

# The Distributed Ledger

## Blockchain, Digital Assets and Smart Contracts

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

1440 New York Avenue, N.W.  
Washington, D.C. 20005  
202.371.7000

### FinCEN Proposes To Designate Convertible Virtual Currency Mixing as a Primary Money Laundering Concern

#### Key Points

- FinCEN released a proposed rule that would designate convertible virtual currency mixing (CVC) as a category of transactions of primary money laundering concern — the first time the agency has targeted an activity as opposed to an institution or jurisdiction.
- If the proposal is adopted following a 90-day public comment period, domestic financial institutions and agencies will be required to implement new recordkeeping and reporting requirements.
- This is the first time a new proposed rule relying on Section 311 of the Patriot Act has been issued since 2018, and it reflects the U.S. government's growing concerns about CVC mixing.
- The proposal follows other U.S. actions targeting CVC mixers, including OFAC's sanctioning of Tornado Cash and DOJ's indictment of its founders for money laundering and other charges.

#### The Proposed Rule Aims To Increase Transparency in CVC Mixing

On October 19, 2023, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) released a [notice of proposed rulemaking](#) (Proposal) that designates CVC mixing as a primary money laundering concern. The Proposal would require domestic financial institutions and agencies to adopt new recordkeeping and reporting requirements on transactions involving CVC mixing.

The Proposal seeks to enhance transparency in CVC mixing and reflects mounting concern that CVC mixing enables money laundering and terrorist financing by obfuscating the source, destination or amount involved in a transaction. CVC mixing can include pooling or aggregating CVC from multiple locations, using algorithms to manipulate the structure of a transaction, including splitting the transaction into a series of transactions, or facilitating user-initiated delays in a transaction.

While the Proposal reflects FinCEN's deep concern that CVC mixing can be exploited by bad actors, FinCEN also acknowledged that CVC mixing is a tool used for legitimate business purposes.

# The Distributed Ledger

## Blockchain, Digital Assets and Smart Contracts

---

### The Proposed Rule Is a Departure From Past Practice

FinCEN's Proposal differs from its past use of its authority under Section 311 of the Patriot Act in several regards. This is the first time that FinCEN has used Section 311 to designate a class of transactions instead of a specific entity or jurisdiction.

Separately, in this Proposal, FinCEN employs special measure one under Section 311, under which the secretary of treasury may require financial institutions and agencies to maintain records and file reports concerning the aggregate amount of transactions or individual transactions. Usually, special measure one is combined with special measure five, which prohibits or imposes conditions on financial institutions from opening or maintaining correspondent accounts with the target of the action. FinCEN determined that special measure five, which would impose conditions on financial institutions in their dealings with CVC mixing, is less appropriate here because CVC transactions are conducted outside of the traditional banking system.

While special measure one on its face may appear less stringent than special measure five, it may still have a chilling effect on the use of CVC mixers, and many financial institutions will look for ways to wall themselves off from this activity. The Proposal states that, while it does not impose requirements on CVC mixers, "it is reasonable to expect that the relative attractiveness of engaging with CVC mixers or the number of those who avail themselves of CVC mixing services might be affected." Prudential regulators may also view any touchpoints with CVC mixers as posing safety and soundness concerns.

### The Reporting and Recordkeeping Requirements

The Proposal would increase covered financial institutions' requirement to regularly report when their customers engage in transfers that include CVC mixing. Covered financial institutions include but are not limited to banks, brokers or dealers in securities, money services businesses, futures commission merchants, commodities brokers and mutual funds. In connection with CVC mixing transactions, the Proposal would require reporting the following information to FinCEN:

- The amount of any CVC transferred.
- The CVC type.

- The mixer used.
- The wallet addresses associated with the mixer.
- The wallet address associated with the customer.
- The transaction hash.
- The transaction date.
- The IP address and time stamps associated with the transaction.
- A narrative describing the activity observed by the covered financial institution.

FinCEN would also collect information related to the customers associated with these transactions, including their name, date of birth, address, associated email address, and unique identifying number.

Covered financial institutions would need to collect, maintain records of, and report to FinCEN within 30 calendar days of initial detection of a covered transaction. This information is similar to the information already collected by institutions to comply with their obligations under anti-money laundering/combating the financing of terrorism (AML/CFT) programs. However, at present there is no explicit requirement for covered businesses to report such information to FinCEN.

### Conclusion

This FinCEN action is a clear statement from the U.S. Department of the Treasury regarding its view of CVC mixing and appears, at least in part, to be an indication that FinCEN does not believe it is receiving sufficient information on mixers through current Bank Secrecy Act and anti-money laundering reporting.

Even if the rule does not go final, it is likely to have a chilling effect on the use of mixers and, given Treasury's articulation of the risks posed by this class of transactions, may result in an increase in suspicious activity reporting related to mixers.

We also expect that reports submitted in response to a final rule will be used by FinCEN to further pursue mixers, as Treasury has already shown a willingness to do so. See our September 5, 2023, alert "[Court Victory for Treasury and Indictment of Tornado Cash Founders Highlights AML and Sanctions Risks for DeFi Crypto Platforms](#)."

# The Distributed Ledger

## Blockchain, Digital Assets and Smart Contracts

---

### Contacts

**Brian J. Egan**

Partner / Washington, D.C.  
202.371.7270  
brian.egan@skadden.com

**Alessio Evangelista**

Partner / Washington, D.C.  
202.371.7170  
alessio.evangelista@skadden.com

**Eytan J. Fisch**

Partner / Washington, D.C.  
202.371.7314  
eytan.fisch@skadden.com

**Khalil N. Maalouf**

Counsel / Washington, D.C.  
202.371.7711  
khalil.maalouf@skadden.com

**Alyssa R. Domino**

Law Clerk / Washington, D.C.  
202.371.7139  
alyssa.domino@skadden.com