather than adding a new reporting requirement that will not demonstrably help law enforcement.

The only thing the Proposed Rule adds beyond existing SAR regulations (aside from sweeping in broad swathes of legitimate digital asset activity) is a requirement to report digital asset transactions below the SAR monetary thresholds. But the reporting of transactions below the SAR threshold cannot justify the Proposed Rule for at least two reasons. First, digital asset transactions are unlikely to raise money laundering concerns for the same reasons that fiat transactions below those thresholds do not raise such concerns. Indeed, the Treasury Department has found that "money laundering, proliferation financing, and terrorist financing most commonly occur using fiat currency or other traditional assets as opposed to virtual assets."

U.S. Dep't of Treasury, Illicit Finance Risk Assessment of Decentralized Finance 36 (Apr. 2023), https://home.treasury.gov/system/files/136/DeFi-Risk-Full-Review.pdf.

Second, basic principles of reasoned decision making would require FinCEN to include a minimum transactional threshold in order to protect the efficiency and effectiveness of BSA/AML compliance programs and BSA reports. FinCEN has recognized this principle by imposing minimum transactional thresholds for other types of transactional recordkeeping and reporting requirements, including those for funds transmittals, geographic targeting orders, SARs, currency transaction reports, and nonfinancial trade and business cash reports. Indeed, the AML Act of 2020 recognized the importance of minimum thresholds and appropriately scoped reporting requirements in mandating that FinCEN engage in reviews to ensure that current regulations, including reporting thresholds, continue to be "risk-based" and "efficient," including by "ensur[ing] that those provisions will continue to require certain reports or records that are highly useful in countering financial crime" and are not "outdated, redundant, or otherwise do not promote a risk-based anti-money laundering compliance and countering the financing of terrorism regime for financial institutions." William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, Division F: Anti-Money Laundering Act of 2020, § 6216; *see also id.* §§ 6202, 6204, 6205; 31 U.S.C. § 5311 note. The Proposed Rule would go against these principles at significant costs. It would require a flood of useless reporting that would benefit no one and could affirmatively harm law enforcement and the efficacy of BSA/AML compliance programs by straining the limited resources at both digital asset firms and FinCEN.

Moreover, without a de minimis threshold the Proposed Rule will impose new, burdensome, and unnecessary information-collection requirements on money services businesses, which will make up a large percentage of the financial institutions that will be covered by the rule, and generally have formal customer identification and verification requirements only for transactions above $3,000, which implicate the funds transmittal rule. 31 C.F.R. § 1010.410. Imposing reporting requirements with no value threshold will require many financial institutions to collect and verify customer information where they otherwise were not required to do so, and without any legitimate law enforcement justification for doing so.

IV. FinCEN lacks statutory authority to impose special measures worldwide.

The Proposed Rule exceeds FinCEN's statutory authority and is arbitrary and capricious because it would impose special measures on CVC mixing transactions occurring anywhere in the world. That approach contravenes Section 311's requirement that FinCEN identify a class of transactions raising money-laundering concerns involving "particular" foreign jurisdictions. 31 U.S.C. § 5318A(a)(1), (c)(2)(B).

Section 311 authorizes FinCEN to impose "special measures" if it "finds that reasonable grounds exist for concluding that … 1 or more classes of transactions within, or involving, *a* jurisdiction outside of the United States … is of primary money laundering concern, in accordance with subsection (c)." 31 U.S.C. § 5318A(a)(1) (emphasis added). The plain import of the singular term "a jurisdiction" is that FinCEN must identify a "class of transactions" involving one or more *particular* foreign jurisdictions that FinCEN finds to be of primary money laundering concern. After doing so, FinCEN may then impose special measures for that class of transactions involving those particular jurisdictions.

The cross-reference to subsection (c) confirms this understanding of Section 311. Subsection (a) provides that before imposing special measures FinCEN must conclude that the class of transactions is of primary money laundering concern "in accordance with subsection (c)." 31 U.S.C. § 5318A(a)(1). Subsection (c), in turn, lists factors that the agency must consider when determining that a "class of transactions … within or involving a *particular* jurisdiction" is of primary money laundering concern. *Id.* § 5318A(c)(2)(B) (emphasis added). The enumerated statutory factors reiterate that approach, mandating a jurisdiction-by-jurisdiction, rather than global, analysis. *See id.* § 5318A(c)(2)(B)(i)–(iii). For example, FinCEN must consider the extent to which the class of transactions is used "for legitimate business purposes in *the jurisdiction*." *Id.* (emphasis added).

Thus, although Section 311 authorizes FinCEN to declare a class of transactions to be of primary money concern in a particular jurisdiction, FinCEN cannot simply identify a class of transactions (CVC mixing transactions) and declare it to be of primary money laundering concern worldwide. It cannot impose special measures on CVC mixing transactions involving, for example, the United Kingdom, France, and Canada without finding that CVC mixing transactions involving those countries are of primary money laundering concern. Nor may FinCEN impose special measures on every country in the globe based on perceived concerns related to specific countries such as North Korea.

Interpreting Section 311 to authorize global class-of-transactions special measures also would create a serious nondelegation problem. To avoid impermissible delegations of legislative power, Congress must provide an "intelligible principle" to guide agencies' exercise of authority. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). As just explained, however, subsection (c) provides FinCEN guidance only for determining whether a class of transactions in a *particular* jurisdiction is of primary money laundering concern. It gives no guidance whatsoever for determining whether a class of transactions is of primary money laundering concern everywhere in the world. Section 311 should not be construed to give the agency such sweeping authority without any intelligible principle to guide the agency. *See United States v. Richards*, 755 F.3d 269, 274 (5th Cir. 2014).

FinCEN's past practice likewise supports a jurisdiction-by-jurisdiction interpretation. Section 311 authorizes FinCEN to impose special measures on four categories of things, including "a jurisdiction outside of the United States" and a "class[] of transactions within, or involving, a jurisdiction outside of the United States." 31 U.S.C. § 5318A(a)(1). FinCEN has never before interpreted the phrase "class[] of transactions within, or involving, a [foreign] jurisdiction," but it has promulgated rules imposing special measures on "a [foreign] jurisdiction." And when FinCEN has exercised that authority, it has imposed special measures only on a specific country, rather than worldwide or on entire regions. *See* 31 C.F.R. §§ 1010.651, 1010.659, 1010.661.

The inconsistency between FinCEN's interpretation in this Proposed Rule and its previous interpretation of "a [foreign] jurisdiction" "counts as one more reason yet to question whether its current position represents the best view of the law." *See Bittner*, 598 U.S. at 97. And at a minimum, the APA requires FinCEN to "'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

V. FinCEN's reliance on "nonpublic" and unspecified "public" information deprives the public of a meaningful opportunity to comment.

The Proposed Rule is also procedurally invalid because FinCEN relies on information that the agency has failed to make publicly available, thereby depriving the public of its right to meaningfully evaluate the Proposed Rule. The only solution at this point is for FinCEN to re-issue the Proposed Rule and fully disclose and explain any non-classified information and analysis on which the agency is relying. For classified information, or information that is otherwise prohibited by statute from public release and that the agency cannot disclose in full, the re-issued rule would need to adequately summarize the information and analysis in sufficient detail so that the public can respond.

Under the APA, "[n]otice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment." *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995). To do so, "the most critical factual material that is used to support the agency's position … must [be] made public in the proceeding and exposed to refutation." *Window Covering Manufacturers Ass'n v. Consumer Prod. Safety Comm'n*, 82 F.4th 1273, 1283 (D.C. Cir. 2023) (quotation marks omitted). It is the "agency's duty to identify and make available" that information. *Id.* (quoting *Owner-Operator Indep. Drivers v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007)). Agencies also "must explain the assumptions and methodology" underlying a proposed rule "and, if the methodology is challenged, must provide a complete analytic defense." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (quotation marks omitted). And where an agency omits some of the "critical factual material" and analysis from a proposed rule, it must disclose the material and then provide "further opportunity [to] comment." *Chamber of Commerce v. SEC*, 443 F.3d 890, 900–01 (D.C. Cir. 2006).

FinCEN has run afoul of this requirement in previous Section 311 rulemakings. When imposing special measures on FBME Bank, for example, FinCEN failed to disclose much of the evidence that it relied on to conclude that FBME was of primary money laundering concern. *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 118–23 (D.D.C. 2015). In holding that the rule was likely arbitrary and capricious, the court explained that FinCEN could not withhold information it relied on unless it was statutorily protected from disclosure. *Id.* at 120–23. And even with respect to statutorily protected information, FinCEN was required to provide a "summary" of that information "sufficient to put" interested parties "on notice ... that FinCEN might rely on [that] information derived from" statutorily protected material. *Id.* at 120.

FinCEN has repeated that mistake here, and this time in a proposed rule with far more sweeping consequences than the designation of a single financial institution. A number of the agency's conclusions on factors that it is statutorily required to consider are supported by "non-public" information that the agency has not released or claimed is classified or otherwise statutorily protected. These include, for example:

- FinCEN's "assess[ment] that CVC mixing activity often occurs within or involves numerous jurisdictions outside the United States." 88 Fed. Reg. at 72,704 (relying on "non-public information").
- FinCEN's conclusion that "DPRK state-sponsored or -affiliated cyber threat actors are responsible for a substantial portion of illicit or stolen CVC funds sent to CVC mixers and that the DPRK utilized CVC mixing to launder proceeds in an attempt to obfuscate its connection to those funds." 88 Fed. Reg. at 72,705 (relying on "non-public reporting").
- FinCEN's conclusion that approximately 15,000 financial institutions would be affected by the rule. 88 Fed. Reg. at 72,722 n.179 (relying on "non-public data sources").

The APA does not permit FinCEN to base a rulemaking on "nonpublic" information. *FBME*, 125 F. Supp. 3d at 122. Instead, the agency must "produce [the] materials it is relying upon." *Id.* And if the materials are classified or statutorily protected from disclosure, FinCEN must (at a minimum) explain the reason for non-disclosure and summarize the information so that commenters have an adequate opportunity to respond. *Id.* at 120.

The Proposed Rule also relies on undisclosed data and studies to support its economic-impact analysis. For example, FinCEN considered an internal study that "incorporated both public and non-public data as well as certain proprietary and non-proprietary computer programs to analyze transactions occurring between" 2010 and 2023. 88 Fed. Reg. at 72,717 n.120. The agency then used that study to support its conclusion that "the number of transactions that would require reporting and recordkeeping [requirements] as a unique consequence of adopting special measure one as proposed is extremely low in relative terms," *id.* at 72,717. But the Proposed Rule fails to "make available" the "stud[y] and data" informing that critical component of the agency's cost estimate. *Window Covering Manufacturers Ass'n*, 82 F.4th at 1283.

In addition, the Proposed Rule relies on an examination of "ransomware-related [Suspicious Activity Reports] filed between January 1, 2021, and June 30, 2021, to determine" trends in the use of CVC mixing for money laundering. 88 Fed. Reg. at 72,706 & n.56. FinCEN is required to disclose the underlying information and the methodology it used to analyze it. *FBME*, 125 F. Supp. 3d at 120. Although FinCEN disclosed the total number of Suspicious Activity Reports in the data-set, the conclusions the agency draws from that dataset—that certain "money laundering typologies" are "prevalent"—cannot be meaningfully assessed unless FinCEN describes the typologies it identified, their prevalence in the dataset, and the methodological assumptions the agency used in reaching those conclusions.

VI. The FinCEN Director cannot promulgate the Proposed Rule without running afoul of the Appointments Clause.

If adopted as proposed, the Proposed Rule would also violate the Appointments Clause. The rule is set to be promulgated by FinCEN's Director, Andrea M. Gacki. But Director Gacki cannot promulgate rules because she has not been duly appointed as a principal officer.

The Constitution contemplates two levels of officers of the United States: principal officers, who must be nominated by the President and confirmed by the Senate, and inferior officers, who can be appointed by a "Head[] of Department[]" if "Congress … by Law" so provides. U.S. Const., art. II, § 2, cl. 2. "Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond v. United States*, 520 U.S. 651, 662 (1997). That is, an "inferior officer" is one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

Here, Director Gacki is an inferior officer because she reports to the Secretary of the Treasury and was not appointed by the President and confirmed by the Senate. As an inferior officer, Director Gacki cannot "exercis[e] significant authority pursuant to the laws of the United States" —authority reserved to officers—without adequate supervision by the Treasury Secretary. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (quotation marks omitted). If she purports to do so, her actions are void. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

Adopting a legislative rule, as Director Gacki is set to do here, is an exercise of significant authority under federal law. "Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 64 (2015) (Alito, J., concurring). And here, although Director Gacki is purporting to exercise statutory authority delegated by the Treasury Secretary, *see* Treasury Order 180-01 ¶ 3 (July 1, 2014), the Secretary is not "direct[ing] and supervis[ing]" Director Gacki's decisions in shaping and promulgating the rule, *Edmond*, 520 U.S. at 663. The Constitution demands that a principal officer be responsible for the final say of something as significant as the Proposed Rule, and the Secretary cannot constitutionally avoid accountability by attempting to divest herself of that responsibility.

Conclusion

For these reasons, FinCEN should withdraw the Proposed Rule and reconsider its approach. At minimum, FinCEN should re-propose the rule and make available the information that it has failed to make public and provide for a new comment period so that commenters can respond to that information. If FinCEN proceeds to finalize the Proposed Rule, it should rely on public/private partnerships, and further engagement with the Association, to develop a more appropriately tailored definition of CVC mixing. As noted above, we would welcome the opportunity to discuss these issues further.

Respectfully submitted,

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