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January 4, 2021

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

Re: Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets;  
RIN 1506-AB47

To Whom It May Concern:

On behalf of the nation's credit unions and their more than 120 million members, the Credit Union National Association (CUNA) submits these comments to the Financial Crimes Enforcement Network (FinCEN) in response to its notice of proposed rulemaking (NPRM) for the above-captioned matter.<sup>1</sup>

## Background

The Currency and Foreign Transactions Reporting Act of 1970, as amended, (hereinafter the "Bank Secrecy Act" or "BSA") provides, *inter alia*, authority for the Secretary of the Treasury to require financial institutions to maintain effective anti-money laundering (AML) programs.<sup>2</sup> These AML programs are designed to protect against financial crimes, international terrorism and counter-intelligence efforts facilitated by the transfer of funds through covered entities.<sup>3</sup> The Director of FinCEN has been delegated the authority to adopt and implement certain AML regulations<sup>4</sup> and ensure compliance by financial institutions, including credit unions, with minimum standards for, *inter alia*, the verification of customer identities, collection and maintenance of records for certain transactions and the reporting of certain currency transactions, or transactions involving other monetary instruments as prescribed.<sup>5</sup>

Through this proposed rule, FinCEN is seeking to address certain AML threats posed by transactions involving convertible virtual currency (CVC) and digital assets with legal tender status ("legal tender digital assets" or LTDA). This NPRM proposes new recordkeeping, verification, and reporting

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<sup>1</sup> FinCEN NPRM on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 Fed. Reg. 83840, December 23, 2020, available at <https://www.federalregister.gov/documents/2020/12/23/2020-28437/requirements-for-certain-transactions-involving-convertible-virtual-currency-or-digital-assets>.

<sup>2</sup> *Id.* at 83845.

<sup>3</sup> See The Money Laundering Control Act of 1986, Pub. Law 99-570, 100 Stat 3207 (Oct. 27, 1986) (amending the BSA).

<sup>4</sup> See Treasury Order 180-01 (re-affirmed Jan. 14, 2020).

<sup>5</sup> See FinCEN NPRM on Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. at 58023.

requirements similar to the existing currency transaction reporting (CTR) requirement, and the existing recordkeeping requirement contained in travel rule regulations pertaining to funds transfers and transmittals.<sup>6</sup>

Specifically, this proposed rule would require the following actions for certain deposits, withdrawals, exchanges, or other payments or transfers of CVC or LTDA by, through, or to a bank or money service business that involve an “unhosted”<sup>7</sup> or “otherwise covered wallet:”<sup>8</sup>

- Filing of a report with FinCEN containing certain information related to a customer's CVC or LTDA transaction and counterparty, including name and physical address;
- Verification of the identity of the customer, if a counterparty to the transaction is using an unhosted or otherwise covered wallet and the transaction is greater than \$10,000 or the transaction is one of multiple CVC transactions involving such counterparty wallets and the customer flowing through the bank or MSB within a 24-hour period that aggregate to value in or value out of greater than \$10,000;
- Recordkeeping of a customer’s CVC or LTDA transaction and counterparty, including verification of the identity of the customer, if a counterparty is using an unhosted or otherwise covered wallet and the transaction is greater than \$3,000.<sup>9</sup>

FinCEN has dispensed with the normal notice-and-comment rulemaking requirements for this NPRM and provided a shortened 15-day comment period, stating that the proposal involves a “foreign affairs function” that renders “notice and public procedure . . . impracticable, unnecessary, or contrary to the public interest.”<sup>10</sup>

## General Comments

Although CUNA strongly supports FinCEN’s efforts to track and eliminate financial crimes involving CVCs and LTDAs through reasonable collection, tracking and reporting requirements, this NPRM does not provide a sufficient justification for the proposed changes or the proscribed notice-and-comment period.

As we have stated in past responses to FinCEN rulemaking, it is critically important to strike the right balance between the imposition of compliance costs on leanly staffed, community-oriented credit unions

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<sup>6</sup> See FinCEN NPRM on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 Fed. Reg. 83840, 83844-45.

<sup>7</sup> *Id.* at 83842 (defining an unhosted wallet as a person who “do[es] not use the services of a financial institution, in which case they use the private key controlling the CVC to transact directly on a blockchain . . . [and] . . . [s]uch persons may store the private key in a software program or written record, often referred to as an “unhosted wallet.”)

<sup>8</sup> See *Id.* at 83842 (defining “otherwise covered wallets” as “wallets hosted by a foreign financial institution not subject to effective anti-money laundering regulation.”); See also NPRM reference to “otherwise covered wallets” as those wallets that are held at a financial institution that is not subject to the BSA and is located in a foreign jurisdiction identified by FinCEN on a List of Foreign Jurisdictions Subject to 31 CFR 1010.316 Reporting and 31 CFR 1010.410(g) Recordkeeping (the “Foreign Jurisdictions List”). Initially, FinCEN is proposing that the Foreign Jurisdictions List be comprised of jurisdictions designated by FinCEN as jurisdictions of primary money laundering concern (i.e. Burma, Iran, and North Korea). *Id.* at 83843.

<sup>9</sup> *Id.* at 83844-45.

<sup>10</sup> *Id.* at 83852.

and the benefits that AML regulations can provide to law enforcement. In this instance, it is not clear that regulated entities have access to all the third-party information that is required to comply with this rule. In addition, a fifteen-day comment period over the course of an extended holiday season does not provide adequate time for interested parties to determine the impact of this proposal or how it fits into an otherwise effective AML program.

Accordingly, CUNA encourages FinCEN to extend the comment period and provide adequate time for interested parties to ask questions, collect information and submit comments that will arm FinCEN with the data it needs to fully understand the ramifications of this rule. In the absence of such an extension of the comment period, FinCEN should adopt a rule with an extended mandatory compliance date and quickly promulgate clarifying regulatory or sub-regulatory guidance based on the specific comments below. Finally, given the lack of information contained in this NPRM and the lack of time provided for comment, FinCEN should refrain from taking any enforcement actions against covered entities that undertake reasonable, good faith efforts to comply with requirements contained in a final rule.

### **Specific Comments**

*FinCEN should immediately engage covered financial services industry participants, including credit unions, in additional consultations similar to those provided to the cryptocurrency industry and solicit and carefully consider additional information and feedback in order to amend or withdraw this proposal.*

FinCEN appears to have engaged extensively with the cryptocurrency industry regarding AML risks associated with CVC and LTDA products,<sup>11</sup> and has provided the financial services industry with CVC risk and compliance guidance in the past.<sup>12</sup> This proposed regulation would benefit greatly from that same level of consultation, discussion and transparency beyond the 15-day comment period provided.

*FinCEN should consider the cumulative impact of its recent AML regulatory changes and prioritize the information collection, tracking and reporting requirements for covered institutions that will be most helpful and meaningful to law enforcement.*

This is the third AML-related regulatory action that FinCEN has undertaken over the past 60 days, and the second involving CVCs and LTDAs.<sup>13</sup> Given that feedback from the previous actions has not been fully reviewed, it is reasonable to ask FinCEN to prioritize its AML regulatory changes to ensure that it is striking the right balance between law enforcement priorities and the expenditure of finite resources by

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<sup>11</sup> See FinCEN NPRM on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 Fed. Reg. 83840, 83841.

<sup>12</sup> See Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies, May 9, 2019, available at <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-certain-business-models>.

<sup>13</sup> See CUNA Comment Letter on Re: Anti-Money Laundering Program Effectiveness; Docket Number FINCEN-2020-0011/RIN1506-AB44, November 16, 2020, available at [https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment\\_Calls\\_Letters\\_and\\_Testimonies/2020/Comment\\_Letters/CUNA%20Comment%20Letter%20-%20FinCenAML-FINAL.pdf](https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment_Calls_Letters_and_Testimonies/2020/Comment_Letters/CUNA%20Comment%20Letter%20-%20FinCenAML-FINAL.pdf); See also, CUNA Comment Letter on the Threshold for the Requirement to Collect, Retain and Transmit Information for International Funds Transfers and Clarification of Treatment of Convertible Virtual Currencies and Digital Assets With Legal Tender Status; Docket Number FINCEN-2020-0011/RIN1506-AB44, November 27, 2020, available at [https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment\\_Calls\\_Letters\\_and\\_Testimonies/2020/Comment\\_Letters/CUNA%20Comment%20Letter%20-Reporting%20Threshold-FINAL.pdf](https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment_Calls_Letters_and_Testimonies/2020/Comment_Letters/CUNA%20Comment%20Letter%20-Reporting%20Threshold-FINAL.pdf).

regulated parties. For example, FinCEN recently asked for comment on whether it should adopt national strategic AML priorities that would, *inter alia*, provide direction and guidance to covered entities to help inform risk assessments and aid the development of an effective AML program that is beneficial and relevant to law enforcement.<sup>14</sup> Given these back-to-back-to-back regulatory proposals, FinCEN should consider using sub-regulatory guidance to prioritize and focus on utilizing existing regulations to accomplish its goals before imposing additional and potentially overlapping burdens on regulated entities.

*FinCEN should extend the existing discretionary exemptions to any CVC/LTDA collection or reporting obligations.*

This proposed regulation would impose new information collection, recordkeeping and reporting obligations, and such obligations are not costless. The additional costs include paying third-party vendors, updating automated systems, training staff and testing to ensure that these changes do not result in confusion, mistakes or AML program gaps. Conflicting or differential treatment for credit union members transacting in CVC's or LTDA versus currency merely increases those costs. The NPRM states in conclusory fashion that certain discretionary exemption categories "*do not appear likely* to be counterparties to transactions between banks' hosted wallet customers and unhosted or otherwise covered wallets."<sup>15</sup> That supposition does not provide a sound rationale for withholding existing discretionary exemptions in this proposed rule, particularly given the lack of a standard notice-and-comment period.

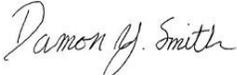
*FinCEN should adopt "as soon as practicable" language for compliance with this proposed rule.*

Given past CTR reporting challenges that credit unions and other covered entities overcame through technological innovations, FinCEN should make this regulation applicable "when practicable," to allow sufficient time for regulated parties to adjust to this new framework.

## **Conclusion**

We thank you for your consideration of CUNA's comments and look forward to working with FinCEN to ensure that these and other BSA regulations are promulgated in a manner that benefits law enforcement, credit unions and their members. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 235-3390 or [dsmith@cuna.coop](mailto:dsmith@cuna.coop).

Sincerely,



Damon Y. Smith  
Senior Director of Advocacy & Counsel

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<sup>14</sup> See CUNA Comment Letter on Re: Anti-Money Laundering Program Effectiveness; Docket Number FINCEN–2020–0011/RIN1506-AB44, November 16, 2020, available at [https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment\\_Calls\\_Letters\\_and\\_Testimonies/2020/Comment\\_Letters/CUNA%20Comment%20Letter%20-%20FinCenAML-FINAL.pdf](https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment_Calls_Letters_and_Testimonies/2020/Comment_Letters/CUNA%20Comment%20Letter%20-%20FinCenAML-FINAL.pdf) (“ . . . FinCEN should create and maintain a tight nexus between the ‘risks communicated by relevant government authorities as national AML priorities’ and any determination of what constitutes ‘information with a high degree of usefulness to government authorities.’”)

<sup>15</sup> See FinCEN NPRM on Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 Fed. Reg. 83840, 83847 (emphasis added).