

## **FinCEN Issues Guidance on Application of Regulations to Certain Business Models Involving Convertible Virtual Currencies**

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On May 9, 2019, the Financial Crimes Enforcement Network of the U.S. Department of the Treasury (FinCEN) issued “interpretive guidance” addressing how FinCEN’s money services business (MSB) regulations apply to a variety of business models that use convertible virtual currency (CVC) (2019 FinCEN Guidance).<sup>1</sup> This is the first significant guidance FinCEN has issued regarding the regulatory treatment of virtual currency under the Bank Secrecy Act (BSA) of 1970, as amended, and FinCEN’s implementing regulations thereunder, since its landmark 2013 virtual currency guidance. In that 2013 guidance, FinCEN grouped persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies as “users,” “administrators,” or “exchangers,” and concluded (i) a “user” of virtual currency is not an MSB under FinCEN’s regulations and therefore not subject to MSB registration, reporting, and recordkeeping regulations, but (ii) an “administrator” or “exchanger” is an MSB under FinCEN’s regulations, specifically, a money transmitter, unless a limitation to or exemption from the definition of MSB applies to the person.<sup>2</sup>

Although the virtual currency space has evolved significantly over the last six years, the 30 pages of interpretive guidance essentially affirms the core of the 2013 FinCEN Guidance, incorporates the conclusions of several FinCEN letter rulings and other interpretations released by FinCEN since the 2013 guidance, and analyzes over a dozen business models that use CVCs in their day-to-day activities to assess whether each business model triggers FinCEN MSB regulation.

Concurrent with the issuance of the CVC interpretive guidance, FinCEN published an *Advisory on Illicit Activity Involving Convertible Virtual Currency* to assist financial institutions in identifying and

reporting suspicious activity concerning how criminals and other bad actors exploit convertible CVCs for money laundering, sanctions evasion, and other illicit financing purposes, particularly involving darknet marketplaces, peer-to-peer (P2P) exchangers, foreign-located MSBs, and CVC kiosks/ATMs.<sup>3</sup>

## Definitions and Background

An MSB is “any person doing business, whether or not on a regular basis or as an organized business concern, in one or more [listed capacities, one of which is]...a money transmitter.”<sup>4</sup> MSBs must register with FinCEN and are subject to a variety of recordkeeping and reporting requirements pursuant to FinCEN regulations.<sup>5</sup>

Generally, a “money transmitter” includes a person that accepts “currency, funds, or **other value that substitutes for currency** from one person *and* [transmits]...currency, funds, or **other value that substitutes for currency** to another location or person by any means.”<sup>6</sup> In the 2019 FinCEN Guidance, FinCEN clarifies that the term “other value that substitutes for currency” encompasses situations in which the transmission does not involve currency or funds, but instead involves **something that the parties to a transaction recognize has value that is equivalent to or can substitute for currency.**<sup>7</sup>

“[V]alue that substitutes for currency” can be created either (a) specifically for the purpose of being used as a currency substitute or (b) originally for another purpose but then repurposed to be used as a currency substitute. In either case, persons involved in the creation and subsequent distribution of the value may be subject to additional regulatory frameworks (other than the BSA) and exempt from MSB status, but covered as a different type of financial institution under FinCEN regulations.

### **Application of BSA Regulations to Persons Exempt from MSB Status Engaged in Transactions Denominated in any Type of Value that Substitutes for Currency**

The following persons are exempt from MSB status: (a) bank and foreign banks; (b) persons registered with and functionally regulated or examined by the U.S. Securities and Exchange Commission (SEC) or the U.S. Commodity Futures Trading Commission (CFTC), or foreign financial agencies that engage in financial activities that, if conducted in the United States, would require them to be registered with the SEC or CFTC; or (c) natural persons who engage in certain MSB activities (i.e., dealing in foreign exchange, check cashing, issuing or selling traveler’s checks or money orders, providing prepaid access, or money transmission) on an infrequent basis and not for gain or profit.<sup>8</sup>

Banks and persons registered with and functionally regulated or examined by the SEC or the CFTC that engage in transactions denominated in value that substitutes for currency are exempt from MSB status but are subject to BSA regulations according to the applicable section of 31 CFR Chapter X.<sup>9</sup>

### **Application of BSA Regulations to Persons Not Exempt from MSB Status Engaged in Transactions Denominated in Any Type of Value that Substitutes for Currency**

A person not exempt from MSB status may be a money transmitter when the person engages in transactions covered under the definition of money transmission, regardless of the technology employed for the transmittal of value or the type of asset the person uses as value that substitutes for currency, or whether such asset is physical or virtual.<sup>10</sup> A person not exempt from MSB status (or an agent, or a mechanical or software agency owned or operated by such person) may be engaged in

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money transmission when such person:

1. uses any representation of currency of legal tender (i.e., paper money, coins, Federal Reserve Bank notes, United States notes, funds credited to an account) associated with the purchase or sale of commodities, securities, or futures contracts to engage in money transmission;
2. issues physical or digital tokens evidencing ownership of commodities, securities, or futures contracts that serve as value that substitutes for currency in money transmission transactions; or
3. issues or employs commodities, securities, or futures contracts by themselves as value that substitutes for currency in money transmission transactions.<sup>11</sup>

## Convertible Virtual Currency

The 2013 FinCEN Guidance states that the term “virtual currency” refers to a medium of exchange that can operate like currency but does not have all the attributes of “real” currency. The 2019 FinCEN Guidance provides more gloss, specifying that **CVC is a type of virtual currency that either has an equivalent value as currency, or acts as a substitute for currency, and is therefore a type of “value that substitutes for currency.”** FinCEN commented that “the label applied to any particular type of CVC (such as ‘digital currency,’ ‘cryptocurrency,’ ‘cryptoasset,’ ‘digital asset,’ etc.) is not dispositive of its regulatory treatment under the BSA.” According to the 2019 FinCEN Guidance, because money transmission involves the acceptance and transmission of value that substitutes for currency *by any means*, **transactions denominated in CVC will be subject to FinCEN regulations regardless of whether the CVC is represented by a physical or digital token, whether the type of ledger used to record the transactions is centralized or distributed, or the type of technology utilized for the transmission of value.**

## General Application of BSA Regulations to Money Transmission

FinCEN regulation provides that whether a person is a money transmitter is a “matter of facts and circumstances” and identifies six circumstances under which a person’s activities would not make such person a money transmitter.<sup>12</sup> The determination of whether a person is an MSB is based on a person’s activities, not a person’s formal business status. **A person qualifies as a money transmitter if that person’s activities include receiving one form of value (currency, funds,**

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***prepaid value, value that substitutes for currency – such as CVC, etc.) from one person and transmitting either the same or a different form of value to another person or location, by any means.***<sup>13</sup>

The 2019 FinCEN Guidance clarifies that a person may be a money transmitter when operating either on a transactional basis or on an account basis.<sup>14</sup> Also, a person will qualify as a money transmitter if that person accepts value with the intent of transmitting it only under certain conditions (e.g., operating a platform that facilitates the conditional exchange of value between two parties – such as the exchange of CVC against currency when an agreed upon exchange rate and amount is met – such person will be engaged in money transmission every time the conditions are met and the person completes the reciprocal transfers).<sup>15</sup>

## **General Application of BSA Regulations to Money Transmission**

The BSA and the regulations promulgated thereunder by FinCEN require that MSBs establish an effective anti-money laundering (AML) program and comply with certain recordkeeping and reporting requirements.<sup>16</sup> The AML program must be reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities.<sup>17</sup> The AML program must be written and must be commensurate with the risks posed by the MSB's location, size, nature and volume of services provided.<sup>18</sup> *At a minimum*, the AML program must:

- a. incorporate policies, procedures and internal controls to ensure compliance with BSA requirements;
- b. designate an individual(s) responsible for coordinating and monitoring day-to-day compliance;
- c. provide for training of appropriate personnel; and
- d. provide for an independent review to monitor and maintain an adequate AML program.<sup>19</sup>

MSBs that engage in money transmission must register with FinCEN within 180 days of starting to engage in money transmission.<sup>20</sup> Money transmitters must comply with important recordkeeping, reporting and transactions monitoring obligations.<sup>21</sup>

## **Application of BSA Regulations to Money Transmission Involving CVC**

As discussed above, persons accepting and transmitting value that substitutes for currency, such as virtual currency, are money transmitters.<sup>22</sup> Persons accepting and transmitting CVC are required (like any money transmitter) to register as MSBs and comply with AML program, recordkeeping,

monitoring, and reporting requirements.<sup>23</sup> These requirements apply equally to domestic and foreign-located CVC money transmitters doing business in whole or in substantial part within the United States, even if the foreign-located entity has no physical presence in the United States.<sup>24</sup>

In the 2019 FinCEN Guidance, FinCEN effectively affirms its 2013 classifications that it ascribed to the three basic types of market participants to a generic CVC arrangement: “exchangers,” “administrators,” and “users.” In the 2013 FinCEN Guidance, FinCEN stated that exchangers and administrators generally qualified as money transmitters under the BSA; users did not.<sup>25</sup> The 2013 FinCEN Guidance confirmed that exchangers are subject to the same obligations under FinCEN regulations regardless of whether the exchangers are directly brokering the transactions between two or more persons, or whether the exchangers are parties to the transactions using their own reserves, in either CVC or real currency.<sup>26</sup> Also, the 2013 FinCEN Guidance made clear that transmission to “another location” is interpreted broadly and occurs when an exchanger selling CVC accepts real currency from a person and transmits the CVC equivalent to the person’s CVC account with the exchanger.<sup>27</sup>

## **Application of BSA Regulations to Common Business Models Involving Transmission of CVC**

In the 2019 FinCEN Guidance, FinCEN uses the term “business model” to refer to key facts and circumstances that are relevant to FinCEN’s determination of: (a) whether a person meets the definition of a particular type of financial institution; and (b) the regulatory obligations associated with the activities performed within that business model. It is important to note that ***differences in similar business models may lead to different regulatory applications.***

***All persons who deal with CVC should contact their legal counsel to determine their BSA obligations under their particular business model. In addition, such persons should ascertain, through their legal counsel, whether any state MSB licensing or registration requirements apply.***

1. Application of BSA Regulations to Common Business Models Involving Transmission of CVC
  - a. P2P Exchangers

People and companies who buy and sell CVCs (whether on or off-line) are referred to as Peer-to-Peer (P2P) exchangers. Unless they engage in such activity infrequently and not for gain/profit, P2P exchangers must comply with BSA regulations **as a money transmitter** regardless of

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the regularity or formality of such transactions or the location from which the person is operating. P2P exchangers must therefore register with FinCEN as an MSB and comply with AML program, recordkeeping, and reporting requirements.

b.

### CVC Wallets

CVC wallets are used to store and transfer CVCs. CVC wallet types vary according to: (i) the technology employed (i.e., mobile, software or hardware wallets); (ii) where the value is stored (i.e., locally or on an external server in one or multiple locations accessible by use of a private key); and (iii) who controls access to the value (i.e., hosted wallets are controlled by a third party who acts as an intermediary between the wallet owner and the CVC payment system, and unhosted wallets are controlled by the wallet owner from their phone, computer or other device).

FinCEN has four criteria for its regulatory treatment of CVC wallets, which is not dependent on the technology employed:

- (i) who owns the value;
- (ii) where the value is stored;
- (iii) whether the owner i

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interacts directly with the payment system where the CVC runs; and,

(iv)

whether the person acting as intermediary has total independent control over the value.

Hosted wallet providers are generally considered **money transmitters** and subject to BSA requirements, which may vary depending on whether the host is a financial institution, an agent, or financial institution other than an agent (e.g., correspondent bank). Hosted wallet providers are also subject to rules such as the Funds Travel Rule based on the host's position in the transmission chain (e.g., transmitter, intermediary, or recipient's financial institution).

Unhosted wallet providers purchasing goods or services on the user's own behalf, however, are not considered money transmitters. If a wallet provider provides unhosted and hosted services, however, it would be considered a money transmitter, regardless of how it markets itself

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or the label it applies to its activities.<sup>28</sup>

c.

#### CVC Kiosks and ATMs

CVC kiosks (also known as CVC ATMs or vending machines) are electronic terminals that facilitate the exchange of CVC for currency or other CVC. These kiosks may connect directly to a separate CVC exchanger, which performs the actual CVC transmission, or they may draw upon the CVC in the possession of the owner-operator of the electronic terminal.<sup>29</sup>

An owner-operator of a CVC kiosk that accepts currency from a customer and transmits the equivalent value in CVC (or vice versa) qualifies as a **money transmitter** and is subject to BSA requirements. That said, owner-operators of CVC kiosks that link an accountholder with his or her account at a regulated depository institution solely to verify balances and dispense currency are not money transmitters.

d.

#### CVC Money Transmission Services Provided Through Decentralized Applications

Decentralized (distributed) applications (DApp) are software programs that operate on a P2P network of computers running a blockchain platform (a type of distributed public ledger that allows the development of secondary blockchains), designed such that they are not controlled by a single person or group of persons (that is, they do not have an identifiable administrator).<sup>30</sup>



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An owner/operator of a DApp may deploy it to perform a wide variety of functions, including acting as an unincorporated organization, such as a software agency, to provide financial services. Generally, a DApp user must pay a fee to the DApp (for the ultimate benefit of the owner/operator) in order to run the software, which is commonly paid in CVC.

Regulatory treatment of DApps that accept and transmit value is the same as for CVC kiosks, regardless of whether the DApps operate for profit. Accordingly, when DApps perform money transmission, the DApp and/or its owners/operators, are considered **money transmitters** and subject to BSA requirements.

e.

Anonymity-enhanced CVC Transactions (tumblers/mixers)

Anonymity-enhanced CVC transactions are transactions structured to conceal information normally available through the CVC's native public ledger or to prevent the tracing of the transmitter's identity through distributed public ledgers (also called privacy coins).<sup>31</sup> Such transactions are not exempt from FinCEN regulations for money transmitters and, thus, any anonymizing service provider that accepts CVCs for currency or other CVCs is a **money transmitter** subject to BSA requirements. If the person's business is different from the money transmission itself and the money transmission is necessary for the business to operate, then it is exempt under the integral

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exemption.<sup>32</sup> In contrast, anonymizing software providers (e.g., suppliers of software a transmitter would use to transact CVC exchanges) are not considered money transmitters unless engaged in the business of money transmissions.

To comply with their BSA obligations, when knowingly accepting anonymity-enhanced CVCs (or regular CVC that has been anonymized), it is not sufficient for money transmitters engaged in CVC transactions subject to the Funds Travel Rule to incorporate procedures into their AML programs that allow them to track and monitor the transaction history of a CVC through publicly visible ledgers. Instead, the money transmitters must also implement procedures to obtain the identity of the transmitter or recipient of the value.<sup>33</sup> The 2019 FinCEN Guidance states that financial institutions that engage in pseudonymous CVC transactions (where the full name of the transmitter is replaced with a numeric code) are not in compliance with obligations under the Funds Travel Rule. This guidance represents a significant compliance hurdle for mixers and tumblers and financial institutions engaging in such transactions.

f.

Payment Processing Services  
Involving CVC Money  
Transmission

CVC payment processors are financial intermediaries that enable traditional merchants to accept CVC from customers in exchange for goods and services

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sold by either integrating with a merchant's point of sale or online shopping cart solution so the value of goods being purchased is quoted in CVC, or collecting the CVC from the customer and then transmitting currency or funds to the merchant, or vice versa.<sup>34</sup>

CVC payment processors are **money transmitters** under the BSA, regardless of whether they accept and transmit the same type of CVC, or they accept one type of value (such as currency or funds) and transmit another (such as CVC).

Significantly, FinCEN concluded in the 2019 FinCEN Guidance that CVC payment processors are not eligible for the payment processor exemption because they do not satisfy the four required conditions for the exemption, particularly the second condition that requires that the payment processor operate through clearance and settlement systems that admit only BSA-regulated financial institutions. According to the Guidance, "[t]his condition is critical, because BSA-regulated financial institutions have greater visibility into the complete pattern of activities of the buyer or debtor, on the one hand, and the seller or creditor, on the other hand. Having BSA-regulated financial institutions at either end of the clearance and settlement of transactions reduces the need to impose additional obligations on the payment processor."<sup>35</sup>

g.

CVC Money Transmission  
Performed by Internet Casinos

According to FinCEN, any person engaged in the business of gambling that is not covered by the regulatory definition of casino, gambling casino, or card club,<sup>36</sup> but which accepts and transmits value denominated in CVC, may still be regulated under the BSA as a **money transmitter**.

This includes Internet casinos accepting deposits and bets and issuing payouts denominated in CVC and may include predictive markets, information markets, decision markets, idea futures, and event derivatives.<sup>37</sup>

### Summary of CVC Business Models That Qualify as Money Transmitters<sup>38</sup>

CVC Business Model	Money Transmitter
P2P Exchangers	Yes, except if making infrequent transactions not for gain.
Hosted wallet provider	Yes
Unhosted wallet provider purchasing goods/services for personal use	No
CVC Kiosk or ATM owner-operator that exchanges CVC for real currency or other CVC	Yes
CVC Kiosk owner-operator linked to regulated financial institution	No
DApps that transmit money either for profit or not-for-profit	Yes
Anonymity Enhanced CVC Service Providers (e.g., Tumblers/Mixers)	Yes, if transacting CVC exchanges.  No, if just providing anonymity services (e.g., software developers) and are not in the business of transmitting money.
Anonymity Enhanced CVC Software Providers	No, assuming they are not engaged in the

	business of money transmission.
Payment Processing Services Using CVC	Yes
Internet Casinos Performing CVC Transactions	Yes – even if not meeting the FinCEN’s formal requirements of a gaming casino, a person engaged in the business of gambling may still be considered a money transmitter depending on the nature of the transaction.

2.

### Specific Business Models Involving CVC Transactions that May be Exempt from the Definition of Money Transmission

As discussed above, FinCEN’s regulations specifically define “money transmission services” to mean “*the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.*” Despite this broad definition of “money transmission services,” several types of business models are exempt from qualifying as a money transmission services.

a.

### CVC Trading Platforms and Decentralized Exchanges

CVC P2P trading platforms act as intermediaries (much like broker-dealers in the securities industry) to create a market by helping buyers find sellers of CVC, and vice versa. If the CVC trading platform does not settle or clear such trades between willing buyers and sellers, then it would not qualify as a money

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transmitter under the FinCEN regulations. If, however, a trading platform purchases the CVC from the seller and then subsequently sells it to a buyer, the CVC trading platform would then be acting as an exchanger, and the platform would qualify as a money transmitter.

b.

#### Capital Raising and Initial Coin Offerings (ICO)

FinCEN provides guidance on two common business models involving ICOs. First, a preferential ICO sale to a select group of buyers (or investors). Here, the exchange of CVC for another type of value may be immediate or deferred to a later date, and the CVC platform may be operational or to-be-developed. Furthermore, in this business model, additional CVC may be generated through mining on a decentralized model. According to FinCEN, in all these scenarios, the seller of the CVC is a money transmitter (functioning as an administrator), because at the time of the ICO the seller is the only person authorized to issue and redeem the new units of CVC.

Second, if the ICO raises funds for new projects by issuing (selling) an equity stake in the company, a debt instrument, or hedges a previous investment through a derivative (like a futures contract), the ICO may, or may not be, exempted from FinCEN's definition of a money transmitter.

With these scenarios, FinCEN notes that two potential exemptions may apply. The first

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exemption that could apply turns on whether the individual or entity issuing an ICO is expressly exempt from the definition of an MSB, i.e., the individual or entity is a bank, foreign bank, or person registered with the SEC or CFTC (or would otherwise be under the SEC or CFTC's oversight if located within the U.S.). Thus, if the ICO issuer is a bank, foreign bank, or person registered with the SEC or CFTC, the issuer will not be considered an MSB.

With respect to the second exemption, FinCEN regulations also exempt persons from the definition of money transmitter when the acceptance and transmission of value is only integral to the sale of goods or services different from money transmission.

Thus, if the person involved in the ICO fundraising is a bank, foreign bank, or registered person with the SEC or CFTC, then any money transmission connected to the ICO will not be treated as an MSB. Keep in mind, these exempt persons are generally otherwise subject to regulation by a banking, securities, or commodities regulator. On the other hand, if the person involved in ICO fundraising activity is not a bank, foreign bank, or a person regulated by the SEC or CFTC, any money transmission may nonetheless be exempted if the activity falls under the integral exemption.

c.

CVC Creators and Distributed Applications (DApps) Conducting CVC Transactions

In certain instances, once a

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number of CVC units are issued, the owners of those units may use those units for payment for goods or services or a repayment of obligations or sell the units against currency, funds or a different type of CVC. Critically, a person who mines CVC and uses it strictly for the purposes of purchasing goods or services is not an MSB under the FinCEN rules and/or regulations because these actions do not constitute acceptance or transmission under the “money transmission services definition.”

d.

#### CVC Money Transmission by Mining Pools and Cloud Miners

The process of verifying the authenticity of a block of transactions by a computer programmer by forming mining pools to increase the chances of being the first to verify such a block of transactions is referred to as “mining.” A “block reward” permits the program that has successfully mined the CVC to receive consistent payments or fees from the parties to a transaction for the authentication services. These mining pools are either managed by a controlling person or operate on a P2P basis. The leader of these mining pools or cloud miner typically distributes or transfers CVC to his own pool members or contract purchaser to distribute the earnings, such a distribution, this money transmission does not qualify under the definition of “money transmission services” under the BSA. These types of earnings distributions are integral to the CVC mining community. If, however, the leader, cloud miner, or software agency engage in



account-based money transmissions by combining their managing and renting services within the hosting of CVC wallets on behalf of the pool members or contract purchasers, the leader or cloud miner will fall under the FinCEN definition of **money transmitter** subject to the requirements of the BSA.

### Summary of CVC Business Models That May Qualify for MSB Exemptions<sup>39</sup>

CVC Business Model	Does an MSB Exemption Apply?
CVC trading platform (no trades cleared on platform)	Yes.
CVC trading platform (trades cleared on platform)	No.
ICO involving select buyers (e.g., Reg D investors)	Maybe. See 1 & 2 below.
1. involving bank, foreign bank or SEC/CFTC registrant.	Yes.
2. not involving bank, foreign bank or SEC/CTFC registrant.	No.
ICO to raise funds by issuing equity/debt or hedging a previous investment through a derivative (futures contract)	Depends. See 1 & 2 below.
1. involving bank, foreign bank or SEC/CFTC registrant.	Yes.
2. not involving bank, foreign bank or	No.

SEC/CFTC registrant.	
ICO issuing assets that do <b>not</b> serve as value that substitutes for currency value (e.g., utility tokens)	Yes.
ICO acting only as an intermediary and the acceptance or transmittal of value is integral to the sale of goods or services that is <i>different</i> from the money transmission itself.	Yes.
CVC miners and creators of DApps conducting CVC transactions.	Typically exempt except where leader or cloud miner has combined their managing and renting services within the hosting of CVC wallets on behalf of the pool members or contract purchasers.

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<sup>1</sup> FIN-2019-G001, "[Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies](#)," (May 9, 2019).

<sup>2</sup> FIN-2013-G001, "[Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies](#)," (March 18, 2013) at (2013 FinCEN Guidance).

<sup>3</sup> FIN-2019-A003, "[Advisory on Illicit Activity Involving Convertible Virtual Currency](#)" (May 9, 2019).

<sup>4</sup> 31 C.F.R. § 1010.100(ff).

<sup>5</sup> 31 C.F.R. § 1022.380(a)(1).

<sup>6</sup> 31 C.F.R. § 1010.100(ff)(5)(i)(A) (emphasis added).

<sup>7</sup> 2019 FinCEN Guidance at 4.

<sup>8</sup> 31 C.F.R. § 1010.100(ff)(8). In the case of 1010.100(ff)(8)(ii), the exemption applies only if the person itself is registered with, and functionally regulated or examined by the SEC or CFTC; the exemption may not apply if it is, for example, the document instrumenting the offer or sale of an asset

(and not the person offering or selling the asset) that which must be registered.

<sup>9</sup> 31 C.F.R. §§ 1010.100(d) and 1020, respectively, for banks; for brokers or dealers in securities, 31 C.F.R. §§ 1010.100(h) and 1023, respectively; for futures commission merchants, 31 C.F.R. §§ 1010.100(x) and 1026, respectively; for introducing brokers in commodities, 31 C.F.R. §§ 1010.100(bb)

and 1026, respectively; and for mutual funds, 31 C.F.R. §§ 1010.100(gg) and 1024, respectively.

<sup>10</sup> 2019 FinCEN Guidance at 5.

<sup>11</sup> *Id* at 7.

<sup>12</sup> A person is not a money transmitter if that person only: (A) provides the delivery, communication, or network access services used by a money transmitter to support money transmission services; (B) acts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or

service through a clearance and settlement system by agreement with the creditor or seller; (C) operates a clearance and settlement system or

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otherwise acts as an intermediary solely between BSA regulated institutions; (D) physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency as a person primarily engaged in such business, such as an armored car, from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency, other monetary instruments, other commercial paper, or other value at any time during the transportation; (E) provides prepaid access, as defined in 31 C.F.R. § 1010.100(ff)(4); or (F) accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds. 31 C.F.R. § 1010.100(ff)(5)(ii)(A)-(F).

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<sup>13</sup> 2019 FinCEN Guidance at 8.

<sup>14</sup> A transactional basis includes one-off transactions where there is no expectation that the money transmitter will establish an ongoing relationship with the transactor, and the money transmitter retains the currency, funds, or other value that substitutes for currency, only for the time required to effect the transmission. An account basis includes circumstances where the transactor is an established customer of the money transmitter and the money

transmitter maintains an account for the transactor to store funds or value that substitutes for currency, from which the transactor can instruct their

transfer. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 31 C.F.R. § 1022.210(a).

<sup>17</sup> *Id.*

<sup>18</sup> 31 C.F.R. § 1022.210(b) and (c).

<sup>19</sup> 31 C.F.R. § 1022.210(d).

<sup>20</sup> 31 C.F.R. § 1022.380.

<sup>21</sup> The 2019 FinCEN Guidance clarifies that, with respect to recordkeeping requirements, transmittal orders involving CVC qualify as transmittals of funds, and thus may fall within the “Funds Travel Rule.” Under the Funds Travel Rule, transmittals of funds of US\$3,000 or more (or the equivalent in

CVC) may trigger certain recording and recordkeeping requirements on a money transmitter acting as either the financial institution for the transmitter or

recipient, or as an intermediary financial institution. 31 C.F.R. § 1010.410(f).

<sup>22</sup> 2019 FinCEN Guidance at 12.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> An “exchanger” is a person engaged as a business in the exchange of virtual currency for real currency, funds or other virtual currency. An “administrator” is a person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (i.e.,

withdraw from circulation) such virtual currency. A “user” is a person that obtains virtual currency to purchase goods or services on the user’s own

behalf. 2013 FinCEN Guidance.

<sup>26</sup> Id.

<sup>27</sup> The 2019 FinCEN Guidance explained that this is transmission to another location because it involves a transmission from a person's account at one location (e.g., a user's real currency account at a bank) to the person's CVC account with the exchanger.

<sup>28</sup> 2019 FinCEN Guidance at 16.

<sup>29</sup> 2019 FinCEN Guidance at 17.

<sup>30</sup> Id. at 18.

<sup>31</sup> Id.

<sup>32</sup> Id. at 19.

<sup>33</sup> FinCEN also issued guidance "stating that originating or intermediary financial institutions that replace the proper identity of a transmitter or recipient in the transmittal order with a pseudonym or reference that may not be decoded by the receiving financial institution (i.e., substituting the full name of the transmitter with a numeric code) are not complying with their obligations under the Funds Travel Rule."

<sup>34</sup> 2019 FinCEN Guidance at 21-22.

<sup>35</sup> 2019 FinCEN Guidance at 22.

<sup>36</sup> FinCEN regulations define a casino, gambling casino or card club, as a person duly licensed or authorized to do business as such in the United States... having gross annual gaming revenue in excess of \$1 million, whether denominated in CVC or other value. 31 CFR § 1010.100(t)(5) and (6).

2019 FinCEN Guidance at 23.

<sup>37</sup> Id.

<sup>38</sup> An entity that characterizes itself as one of these business models does not automatically qualify as a money transmitter or non-money transmitter. Instead, as the Guidance makes clear, FinCEN will examine the nature of the underlying transaction to determine whether that activity qualifies the

entity as a money transmitter. E.g., 2019 FinCEN Guidance at 16, 19-21.

<sup>39</sup> Although a circumstance may arise where an MSB exemption exists for purposes of a money transmission, the CVC business model may be subject to other AML regulations (e.g., regulations governing financial institutions).

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National Law Review, Volume IX, Number 158

Source URL: <https://natlawreview.com/article/fincen-issues-guidance-application-regulations-to-certain-business-models-involving>