

SHERROD BROWN, OHIO, CHAIRMAN
JACK REED, RHODE ISLAND
ROBERT MENENDEZ, NEW JERSEY
JON TESTER, MONTANA
MARK WARNER, VIRGINIA
ELIZABETH WARREN, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
CATHERINE CORTEZ MASTO, NEVADA
TINA SMITH, MINNESOTA
KYRSTEN SINEMA, ARIZONA
JON OSSOFF, GEORGIA
RAPHAEL G. WARNOCK, GEORGIA
PATRICK J. TOOMEY, PENNSYLVANIA
RICHARD C. SHELBY, ALABAMA
MIKE CRAPO, IDAHO
TIM SCOTT, SOUTH CAROLINA
MIKE ROUNDS, SOUTH DAKOTA
THOM TILLIS, NORTH CAROLINA
JOHN KENNEDY, LOUISIANA
BILL HAGERTY, TENNESSEE
CYNTHIA M. LUMMIS, WYOMING
JERRY MORAN, KANSAS
KEVIN CRAMER, NORTH DAKOTA
STEVE DAINES, MONTANA

LAURA SWANSON, STAFF DIRECTOR
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

United States Senate
COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS
WASHINGTON, DC 20510-6075

June 10, 2021

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Yellen:

I write to raise concerns with two proposals involving the Department of the Treasury (“Treasury”) related to the regulation and oversight of cryptocurrencies. The first is the Financial Crimes Enforcement Network’s (“FinCEN”) proposed rule for certain cryptocurrency transactions.¹ The second is the Financial Action Task Force’s (“FATF”) draft guidance on cryptocurrencies² and Virtual Asset Service Providers (VASPs).³ While I recognize that FinCEN and FATF’s proposals are seeking to address the misuse of cryptocurrencies for illicit activity, if adopted, they would have a detrimental impact on financial technology (“fintech”), the fundamental privacy of Americans, and efforts to combat illicit activity. I urge you to make significant revisions to them.

1. Fostering financial innovation is important for the United States

Fintech is rapidly evolving and holds the promise of expanding consumer choice, increasing personal privacy, and building a better future for Americans with limited or no access to traditional financial services. It is, therefore, critical that U.S. regulators and the international bodies the United States participates in cautiously approach any new regulations that could stifle American investment in, and development of, fintech, including cryptocurrencies.

Cryptocurrencies have played an important role in the rise of fintech. A cryptocurrency connects one person with another through open, public networks—separate from government control or other financial intermediaries. As a result, cryptocurrencies stand to dramatically improve consumers’ privacy, access to financial services, and power to make decisions for themselves. Some have argued that cryptocurrency is a technology that could be as revolutionary as the internet.

¹ U.S. Department of the Treasury, Notice of proposed rulemaking, *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, 85 Fed. Reg. 83,840 (Dec. 23, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-12-23/pdf/2020-28437.pdf>.

² FATF refers to cryptocurrencies as “virtual assets.”

³ Financial Action Task Force, *Draft updated Guidance for a risk-based approach to virtual assets and VASPs*, Sixth draft (Mar. 2021), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-guidance-vasp.html>.

2. FinCEN's proposed rule will negatively impact the United States

a. The proposal imposes requirements on cryptocurrency transactions that are not imposed on U.S. dollar transactions

FinCEN's proposed rule would impose on cryptocurrency transactions onerous recordkeeping and reporting requirements that extend beyond existing requirements for U.S. dollar transactions. The proposed rule would unnecessarily require financial institutions to collect and, in some cases report to FinCEN, information for transactions involving cryptocurrencies held in self-hosted wallets, which is akin to holding cash in a physical wallet.

For transactions valued above \$3,000, financial institutions would be required to keep records like names and physical addresses of individuals who are not their customers. No such requirement exists at this threshold for U.S. dollar transactions between financial institutions and individuals. For transactions valued above \$10,000, financial institutions would be required to collect and report to FinCEN personal information about individuals who are not their customers. Unlike an existing reporting requirement that applies to U.S. dollar transactions, this new requirement requires financial institutions to collect this information even when it is not provided to them or readily obtainable. The collection and reporting of personal information from individuals who are not customers of a financial institution raise serious privacy concerns.

FinCEN's proposed rule may also prove to be counterproductive in combatting illicit activity. It could cause illicit transactions to become less traceable than they otherwise would be. By limiting individual privacy and the ability to transact with financial institutions, the rule would likely push bad actors to utilize methods that do not interface with financial institutions. As a result, such cryptocurrency transactions would be less susceptible to appropriate government oversight and detection.

b. Existing requirements on the U.S. dollar are no longer appropriately tailored to identify illicit activity

Treasury should take this opportunity to consider whether the current recordkeeping and reporting requirements are appropriate for U.S. dollar transactions. In fact, Congress recently instructed Treasury to review the existing regulatory regime related to certain reporting requirements, namely, currency transaction reports and suspicious activity reports. The National Defense Authorization Act for Fiscal Year 2021 requires Treasury to review "whether different thresholds should apply to different categories of activities," and for existing reporting obligations, to "propose changes to those reports to reduce any unnecessarily burdensome regulatory requirements and ensure that the information provided fulfills the purposes described in" the Bank Secrecy Act.⁴

In some cases, reporting requirements for U.S. dollar transactions have not been updated in more than 40 years. These requirements are based on outdated asset thresholds and ignore inflation

⁴ National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Sec. 6204.

that has occurred over this period, as well as developments in technology that have enhanced the ability of law enforcement and regulators to more intelligently analyze and track suspicious activity. In fact, one of those developments is cryptocurrency, which in some cases can be more easily traceable than transactions utilizing U.S. dollars. For example, federal law enforcement officials recently announced that they were able to trace and seize millions of dollars' worth of cryptocurrencies paid to the hackers behind the recent ransomware attack on Colonial Pipeline. Instead of seeking to impose onerous regulatory requirements on cryptocurrencies, FinCEN should collaborate with stakeholders and analytics firms to understand what existing and emerging capabilities exist for identifying illicit cryptocurrency activity.

3. FATF's draft guidance on cryptocurrencies is also concerning

FATF's recently updated draft guidance on cryptocurrencies also recommends imposing stringent regulatory requirements on cryptocurrency transactions. Like FinCEN's proposed rule, this guidance would impose on financial institutions onerous recordkeeping requirements for cryptocurrency transactions that do not currently exist for U.S. dollar transactions. It would encourage VASPs to limit their transactions with self-hosted wallets. FATF's guidance would also classify as VASPs—and, thus, subject them to registration and regulation—entities that never take custody of or control another person's cryptocurrencies. This overly broad approach to classifying VASPs runs counter to existing FinCEN guidance, which has successfully provided regulatory clarity in the United States.⁵

FATF's guidance will drive cryptocurrency transactions away from financial institutions, undermining the ability of law enforcement and analytics firms to identify and track illicit activity. FATF should revise its guidance to focus on transactions and entities that warrant regulation.

4. The United States should support, not inhibit, financial innovation

The regulation of cryptocurrencies should be approached with the understanding that this technological breakthrough has the potential to dramatically empower individuals and improve their lives. Rather than taking an ultimately futile approach to impede cryptocurrency development and future innovation, the United States should approach any new regulations with a light touch.

⁵ Financial Crimes Enforcement Network, Guidance, *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FIN-2019-G001 (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

In your consideration of FinCEN's proposed rule and your input to FATF regarding its draft guidance, I urge you to take a more thoughtful approach to identifying illicit activity so financial innovation can flourish and the privacy of Americans remains respected.

Sincerely,

A handwritten signature in blue ink that reads "Pat Toomey". The signature is written in a cursive style with a large, looping initial "P".

Pat Toomey
Ranking Member

cc: The Honorable Sherrod Brown, Chairman, Senate Committee on Banking, Housing, and Urban Affairs

The Honorable Wally Adeyemo, Deputy Secretary, U.S. Department of the Treasury

Michael Mosier, Acting Director, Financial Crimes Enforcement Network

Scott Rembrandt, Deputy Assistant Secretary for Strategic Policy, U.S. Department of the Treasury