# DOJ Digital Asset Recs Would Widen Prosecutorial Authority

By **Peter Hardy, Marjorie Peerce and Siana Danch** (October 17, 2022)

Peter Hardy

Marjorie Peerce

Siana Danch

The U.S. Department of Justice recently released a 66-page report, "The Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets."[1]

The report discusses at length how illicit actors are exploiting digital asset technologies, the challenges that digital assets pose to criminal investigations, and DOJ and law enforcement initiatives to pursue such crimes.

But the report's most important and interesting aspects are the recommended regulatory and legislative actions, which seek to significantly expand the DOJ's ability to investigate and prosecute offenses involving digital assets.

We focus here on three of the report's many recommendations.

First, the DOJ wants to ensure that the federal criminal law against operating an unregistered money transmitter business applies to peer-to-peer, or P2P, platforms that claim to not take custody or assume control over the digital asset being exchanged.

Second, the DOJ wants the U.S. Sentencing Guidelines amended so that all convictions for violating the Bank Secrecy Act receive higher sentences.

Third, the DOJ says it wants to support the Financial Crimes Enforcement Network in issuing a final regulation ostensibly clarifying the application of the so-called travel rule under the BSA to digital asset transfers — so that the DOJ then can prosecute alleged violations of the travel rule involving digital assets.

Although the report adopts a tone of confidence, all of these recommendations seek substantial expansions of DOJ authority in cases involving potentially very complex issues.

**Unlicensed Money Transmission and Peer-to-Peer Platforms**

The DOJ seeks to strengthen Title 18 of the U.S. Code, Section 1960, a criminal statute prohibiting the operation of an unlicensed money transmitting business.

Specifically, the DOJ wants the underlying BSA regulations to provide that the provisions of Section 1960(b)(1)(B) apply to unlicensed P2P platforms that, per the report, "enable their users to transfer digital assets in a manner analogous to traditional money-transmitting businesses."

This is an opaque and potentially circular recommendation that, depending on how it is understood, could have substantial consequences — and could represent a "tail wagging the dog" scenario where a criminal statute is broadened by reinterpreting the substantive

requirements of the underlying regulation.

Section 1960 applies in part to a money transmitting business that "fails to comply with the money transmitting business registration requirements under section 5330 [of the BSA], or regulations prescribed under such section."[2]

Under the BSA, money services businesses, or MSBs, include money transmitters and must register with FinCEN.[3] 2019 guidance from FinCEN provides that administrators and exchangers of virtual currency generally qualify as money transmitters, and therefore are MSBs that must register.[4]

According to the 2019 guidance,

> [a]n exchanger is a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency, while an administrator is a person engaged as a business in issuing ... a virtual currency, and who has the authority to redeem ... such virtual currency.

With regard to P2P exchangers, the 2019 FinCEN guidance explains that they are typically natural persons engaged in the business of buying and selling virtual currency by facilitating transfers from one type of virtual currency to a different type, as well as exchanges between virtual currency and other types of value.[5]

Importantly, FinCEN understands that these natural-person P2P exchangers handle the virtual currency and fiat side on behalf of the seller and buyer, thus acting as a true intermediary. For FinCEN, these P2P exchangers are subject to the BSA.[6]

However, P2P exchangers are not limited to natural persons and may be P2P trading platforms, which are websites that enable buyers and sellers of virtual currency to find each other.

The 2019 FinCEN guidance explains that no MSB registration is required if the P2P platform only provides a forum where buyers and sellers post their bids and offers, and the parties themselves settle any matched transactions through an outside venue, either through individual wallets or other wallets not hosted by the trading platform.[7]

By contrast, if a trading platform purchases virtual currency from the seller and sells it to the buyer, then the platform is acting as an exchanger and falls within the definition of money transmitter subject to the BSA.[8]

The report addresses positions taken by P2P platforms that connect, for profit, buyers and sellers of virtual currencies but do not take custody because some platforms assert that they are not covered by the BSA by invoking the 2019 FinCEN guidance, which "ties an entity's [BSA] registration obligations to, among other things, whether the entity takes custody or assumes control over the value to be exchanged."

The DOJ wants to obtain clarity that Section 1960(b)(1)(B) applies to such platforms.

However, based on FinCEN's guidance on P2P platforms and its definitions of administrators and exchangers, the P2P platforms referenced in the report would be money transmitters only if their business models involve settling transactions directly, not through a third-party mechanism.

Although the report is not a model of clarity, it seems that the DOJ desires P2P platforms that involve transactions settled for buyers and sellers through outside venues to also be covered by the BSA — and subject to criminal prosecution if they are not registered as MSBs with FinCEN. If so, this would be an apparent expansion of FinCEN interpretive guidance, courtesy of the DOJ.

Further, it is unclear how the DOJ would attain this goal. As noted, the report opaquely provides that the DOJ

> would welcome changes to clarify that [Section 1960(b)(1)(B)] applies to platforms providing services that enable their users to transfer digital assets in a manner analogous to traditional money transmitting businesses.

This goal presumably could be accomplished through one of three ways: (1) amend Section 1960 itself; (2) somehow convince FinCEN to alter its existing guidance; or (3) amend the BSA's definition of a "money transmitter," or, after proper notice and comment, amend FinCEN's regulations implementing this statutory definition.

Under any scenario, the DOJ's recommendation strikes at the many P2P platforms that have taken the position that they are not covered by the BSA because they do not take custody of digital assets.

**Sentencing**

The DOJ further recommends that the U.S. Sentencing Guidelines applicable to BSA violations be amended so as to produce harsher sentences "to more accurately reflect the gravity of BSA violations that facilitate money laundering and other illicit activity."

Condensed greatly, the guidelines provide federal district courts with an advisory range of imprisonment — or, at the lower ranges, probation — through a complicated process of numerical calculations resulting in a final offense level.

The guidelines provision that applies to BSA violations is U.S. Sentencing Guidelines Section 2S1.3, and it provides a base offense level of 8, subject to increases based upon specific offense characteristics regarding the details of the particular crime, or reductions, such as for acceptance of responsibility as well as any prior criminal history of the defendant.[9]

The higher the number, the longer the advisory range of imprisonment. Importantly, Section 2S1.3 does not increase the calculation — and therefore the advisory range — according to the amount of money involved in the transactions at issue, unlike guideline provisions applicable to other financial crimes such as fraud, money laundering and tax evasion.[10]

Accordingly, the DOJ complains that "a defendant's Guidelines range for BSA-related violations always falls well below the five-year statutory maximum, even when the violations were widespread or facilitated millions of dollars' worth of money laundering." The DOJ is concerned that district courts therefore "may end up viewing BSA offenses as mere technical or regulatory violations not meriting a substantial period of incarceration."

Of course, if the DOJ truly believes that a defendant committed money laundering — a very distinct crime from violating the BSA, and almost always a more serious crime because it involves knowingly transacting in illicit proceeds — then it presumably could actually charge and seek a conviction for money laundering, rather than trying to maximize its chances of

obtaining a conviction by charging an arguably easier-to-prove BSA offense, and then seeking a higher sentence anyway.

Moreover, district courts are entirely able to use their discretion to depart upward from an advisory guidelines sentencing range, and are well-equipped to understand the specific facts of the offense and the offender being sentenced, and whether the violation at hand is merely technical.

**The Travel Rule**

The report states that the DOJ supports FinCEN issuing a final rule amending the record-keeping and travel rule regulations under the BSA as they apply to virtual currency: "Once FinCEN issues the final rule, the Department proposes to support FinCEN in enforcing the rule."

However, real-world and effective implementation of the travel rule in the digital assets industry is more easily said than done, and the prospect of criminal prosecutions based on alleged travel rule violations is concerning.

The current travel rule requires covered financial institutions to collect and pass on certain customer and transaction information to the next financial institution for transfers exceeding $3,000.

Very generally, when sending a transmittal on behalf of a customer to a receiving financial institution, the originating financial institution must include the following information:

- Name and, if the payment is ordered from an account, the account number of the transmitter;
- The transmitter's address;
- The amount of the transmittal;
- The execution date of the transmittal;
- The identity of the recipient's financial institution; and
- Either the name and address or numerical identifier of the transmitter's financial institution.[11]

The recipient financial institution should retain information sent by the originating financial institution and send it with any transfers to other financial institutions.[12]

The travel rule has clearly applied since 1996 to transfers of conventional fiat currency. In October 2020, FinCEN proposed regulations — still pending — that would change the travel rule by lowering the applicable monetary threshold from $3,000 to only $250 for international, but not domestic, fund transfers.[13]

Further, the proposed regulations would purport to clarify that the travel rule applies to transactions involving virtual currencies, as well as transactions involving digital assets with legal tender status, by clarifying the meaning of "money" in certain defined terms.[14]

This proposal, if finalized, would greatly expand the breadth of the travel rule, although FinCEN takes the position that the travel rule has always applied to virtual currency,[15] and the global Financial Action Task Force has stated for years that its version of the travel rule applies to virtual asset service providers.[16]

However, the lack of readily available technology has hindered real-world compliance with the travel rule, primarily because a virtual currency business conducting a transfer on behalf of a customer does not necessarily have all of the information necessary to determine if the recipient is a financial institution and the travel rule applies.

Although the long-established SWIFT system allows banks to obtain beneficiary information for international fund transfers, there is no such similar, established system for digital assets.

However, digital asset industry participants are collaborating to develop and implement mechanisms to comply with the travel rule. For example, a working group has released a new standard, called Intervasp Messaging Standard 101, which defines a uniform model for data that must be exchanged by virtual currency platforms alongside transactions.[17] IVMS101 will identify the senders and receivers of virtual currency payments, and this information will travel with each transaction.

Although industry actors are making progress, there remains a gap between the proposed regulatory requirements and the ability of industry to comply readily in the real world. The report strongly suggests that the DOJ wishes to focus on that gap.

**Other Recommendations, and a New Prosecutor Network**

The report makes several other recommendations on regulatory and legislative steps, all of which seek to make it easier to investigate and prosecute cases relating to digital assets, including:

- Expanding the laws prohibiting employees of financial institutions from tipping off suspects whose records are sought via grand jury subpoena[18] to apply to virtual asset service providers acting as MSBs under the BSA, and expanding the anti-tipoff prohibition to include all criminal offenses under Title 18, the general federal criminal code; Title 21, the drug laws; and the BSA;

- Consider amendments to the general venue provision in Title 18 for criminal offenses, or to the venue provisions of specific offenses, "that would permit prosecution in any district where the victim of a digital assets-related offense or other cybercrime is found";

- Expanding or purportedly clarifying that the BSA applies to platforms dealing in nonfungible tokens;

- Extending the general federal criminal statute of limitations of five years[19] to 10 years for offenses involving the transfer of digital assets "to account for the complexities of digital assets-related investigations";

- Recommending general statutory or regulatory changes, and international cooperation initiatives "designed to address the challenges in gathering evidence of crimes related to digital assets," including laws requiring record preservation or enhanced penalties for noncompliance with legal process;

- Creating criminal and civil forfeiture authority for commodities-related violations, and making such violations predicate offenses, or specified unlawful activity, for money laundering charges;

- Lifting the $500,000 cap on administrative forfeitures involving virtual currencies — in contrast to civil or criminal forfeitures, which have no such cap; and

- Finally, and not surprisingly, increasing funding for technical resources specific to digital asset investigations, "including blockchain analytical tools and the technical infrastructure (e.g., server space or cloud access) needed to ingest and maintain potentially voluminous and complex data and to analyze that data." Similarly, the DOJ seeks increased funding to "to hire and retain the skilled agents, analysts, prosecutors, and other attorneys essential to addressing existing and emerging threats relating to digital assets."

The DOJ's request for increased resources aligns with the creation of the Digital Asset Coordinator, or DAC, Network, a nationwide group of prosecutors designated as legal and technical experts in digital asset cases, which the DOJ announced on the same day that it released the report.[20]

The DAC Network reflects the DOJ's desire for enhanced institutional knowledge and

experience in this evolving and complex area of the law. The DAC Network will be led by the DOJ's existing National Cryptocurrency Enforcement Team,[21] and will serve as the DOJ's

> primary forum for prosecutors to obtain and disseminate specialized training, technical expertise, and guidance about the investigation and prosecution of digital asset crimes.

The DAC Network will consist of over 150 designated federal prosecutors from U.S. attorney's offices nationwide and various offices of Main Justice based in Washington, D.C. These designated prosecutors will act as their office's subject matter expert on legal and technical issues relating to digital assets, and will receive training on investigating and prosecuting crimes related to digital assets.

The report and the DAC Network reaffirm the DOJ's ambitions to significantly ramp up digital asset investigations and prosecutions. Time will tell whether the DOJ truly can build a strong, nationwide team of experienced prosecutors who remain accurately up-to-date on technological advances that challenge and often outpace the application of existing law and regulation.

---

*Peter Hardy is a partner and co-leader of the anti-money laundering team at Ballard Spahr LLP. He previously served as an assistant U.S. attorney and as a trial attorney for the U.S. Department of Justice's Tax Division.*

*Marjorie J. Peerce is a partner and co-leader of the blockchain technology and cryptocurrency team at Ballard Spahr.*

*Siana Danch is an associate at the firm.*



[1] U.S. Dep't of Justice, The Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets (Sept. 16, 2022), https://www.justice.gov/ag/page/file/1535236/download.

[2] 18 U.S.C. § 1960(b)(1)(B).

[3] See 31 C.F.R. §§ 1010.100(t)(3) and (ff)(5)(i), 1022.380(a)(1).

[4] FinCEN, Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies, FIN-2019-G001 [hereinafter "FIN-2019-G001"] (May 9, 2019), https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf, at 13. FIN-2019-G001 builds on earlier FinCEN guidance published in 2013. See FinCEN, Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, FIN-2013-G001 (Mar. 18, 2013), https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf.

[5] FIN-2019-G001 at 14.

[6] Id. at 15.

[7] Id. at 23-24.

[8] Id. at 24.

[9] U.S.S.G. § 3E1.1.

[10] U.S.S.G. §§ 2B1.1, 2S1.1, 2T1.1.

[11] 31 C.F.R. § 1010.410(f)(1).

[12] 31 C.F.R. § 1010.410(f)(2).

[13] FinCEN and Board of Governors of the Federal Reserve System, Threshold for the Requirement To Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds That Begin or End Outside the United States, and Clarification of the Requirement To Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets With Legal Tender Status, Joint Notice of Proposed Rulemaking, 85 FR 68005, 68006 (Oct. 27, 2020), available here: https://www.federalregister.gov/documents/2020/10/27/2020-23756/threshold-for-the-requirement-to-collect-retain-and-transmit-information-on-funds-transfers-and.

[14] Id.

[15] FinCEN, Prepared Remarks of FinCEN Director Kenneth A. Blanco, delivered at the Consensus Blockchain Conference, (May 13, 2020), available here: https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-consensus-blockchain.

[16] E.g., FATF, Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers, (Oct. 28, 2021), available here: https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf.

[17] Ian Allison, Crypto Firms Establish Messaging Standard to Deal With FATF travel rule, CoinDesk (May 7, 2020), https://www.coindesk.com/policy/2020/05/07/crypto-firms-establish-messaging-standard-to-deal-with-fatf-travel-rule/.

[18] 18 U.S.C. § 1510.

[19] 18 U.S.C. § 3282.

[20] Press Release, Justice Department Announces report on Digital Assets and Launches Nationwide Network, U.S. Dep't of Justice (Sept. 16, 2022), https://www.justice.gov/opa/pr/justice-department-announces-report-digital-assets-and-launches-nationwide-network.

[21] Press Release, Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team, U.S. Dep't of Justice (Oct. 6, 2021), https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team.