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U.S. Department of Treasury
P.O. Box 39
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Re: *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, Docket Number FINCEN-2020-0020-0001

Director Blanco:

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the Financial Crimes Enforcement Network's (FinCEN) proposed rule, *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, 85 Fed. Reg. 83840 (Dec. 23, 2020).

NCLA sincerely appreciates this opportunity to comment and express its concerns about the Proposed Rule. FinCEN must not continue with its proposed course of action and should instead recognize constitutional limits on its authority. The Proposed Rule represents a radical extension of FinCEN's financial surveillance of innocent Americans. Instead of confining its reach to regulated entities, FinCEN proposes to gather sensitive information about the financial dealings of parties that are expressly beyond the scope of its authority. That, in fact, is the point of the proposed rule. Even if Congress has attempted to authorize this kind of breathtaking extension of FinCEN's surveillance through an entirely standardless grant of authority, the Proposed Rule violates the limits on divesting legislative power inherent in Article I of the Constitution. Further, the Proposed Rule unconstitutionally requires disclosure of private information to law enforcement without any suspicion of wrongdoing.

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I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The administrative state poses an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, a vastly different sort of government has developed within it—a type, in fact, that the Framers designed the Constitution to prevent.[1] This unconstitutional administrative state is the focus of NCLA's attention.

In addition to suing agencies to enforce constitutional limits on the exercise of administrative power, NCLA encourages agencies to curb their own unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law—not least by avoiding unlawful modes of governance. All agencies and agency heads must ensure that their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution.

II. THE PROPOSED RULE

The Proposed Rule attempts to extend current customer-reporting obligations for banks and financial institutions to transactions involving digital assets. But it also takes things one step further, and subtly extends those reporting requirements to gathering and producing information to FinCEN for people and businesses that *are not* customers, are likely not resident in the United States, and are, by definition, beyond the scope of FinCEN's authority.

First, the rule proposes to include digital assets under the umbrella term "monetary instruments" for purposes of 31 U.S.C. § 5313, which relates to the Secretary's authority to issue

[1] *See generally*, Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

reporting requirements for U.S. coins or currency. *Proposed Rule*, 85 Fed. Reg. at 83846.

Second, based on the inclusion of digital assets as "monetary instruments," the Proposed Rule extends Bank Secrecy Act (BSA) record-keeping and currency transaction reporting (CTR) requirements to digital asset exchanges. *Proposed Rule*, 85 Fed. Reg. at 83849. For instance, the Proposed Rule requires transaction reports to be filed with FinCEN when a customer engages in transactions valued more than $10,000. *Id.* at 83850. The Proposed Rule also extends prohibitions on structuring transactions to avoid the reporting limits. *Id.*

Notably, the Proposed Rule also extends the scope of CTR reporting, to include information about any *counterparty* that is excluded from the BSA's reach. *Id.* at 83849. Specifically, "the proposed rule would require the reporting of certain identifying information including, at a minimum, the name and physical address of each counterparty," and encourages regulated entities "to follow risk-based procedures to determine whether to obtain additional information about their customer's counterparties or take steps to confirm the accuracy of counterparty information." *Id.*

Third, the rule proposes a novel record-keeping requirement related to transactions with "unhosted" digital asset "wallets." *Id.* at 83842. "Unhosted wallets" are any arrangement where a person holds digital assets without utilizing a third party, such as an exchange. *Id.* This can be as simple as an individual storing a digital currency's private key on a slip of paper. FinCEN recognizes that a "person conducting a transaction through an unhosted wallet to purchase goods or services on their own behalf is not" subject to reporting requirements imposed on regulated financial institutions. *Id.* This is no different than if someone purchased a cup of coffee with cash.

Nonetheless, under the new rule, any time a person at a registered entity makes "a withdrawal, exchange or other payment or transfer" involving digital assets worth more than $3,000, measured in the aggregate, with a person with an unhosted wallet, the financial institution must keep detailed records concerning *both* the customer and the *counterparty*. *Id.* at 83860-61. For the existing

customer, the registered entity must verify their identification, and gather transaction information. *Id.* at 83861. But for the counterparty, who is by definition not subject to BSA requirements, the entity must record the amount of digital assets transferred, the value in dollars, any payment instructions received by the institution, the "name and physical address of each counterparty to the transaction" "as well as other counterparty information the Secretary may prescribe as mandatory on the reporting form," and "[a]ny other information that uniquely identifies the transaction, the accounts, and, to the extent reasonably available, the parties involved[.]" *Proposed Rule*, 85 Fed. Reg. at 83861.

FinCEN cites a number of statutory sources for its purported authority to issue the proposed rule. First, FinCEN relies on 12 U.S.C. § 1829b(b)(1), and 12 U.S.C. § 1953, which establish reporting requirements for banks and non-bank financial institutions respectively. *Id.* at 83845. Second, "[t]he proposed rule relies on authority under 31 U.S.C. 5313 and 5318(a)(2) to extend several existing requirements that apply to the current requirement to file currency transaction reports to the new requirement to file transaction reports related to transactions in CVC or LTDA. It also relies on the authority of 31 U.S.C. 5318(a)(2) for the promulgation of the recordkeeping requirements on wallets held by foreign financial institutions in jurisdictions identified by FinCEN." *Id.* at 83845 n. 38.

III. THE PROPOSED RULE WOULD BE UNLAWFUL

A. FINCEN'S AUTHORITY UNDER THE BANK SECRECY ACT

Perhaps the best way to understand how FinCEN has arrived at its current, audacious view of its authority is to go back to the source—the Bank Secrecy Act.[2] For federally *insured* banks, 12

[2] There is, of course, no single Bank Secrecy Act, but rather a collection of statutes found in Titles 12 and 31. Nevertheless, NCLA follows common practice in referring to them collectively under their best-known moniker.

U.S.C. § 1829b(b)(1) purports to allow the Secretary of the Treasury to "prescribe regulations" whenever she "determines that the maintenance of appropriate types of records and other evidence by insured depository institutions has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings[.]" 12 U.S.C. § 1953(a) extends that same authority for any "uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States" any such function. 31 U.S.C. § 5312(a)(2) takes this idea and runs with it, defining a "financial institution" to not only include banks, but also 25 other categories of businesses, such as pawn brokers and travel agencies. Relevant here, this also includes "a licensed sender of money or any other person who engages as a business in the transmission of … value that substitutes for currency[.]" 31 U.S.C. § 5312(a)(2)(R). Also, just in case that delegation wasn't broad enough, 31 U.S.C. § 5312(a)(2)(Z) includes, "any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters."

The Secretary also has the authority to require a "domestic financial institution" that is involved with a transaction involving US currency "or other monetary instruments the Secretary of the Treasury prescribes" to "file a report on the transaction at the time and in the way the Secretary prescribes," under whatever "circumstances the Secretary prescribed by regulation." 31 U.S.C. § 5313(a). Additionally, Congress has delegated defining "monetary instruments" by allowing the Secretary to include "by regulation, value that substitutes for any monetary instrument[.]" 31 U.S.C. § 5312(a)(3)(D). Finally, Congress granted the Secretary the power to "require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation[.]" 31 U.S.C. § 5318(a)(2).[3]

[3] *After* FinCEN proposed the rule at issue here, Congress amended both Sections 5312(a)(3)(D) and 5318(a)(2) to include the quoted language. As other commenters have noted, FinCEN's authority to

It is also worth noting that violators of these statutory provisions or "a regulation prescribed" under the relevant portions of Title 31, "shall be fined not more than $250,000, or imprisoned for not more than five years, or both." 31 U.S.C. § 5322(a). Further, if an entity violates "a regulation prescribed under section 5318(a)(2), a separate violation occurs for *each day the violation continues* and at each office, branch, or place of business at which a violation occurs or continues." *Id.* at § 5322(c) (emphasis added).

Taking Congress' vast grant of authority to heart, the Secretary has further defined the relevant subset terms that control the scope of Treasury's authority, including a convoluted 8-part definition of "money services business[es]," which further differentiates types of "money transmitter[s]." *See* 31 CFR § 1010.100(ff)(5)(i)(A). "Money transmission" means "acceptance of currency, 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" by anyone. 31 CFR § 1010.100(ff)(5)(i)(A). But because that definition would literally encompass any participant in the economy, the definition also includes six contrary "[f]acts and circumstances" limitations and another exception for any "natural person" who acts "on an infrequent basis and not for gain or profit." 31 CFR §§ 1010.100(ff)(5)(ii), (8)(iii). Essentially, the Secretary has adopted a definition that literally encompasses every American person and entity, and merely suggested fact-dependent limitations on the scope of that definition.

Now, the Secretary, through FinCEN, seeks to take this already vast authority and extend it *further*. Instead of just seeking to regulate *banks*, or even those encompassed by the functionally limitless definition of a domestic financial institution, FinCEN proposes to gather information about

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issue the Proposed Rule remains dubious based on the authority originally invoked by the agency. NCLA will take Congress at its most recent word and assume that FinCEN will ultimately invoke the newly-amended statutory sections.

people whom even FinCEN acknowledges *should not be* regulated by the agency—users of digital assets unaffiliated with financial institutions. It further hopes to *criminalize* doing business with these entities if regulated entities fail to gather private information about individuals who are not bound by the BSA and promptly turn it over to the government. FinCEN should not be in the business of expanding its own reach to unprecedented levels, while dragooning regulated parties into becoming spies for the government.

B. The Proposed Rule Would Be Unconstitutional

1. The Proposed Rule Would Exercise Unconstitutionally Divested Legislative Authority

Article I of the Constitution provides that "*[a]ll* legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). "[T]he integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (internal citation and quotation marks omitted). Furthermore, "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Congress may not "abdicate or [] transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). The President, acting through his agencies, therefore, may not exercise Congress' legislative power to declare entirely "what circumstances … should be forbidden" by law. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418-19 (1935).

The Supreme Court has struggled with defining the limits on the legislature's divestment of its authority. The Court has allowed agencies to exercise authority so long as Congress has set out an "intelligible principle to which the person or body authorized to [exercise the authority] is directed to conform." *Mistretta*, 488 U.S. at 372. But that test lacks clear limits. Furthermore, five members of

the Court have recently expressed interest in at least exploring a reconsideration of that standard. *See Gundy v. United States*, 139 S. Ct. 2116, 2131-42 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 2130-31 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (stating that the issues raised in the *Gundy* dissent "may warrant further consideration in future cases").

As Justice Gorsuch recently highlighted in his dissenting opinion in *Gundy v. United States*, though, the Court's precedents offer at least three limiting principles to consider in order "to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities."139 S. Ct. at 2135 (Gorsuch, J., dissenting).

"First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to fill up the details." *Id.* at 2136. The opposite is true as well—when Congress leaves policy decisions up to another branch, it unlawfully divests itself of power. *See A.L.A. Schecter Poultry Corp.*, 295 U.S. at 529. What constitutes a "policy decision[]" was illustrated as far back as 1825, when the Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain "alterations and additions." *Wayman v. Southard*, 23 U.S. 1, 1 (1825). Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act … to fill up the details." *Id.* at 21.

The Court provided a concrete example of this distinction in *United States v. Eaton*, 144 U.S. 677 (1892). There, the Court struck down a series of federal tax regulations that purported to impose criminal liability even though Congress had not set out a penalty provision. *Id.* at 688. As there were "no common-law offenses against the United States," it was up to Congress to provide criminal punishment for violation of a regulation. *Id.* at 687. This decision could not be delegated to an

agency, because "[i]t would be a very dangerous principle" to allow an agency to issue regulations that, themselves, carried criminal penalties under the general rubric of being "a needful regulation" to enforce a statute. *Id.* at 688. Thus, the Court held that "[i]t is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense," even if the agency could otherwise issue regulations that had, "in a proper sense, the force of law[.]" *Id.*

"Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting). Thus, during the Napoleonic Wars the Court allowed an exercise of authority to impose a trade embargo that depended on predicate factual findings of need. *Cargo of The Brig Aurora v. United States*, 11 U.S. 382, 388 (1813). This distinction weighed heavily in the Court's more recent analysis in *Touby v. United States*, where the Court allowed the Attorney General to add a substance to a list of prohibited drugs temporarily if he determined that doing so was "necessary to avoid an imminent hazard to the public safety." 500 U.S. 160, 166 (1991). As described by Justice Gorsuch, "In approving the statute, the Court stressed all the[] constraints on the Attorney General's discretion and, in doing so, seemed to indicate that the statute supplied an 'intelligible principle' because it assigned an essentially fact-finding responsibility to the executive." *Gundy*, 139 S.Ct. at 2141. Exercise of authority that lacks any such fact-intensive inquiry likely also lacks an essential limit. *See id.*

"Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities." *Id.* at 2137. For instance, the Executive Branch possesses certain unique and historical constitutional authorities, such as those related to foreign affairs, and the Court may view such exercises of delegated authority more favorably. *Id.* This is a point that has been emphasized by lower courts following *Gundy*. *See United States v. Bruce*, 950 F.3d 173, 175 (3d Cir. 2020) ("Importantly, the non-delegation doctrine applies only to delegations by Congress of legislative

power; it has no application to exercises of executive power.); *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 Fed.Appx. 982, 2020 WL 967925, at *7 (Fed. Cir. Feb. 28, 2020) (unpublished) (affirming tariff and opining that the President's "independent constitutional power" may justify the conclusion).

The BSA presents one of the furthest and most open-ended Congressional divestments of authority in a U.S. Code replete with such delegations of legislative power. But that does not mean FinCEN may, consistent with Article I, exercise the full rulemaking authority set down in the BSA. The proposed rule would exceed appropriate constitutional limits, as it would constitute FinCEN's exercise of Congress' legislative power to declare entirely "what circumstances … should be forbidden" by law. *Panama Refining Co.*, 293 U.S. at 418-19.

The proposed rule would violate all three traditional bars on Congressional divestment to an agency discussed above. First, the delegations of legislative power FinCEN seeks to exercise are explicitly those of *policy*. Indeed, the first statute FinCEN invokes, 31 U.S.C. § 5313(a), allows the Secretary to require transaction reports "at the time and in the way the Secretary prescribes," for any "monetary instruments the Secretary of the Treasury prescribes" under whatever "circumstances the Secretary prescribed by regulation." There are no limits set out in the statute beyond the Secretary's policy preferences. The other statute relied on by FinCEN, 31 U.S.C. § 5318(a)(2), just says the Secretary may require any entity to produce whatever information she desires, as long as she decides, as a matter of policy, that they might "ensure compliance with [the BSA] and [related] regulations … or to guard against money laundering, the financing of terrorism, or other forms of illicit finance." And FinCEN has decided, unilaterally, that digital assets should fall under the BSA's reach, and even unregulated counterparties should be required to produce personal information. This is not just filling in details, this is an exercise of the "very dangerous principle" of allowing an agency to write new rules, on new subjects, with criminal consequences. *See Eaton*, 144 U.S. at 688.

Second, this Proposed Rule is not premised on fact-finding. Of course, one might expect some sort of quantifiable data that might justify the proposed rule, such as evidence of widespread fraud concerning digital assets. The best FinCEN offers, though, is Treasury's own speculation that "anonymity in transactions and funds transfers is the main risk that facilitates money laundering." *Proposed Rule*, 85 Fed. Reg. at 83844 (citation omitted). From this general premise, FinCEN simply asserts, on its own say-so, that more information about every type of transaction should be beneficial. Regardless of FinCEN's fact-finding though, the statutory authority *requires* none, which creates the constitutional problem. *See* 31 U.S.C. §§ 5313(a), 5318(a)(2). FinCEN has been permitted endless discretion, which contributes to the unlawful nature of the Proposed Rule.

Finally, this Proposed Rule is decidedly *not* within the Executive's inherent powers. This rule would create whole new types of criminal liability based solely on a limitless divestment of Congress' legislative power. But creating crimes is a uniquely legislative duty, and not one that can be freely transferred to the Executive. *See Eaton*, 144 U.S. at 687-88. As the Executive Branch is charged with enforcement of existing crimes, if anything, its authority here should be at its weakest. Otherwise, the Constitution's separation of legislative from executive power will be defeated.

Thus, the Proposed Rule would constitute an invalid exercise of legislative power. FinCEN must not exercise powers that Congress could not divest from itself in this fashion.

2. The Proposed Rule Would Violate the Fourth Amendment

The Fourth Amendment to the U.S. Constitution protects "the right of the people to be secure in their … papers … against unreasonable searches and seizures."

"The Fourth Amendment refers to 'papers' because the Founders understood the seizure of papers to be an outrageous abuse distinct from general warrants." Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" As Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 52 (2013). "The English courts and resolutions of the House of

Commons condemned both abuses distinctly." *Id.* Moreover, "America inherited the common law ban on searches for papers, adopted constitutional provisions that mentioned papers distinctly, and refused to modify the common law ban by statute until the Civil War," and the "one Founding-era attempt to authorize seizing papers by statute was condemned as contrary to common law and natural right and never passed into law." *Id.*

Thus, "[i]f one goes back to the early Republic [] it is difficult to find any deferral executive body that could bind subjects to appear, testify, or produce records." Philip Hamburger, *Is Administrative Law Unlawful?* 221 (2014). Historically Congress allowed record-keeping requirements and administrative inspection for industry (*e.g.*, distillers to examine books), but "the inspection requirement was very limited, for it applied only to places that the distillers reported to the government." *Id.* at 224. "The record-keeping and inspection requirements, moreover, did not apply to privately owned records or papers. … [T]he 1791 statute carefully stated that treasury officers were to supply distillers with books for recording their production of spirits, and that distillers were to enter their production of spirits in these books." *Id.* "It also is apparent that privately owned papers were peculiarly protected: They were not subject even to general disclosure requirements, it being only government-owned records that were open to inspection." *Id.*

Shortly after the Civil War a statute was passed that granted the Secretary of the Treasury the authority in all revenue actions "other than criminal" the power to serve an investigative demand on a defendant, and if he "refuse[d] to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court." An Act to Amend the Customs-Revenue Laws and to Repeal Moieties, ch. 391 § 5, 18 Stat. 187 (1874). If produced, the documents could be inspected by the government in the presence of their owner and were admissible in evidence but were not forfeited. *Id.*

In *Boyd v. United States*, 116 U.S. 616, 638 (1886), the Supreme Court ruled that subpoenas issued under the statute were "unconstitutional and void" under the Fourth Amendment because they were akin to general warrants. The Court relied heavily on the Founders' incorporation of English common law to frame its understanding of the original meaning of the Fourth Amendment protection. *Id.* at 626. The Court said that "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with" the case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). *Id.* The Court called the decision, a "monument of English freedom" and noted that the Founders "considered it as the true and ultimate expression of constitutional law" such that "it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the [C]onstitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." *Boyd*, 116 U.S. at 626-27.

In the *Entick* decision Lord Camden had written,

> Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and erried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

Id. at 627-28 (quoting *Entick*, 19 How. St. Tr. at 1029).

According to the Court, the "principle[s] laid down" in the *Entick* opinion "affect the very essence of constitutional liberty and security." *Id.* at 630. The Court equated "a compulsory production of a man's private papers" with "[b]reaking into a house and opening boxes and drawers." *Id.* at 622, 630. Both constituted "the invasion of his indefeasible right of personal security, personal liberty. and private property[.]" *Id.* at 630.

Despite this strong historical pronouncement, in *United States v. Miller*, 425 U.S. 435 (1976)

the Supreme Court blessed not only intrusive, suspicionless subpoenas, but even the mandatory disclosure regime of the BSA. In *Miller*, Treasury agents obtained facially invalid grand jury subpoenas for Miller's bank records and obtained bank account information from a separate financial institution. *Id.* at 439. The lower courts ordered suppression in adherence to *Boyd*'s particularity requirement. *Id.*

The Supreme Court reversed after concluding that the subpoenaed documents did not "fall within a protected zone of privacy" because they were not Miller's "private papers" but were "business records of the banks." *Id.* 440. The Court "perceive[d] no legitimate 'expectation of privacy'" in the records because "[a]ll of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 442. Indeed, the Court said, "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.*

Because of *Miller*'s holding, and the so-called third-party doctrine, the entire BSA regime, which mandated disclosures to FinCEN, even without *any* suspicion of wrongdoing, was viewed as simply outside the protection of the Fourth Amendment. *See United States v. Kaatz*, 705 F.2d 1237, 1242 (10th Cir. 1983) ("We have here no search or seizure in violation of the Fourth Amendment. The Bank reported a transaction to which it and [the defendant] were the only parties. [The defendant] had no legitimate 'expectation of privacy' concerning information contained in Bank records, and no Fourth Amendment protected interest in the Bank records.") (citing *Miller*, 425 U.S. at 442). Financial records thus have become fair game for FinCEN's mere curiosity.

But, as the Court recently held in *Carpenter v. United States*, 138 S.Ct. 2206 (2018), the *Miller* exception does not always apply. There, the Court held, for the first time since *Boyd*, that any time the government subpoenas "records held by a third party" it must first obtain a warrant "where the

suspect has a legitimate privacy interest" in the records. *Id.* at 2222.

In reaching its conclusion, the Court noted that *Miller*'s "third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Id.* at 2219 (citation omitted). Indeed, the Court limited the *Miller* decision based on the conclusion "that checks were 'not confidential communications but negotiable instruments to be used in commercial transactions.'" *Id.* (quoting *Miller*, 425 U.S. at 442). The Court also noted that the "voluntary exposure" rationale would not justify intrusions when the intrusion was so pervasive that "in no meaningful sense" did the "user voluntarily assume the risk of turning over" the data. *Id.* (citation omitted).

The Proposed Rule ignores this history, and would, for the first time, extend the BSA's reach to require production of sensitive financial information from those who have never voluntarily disclosed it to a financial institution, and who, by definition, have been excluded from the BSA's reach. The *Miller* decision itself stands on dubious historical footing, and it cannot be extended to justify suspicionless inspections of non-regulated persons who have not voluntarily disclosed anything. But that is precisely what FinCEN seeks to do.

First, the proposed CTR rule would require the *mandatory* disclosure of personal information about the counterparty to FinCEN, without any suspicion at all. *See Proposed Rule*, 85 Fed. Reg. at 83849. This would include, "at a minimum, the name and physical address of each counterparty," but financial institutions are encouraged to "obtain additional information about their customer's counterparties or take steps to confirm the accuracy of counterparty information." *Id.* at 83849. But financial records, like any other personal papers, are a person's "dearest property," and a general power to inspect them without cause "would be subversive of all the comforts of society." *Boyd*, 116 U.S. at 627-28 (quoting *Entick*, 19 How. St. Tr. at 1029). What people choose to sell or purchase,

with whom, and for what purpose, is simply none of FinCEN's business. The entire mandatory disclosure regime of the BSA would be repugnant to the Founders. *See* Hamburger, *Is Administrative Law Unlawful?* at 224. But even under the modern view of the government's power, *Miller*'s "voluntary exposure" rationale does not justify an intrusion where, "in no meaningful sense" did the "user voluntarily assume the risk of turning over" the data. *Carpenter*, 138 S.Ct. at 2219. The Proposed Rule *only* requires counterparty disclosures *if they are not regulated by the BSA*. Certainly, in no meaningful sense, did these counterparties voluntarily turn over their information to FinCEN. The Proposed Rule would therefore require unlawful government intrusions into protected areas.

Next, the new recordkeeping requirement for transactions with unhosted wallets runs into the same problem. The financial institution must collect a host of sensitive information for parties that are specifically excluded from the BSA's reach. This includes sensitive "information that uniquely identifies the transaction, the accounts, and, to the extent reasonably available, the parties involved," such as the size and purpose of the transaction, the "name and physical address of each counterparty to the transaction" and potentially unlimited other details about the counterparty "the Secretary may prescribe as mandatory on the reporting form[.]" *Proposed Rule*, 85 Fed. Reg. at 83861. No doubt many (if not most) counterparties will reasonably expect this sensitive information to be protected from prying government eyes. And even though the financial institution need not affirmatively file a report with FinCEN, the agency still always retains the authority to "examine any books, papers, records, or other data of domestic financial institutions or nonfinancial trades or businesses relevant to the recordkeeping or reporting requirements of this subchapter" without any suspicion of wrongdoing. *See* 31 U.S.C. § 5318(a)(3). Thus, this general warrant-like provision would also violate the Fourth Amendment's prohibition on general searches of private papers.

It is also no defense that FinCEN hopes to force regulated entities to gather information that FinCEN itself may not gather. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (government

actors are "held responsible for a private decision" when government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be in law be deemed to be that" of the government); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (search conducted by private actor is subject to Fourth Amendment when private actor "must be regarded as having acted as an 'instrument' or agent of the state"). If domestic financial institutions refuse to follow these rules, then they can be criminally prosecuted, which is perhaps the clearest possible example of government coercion. *See* 31 U.S.C. § 5322(a).

Of course, the elephant in the room is that many domestic financial institutions will be simply unable to comply with the Proposed Rule. The counterparties largely control their own information, and unless the financial institutions are able to take this information without the counterparty's permission (perhaps through their existing customer acting as an informant), a recalcitrant counterparty may be able to maintain its privacy. But the penalty is that the counterparty may not transact business with any domestic financial institution. And that may be the point of this Proposed Rule—to disfavor digital assets and force them out of the U.S. banking system. FinCEN, of course, has no business trying to force an entire class of legal transactions underground. Even if Congress approved such a policy, NCLA would be deeply concerned about trading the ability of participating in commerce for the surrender of constitutional rights.

IV. CONCLUSION

The Proposed Rule constitutes an unprecedented effort to gather private information of unregulated parties in violation of constitutional limits on FinCEN's authority. But the rule remains just a *proposal*. FinCEN ought to recognize the impropriety of finalizing the rule and promptly withdraw it from consideration. Should FinCEN unwisely seek to promulgate a substantially similar version of the Proposed Rule, NCLA will not hesitate to file suit to protect Americans' civil liberties.

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Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Caleb Kruckenberg, Litigation Counsel, at caleb.kruckenberg@ncla.legal.

Sincerely,

NEW CIVIL LIBERTIES ALLIANCE

/s/ *Caleb Kruckenberg*
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