



THE US FINANCIAL CRIMES ENFORCEMENT NETWORK SPECIFIES THE SCOPE OF ANTI-MONEY LAUNDERING RULES APPLICABLE TO ACTIVITIES INVOLVING CONVERTIBLE VIRTUAL CURRENCIES



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On 9 May 2019, the Financial Crimes Enforcement Network ("FinCEN"), published a *guidance*¹ that specified the scope of application of FinCEN's regulations to certain activities involving convertible virtual currencies. FinCEN is a bureau of the U.S. Department of the Treasury in charge of combatting money laundering and terrorist financing.

The timing of this publication is not insignificant. It coincides with the transposition by several European Union Member States² of the provisions of the 5th Anti-Money Laundering Directive³ relating to virtual currencies and comes a few weeks before the plenary meeting of the Financial Action Task Force ("FATF") to be held in Orlando, Florida, in mid-June 2019. On this occasion, FATF members will be invited to approve the interpretative note clarifying recommendation 15⁴, updated in October 2018, which subjects "virtual asset service providers" to the applicable AML/CFT⁵ obligations.

◆◆ FinCEN reaffirms its position taken in 2013 by re-stating the definition of "convertible virtual currencies" ("CVC")

Ce Indeed, this is not the first time that the FinCEN has expressed its views on the scope of AML/CFT requirements for activities involving "convertible virtual currencies". In 2013, it had already gone so far as to publish a first guidance⁶ specifying the concept of "virtual currency", and which had led to the **inclusion within the regulatory scope of most activities involving "convertible" virtual currencies**. According to the American watchdog, a virtual currency is qualified as a convertible virtual currency if it has an equivalent in "*real currency, or acts as a substitute for real currency*"⁷.

The May 2019 guidance is more detailed and covers a wider range of activities involving CVC, thereby reflecting the significant development of this market over the past five years.

¹ FinCEN, *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*, 9 May 2019 (FIN-2019-G001).

² In France, the PACTE law of 22 May 2019 transposed the new provisions introduced by the 5th Anti-Money Laundering Directive relating to virtual currencies (Articles 85 and 86). In the United Kingdom, HM Treasury has initiated a public consultation open until 10 June 2019 on the transposition of the 5th Anti-Money Laundering Directive and, in particular, the provisions relating to virtual currencies.

³ EU *Directive 2018/843* on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing (or "**5th Anti-Money Laundering Directive**").

⁴ <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Recommandations%20du%20GAFI%202012.pdf>

⁵ Anti-Money Laundering/Combating the Financing of Terrorism ("**AML/CFT**").

⁶ FinCEN, *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, 18 March 2013 (FIN-2013-G001).

⁷ Idem (p.1).

◆ The definition of "money transmitter", which determines the application of AML/CFT obligations

One of the key concepts of the US anti-money laundering regulations, the **Bank Secrecy Act** ("BSA"), is the definition of a "**money transmitter**", which implies the application of the AML/CFT requirements and the obligation to register with FinCEN in the United States. The AML/CFT framework is applicable to money transmitters physically established in the United States or operating from abroad without a physical presence on US territory⁸.

Money transmitters are providers of "**money transmission services**". These services consist in the **acceptance** and **transmission** of currency, funds or other value that that substitutes for currency (such as CVC) **from one person to another** by any means.

◆ Type of activities involving the transmission of CVC

FinCEN clarifies the scope of the rules resulting from the BSA by precisely defining the type of activities involving the transmission of the targeted convertible virtual currencies. Several examples cited in the guidance are worth noting, such as:

- ◆ **Peer-to-peer exchangers**, whose activity consists in buying and selling CVC through designed platform websites, online forums, social media, etc.). These service providers make it possible to exchange CVC for other types of value (e.g. real currency). Provided that they conduct this type of activity as a regular business, these actors fall within the scope of the BSA..
- ◆ **CVC wallets**, which are interfaces for storing and transmitting CVC. FinCEN distinguishes two types of activities: (i) on the one hand, hosted wallet providers, and (ii) on the other hand, unhosted wallet providers. In the first case, the service provided by the service provider consists in storing and transmitting the CVC on behalf of their owner. In the second case, it is the owner of the funds who is responsible for storing and transferring them; the service provider only provides a technological solution to do so. While for FinCEN hosted wallet providers fall within the scope of the BSA, unhosted wallet providers are excluded.
- ◆ **CVC trading platforms** and **decentralized exchanges** are websites that enable buyers and sellers of CVC to find each other. These service providers can also facilitate trades as an intermediary. FinCEN indicates that platforms that are limited to bringing buyers and sellers together by posting bids and offers do not fall within the scope of the BSA, provided that transactions matching is carried out well outside such platform. By contrast, if, when transactions are matched, a trading platform purchases the CVC from the seller and sells it to the buyer, then the trading platform is acting as a CVC exchanger, and thus falls within the definition of money transmitter and its accompanying BSA obligations.

Lastly, the guidance mentions initial coin offerings ("**ICOs**") that involve CVC. FinCEN tends to adopt an extensive approach that qualifies the transaction administrator (or seller) as a money transmitter when the ICO involves the exchange of CVC for another type of value.



⁸ Excerpt of the FIN-2018-G001 guidance: "*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*" (p 12).

The publication of this guidance by the FinCEN is particularly useful for players, especially as regards the extraterritorial scope of the US AML/CFT regulations.

The US "principle-based approach" enables FinCEN to retain an extensive scope of application of the AML/CFT rules (in particular through the concepts of "convertible virtual currency" and "money transmitter" whose acceptance is particularly broad) and to include, under certain conditions, trading platforms and ICO administrators.

Such an understanding of the BSA application enables, in the US, broad compliance with the definition of "virtual asset service providers" proposed by the FATF in its glossary⁹.

⁹ According to the FATF, the concept of "*virtual asset service provider*" refers to any natural or legal person that carries out one or more of the following activities: (i) exchange between virtual assets and fiat currencies; (ii) exchange between one or more forms of virtual assets; (iii) transfer of virtual assets; (iv) safekeeping and/or administration of virtual assets or instruments enabling control over virtual assets; and (v) participation in and provision of financial services related to an issuer's offer and/or sale of a virtual asset.

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