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Leaders of CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets

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Washington, DC – The leaders of the U.S. Commodity Futures Trading Commission, the Financial Crimes Enforcement Network, and the U.S. Securities and Exchange Commission (the "Agencies") today issued the following joint statement to remind persons engaged in activities involving digital assets of their anti-money laundering and countering the financing of terrorism (AML/CFT) obligations under the Bank Secrecy Act (BSA).[1]

AML/CFT obligations apply to entities that the BSA defines as "financial institutions," such as futures commission merchants and introducing brokers obligated to register with the CFTC, money services businesses (MSBs) as defined by FinCEN, and broker-dealers and mutual funds obligated to register with the SEC. Among those AML/CFT obligations are the requirement to establish and implement an effective anti-money laundering program (AML Program)[2] and recordkeeping and reporting requirements, including suspicious activity reporting (SAR) requirements.[3]

For the purpose of this joint statement, "digital assets" include instruments that may qualify under applicable U.S. laws as securities, commodities, and security-or commodity-based instruments such as futures or swaps. We are aware that market participants refer to digital assets using many different labels.[4] The label or terminology used to describe a digital asset or a person engaging in or providing financial activities or services involving a digital asset,[5] however, may not necessarily

1. The BSA is codified at 31 U.S.C. §§ 5311-5314; 5316-5332 and 12 U.S.C. §§ 1829b, 1951-1959.

2. *See* 31 C.F.R. § 1022.210 (MSBs); 31 C.F.R. § 1023.210 (brokers or dealers in securities); 31 C.F.R. § 1024.210 (mutual funds); 31 C.F.R. § 1026.210 (futures commission merchants and introducing brokers in commodities). An AML Program must include, at a minimum, (a) policies, procedures, and internal controls reasonably designed to achieve compliance with the provisions of the BSA and its implementing regulations; (b) independent testing for compliance; (c) designation of an individual or individuals responsible for implementing and monitoring the operations and internal controls; and (d) ongoing training for appropriate persons. Rules for some financial institutions refer to additional elements of an AML Program, such as appropriate risk-based procedures for conducting ongoing customer due diligence.

3. *See* 31 C.F.R. § 1022.320 (MSBs), 31 C.F.R. § 1023.320 (brokers or dealers in securities), 31 C.F.R. § 1024.320 (mutual funds), and 31 C.F.R. § 1026.320 (futures commission merchants and introducing brokers in commodities). A suspicious transaction must be reported if it is conducted or attempted by, at, or through the financial institution and the amount involved exceeds a certain threshold.

4. Digital assets may be referred to in the industry by labels such as "virtual assets," "crypto-assets," "digital tokens," "digital coins," "digital currencies," "cryptocurrencies," and "convertible virtual currencies." Financial activities involving digital assets may also be referred to as "initial coin offerings" or "ICOs."

5. The Financial Action Task Force (FATF), for example, refers to such persons as "virtual asset service providers."

align with how that asset, activity or service is defined under the BSA, or under the laws and rules administered by the CFTC and the SEC. For example, something referred to as an "exchange" in a market for digital assets may or may not also qualify as an "exchange" as that term is used under the federal securities laws. As such, regardless of the label or terminology that market participants may use, or the level or type of technology employed, it is the facts and circumstances underlying an asset, activity or service, including its economic reality and use (whether intended or organically developed or repurposed), that determines the general categorization of an asset, the specific regulatory treatment of the activity involving the asset, and whether the persons involved are "financial institutions" for purposes of the BSA.[6]

The nature of the digital asset-related activities a person engages in is a key factor in determining whether and how that person must register with the CFTC, FinCEN, or the SEC. For example, certain "commodity"-related activities may trigger registration and other obligations under the Commodity Exchange Act (CEA), while certain activities involving a "security" may trigger registration and other obligations under the federal securities laws. If a person falls under the definition of a "financial institution," its AML/CFT activities will be overseen for BSA purposes by one or more of the Agencies (and potentially others). For example, the AML/CFT activities of a futures commission merchant will be overseen by the CFTC, FinCEN, and the National Futures Association (NFA); those of an MSB will be overseen by FinCEN; and those of a broker-dealer in securities will be overseen by the SEC, FinCEN and a self-regulatory organization, primarily the Financial Industry Regulatory Authority (FINRA).

Certain BSA obligations that apply to a broker-dealer in securities, mutual fund, futures commission merchant, or introducing broker, such as developing an AML Program or reporting suspicious activity, apply very broadly and without regard to whether the particular transaction at issue involves a "security" or a "commodity" as those terms are defined under the federal securities laws or the CEA.

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6. *See United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848 (1975) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)) ("[I]n searching for the meaning and scope of the word 'security' in the [U.S. securities laws], form should be disregarded for substance and the emphasis should be on economic reality."); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) ("Form was disregarded for substance and emphasis was placed upon economic reality."); *United Housing*. 421 U.S. at 849 ("Because securities transactions are economic in character, Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."); *Haekal v. Refco, Inc.*, CFTC No. 93-109, 2000 WL 1460078, at *4 (Sept. 29, 2000) ("[T]he labels that parties apply to their transactions are not necessarily controlling. Because such labels are often illusory, a decision maker must evaluate those labels in the context of the parties' actual conduct."); *In re Stovall*, CFTC No. 75-7, 1979 WL 11475, at *5 (Dec. 6, 1979) (holding that the CFTC "will not hesitate to look behind whatever label the parties may give to the instrument"); *see also* FIN-2019-G001, "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) (discussing the distinction between "business models" and "labels"); *see also* https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (Framework for "Investment Contract" Analysis of Digital Assets).

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Additional Comments by the U.S. Commodity Futures Trading Commission Chairman

The mission of the CFTC is to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation. In advancing that mission, the CFTC regulates key participants in the derivatives markets, including boards of trade, futures commission merchants, introducing brokers, swaps dealers, major swap participants, retail foreign exchange dealers, commodity pool operators, and commodity trading advisors pursuant to the CEA. An "introducing broker" or "futures commission merchant" is defined in BSA regulations as a person that is registered or required to register as an introducing broker or futures commission merchant under the CEA.[7] Introducing brokers and futures commission merchants are required to report suspicious activity and implement reasonably-designed AML Programs.[8] These requirements are not limited in their application to activities in which digital assets qualify as commodities or are used as derivatives. The rules would also apply to activities that are not subject to regulation under the CEA.

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Additional Comments by the Financial Crimes Enforcement Network Director

As a bureau of the Department of the Treasury, FinCEN is the administrator of and lead regulator under the BSA -- the nation's first and most comprehensive AML/ CFT statute. FinCEN's mission is to protect our financial system from illicit use, ensure our national security, and protect our people from harm. FinCEN has supervisory and enforcement authority over U.S. financial institutions to ensure the effectiveness of the AML/CFT regime. As such FinCEN mandates certain controls, reporting, and recordkeeping obligations for U.S. financial institutions. The BSA and its implementing regulations set forth the regulatory obligations that generally apply to financial institutions,[9] including AML Program, recordkeeping, and reporting requirements.

FinCEN regulates, among other persons, money transmitters and other MSBs.[10] FinCEN's BSA regulations define a "money transmitter" as a person engaged in the business of providing money transmission services or any other person engaged as a business in the transfer of funds.[11] The term "money transmission services" means "the acceptance of currency,[12] 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."[13]

7. 31 C.F.R. §§ 1010.100(x), 1010.100(bb), 1026.100(f), and 1026.100(g).
8. 31 C.F.R. §§ 1026.210 and 1026.320.
9. The BSA and its implementing regulations list a number of businesses that qualify as "financial institutions." *See generally* 31 U.S.C. § 5312(a)(2); 31 CFR § 1010.100(t).
10. *See generally* 31 CFR § 1010.100(ff). An MSB includes a money transmitter, a dealer in foreign exchange, a check casher, an issuer or seller of traveler's checks or money orders, or a seller or provider of prepaid access.
11. 31 CFR § 1010.100(ff)(5).
12. "Currency" is defined at 31 CFR § 1010.100(m) as "[t]he coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance."
13. 31 CFR § 1010.100(ff)(5)(i)(A).

In May 2019, FinCEN issued interpretive guidance (2019 CVC Guidance) to remind persons subject to the BSA how FinCEN regulations relating to MSBs apply to certain business models involving money transmission denominated in value that substitutes for currency, specifically, convertible virtual currencies.[14] The 2019 CVC Guidance consolidated current FinCEN regulations, and related administrative rulings and guidance issued since 2011, and applied these rules and interpretations to other common business models involving CVC engaging in the same underlying patterns of activity. Covered persons and institutions are strongly encouraged to review the 2019 CVC Guidance.

As set forth in the 2019 CVC Guidance, a number of digital asset-related activities qualify a person as an MSB that would be regulated by FinCEN. FinCEN's BSA regulations also provide that any person "registered with, and functionally regulated or examined by, the SEC or the CFTC,"[15] would not be subject to the BSA obligations applicable to MSBs, but instead would be subject to the BSA obligations of such a type of regulated entity. Accordingly, even if an introducing broker, futures commission merchant, broker-dealer or mutual fund acts as an exchanger of digital assets and provides money transmission services for the purposes of the BSA, it would not qualify as a money transmitter or any other category of MSB and would not be subject to BSA requirements that are applicable only to MSBs. Instead, these persons would be subject to FinCEN's regulations applicable to introducing brokers, futures commission merchants, broker-dealers and mutual funds, respectively. These obligations include the development of an AML program and suspicious activity reporting requirements, as well as requirements under applicable CFTC or SEC rules. Furthermore, regardless of federal functional regulator, all financial institutions dealing in digital assets meeting the definition of "securities" under federal law must comply with federal securities law.

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Additional Comments by the U.S. Securities and Exchange Commission Chairman

The statutory mission of the SEC is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. In general, the SEC has jurisdiction over securities and securities-related conduct. Persons engaged in activities involving digital assets that are securities have registration or other statutory or regulatory obligations under the federal securities laws.[16]

14. *See* Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies, FIN-2019-G001 (May 9, 2019) (available at https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-certain-business-models) (summarizing FinCEN guidance interpreting the term "value that substitutes for currency")

15. 31 CFR § 1010.100(ff)(8)(ii).

16. *See, e.g.*, https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11 (Statement on Cryptocurrencies and Initial Coin Offerings); https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (Framework for "Investment Contract" Analysis of Digital Assets); https://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading (Statement on Potentially Unlawful Online Platforms for Trading Digital Assets); https://www.sec.gov/news/public-statement/digital-asset-securites-issuuance-and-trading (Statement on Digital Asset Securities Issuance and Trading). SEC staff statements represent the views of the SEC staff. They are not rules, regulations, or statements of the SEC. The SEC has neither approved nor disapproved their content. SEC staff statements, like all SEC staff guidance, have no legal force or effect: they do not alter or amend applicable law, and they create no new or additional obligations for any person.

The SEC oversees the key participants in the securities markets, some of which may engage in digital asset activities.[17] Key participants in the securities markets include but are not limited to national securities exchanges, securities brokers and dealers, investment advisers, and investment companies. Market participants receiving payments or engaging in other transactions in digital assets should consider such transactions to present similar or additional risks, including AML/CFT risks, as are presented by transactions in cash and cash equivalents. With regard to SEC regulated entities, broker-dealers and mutual funds are defined as "financial institutions" in rules implementing the BSA. A "broker-dealer" is defined in rules implementing the BSA as a person that is registered or required to register as a broker or dealer under the Securities Exchange Act,[18] while a "mutual fund" is defined as an investment company that is an "open-end company" and that is registered or required to register under the Investment Company Act of 1940.[19]

Broker-dealers and mutual funds are required to implement reasonably-designed AML Programs and report suspicious activity.[20] These rules are not limited in their application to activities involving digital assets that are "securities" under the federal securities laws.[21]

17. Issuers of securities are required to register the offer and sale of securities pursuant to the Securities Act of 1933 unless an exemption from registration is available. *See* 15 U.S.C. 77e. To the extent the issuer meets certain thresholds related to size or has a class of securities listed on a national securities exchange, that issuer is required to file reports pursuant to the Securities Exchange Act of 1934 ("Exchange Act") with the Commission, under Section 13(a) of the Exchange Act. *See* 15 U.S.C. 78m. Generally, an issuer of securities is not, solely by virtue of offering or selling securities, or solely by registering a class of securities, "a person registered with, and functionally regulated or examined by, the SEC …," such that the issuer would fall within the exemption from MSB status contained in 31 CFR 1010.100(ff)(8)(ii).

18. 31 CFR §§ 1010.100(h), 1023.100(b).

19. 31 C.F.R. § 1010.100(gg).

20. 31 C.F.R. §§ 1023.210 and 1023.320 (broker-dealers); 31 C.F.R. §§ 1024.210 and 1024.320 (mutual funds). For a compilation of key laws, rules, and guidance applicable to broker-dealers and mutual funds, *see* https://www.sec.gov/about/offices/ocie/amlsourcetool.htm (Anti-Money Laundering (AML) Source Tool for Broker-Dealers) and https://www.sec.gov/about/offices/ocie/amlmfsourcetool.htm (Anti-Money Laundering (AML) Source Tool for Mutual Funds).

21. Broker-dealers have other obligations, such as financial responsibility rules, that are relevant to digital assets. *See* https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities (Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities).