

Alert | Financial Regulatory & Compliance



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CFTC, FinCEN and SEC Issue Joint Statement Reminding Persons in Digital Assets Space of Obligations Under Bank Secrecy Act

On Oct. 11, 2019, the Financial Crimes Enforcement Network (FinCEN), the U.S. Commodity Futures Trading Commission (CFTC), and the U.S. Securities and Exchange Commission (SEC) (collectively, the “Agencies”), published a [Joint Statement on Activities Involving Digital Assets](#) (the “Joint Statement”). The purpose of the Joint Statement was “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).”

The Joint Statement reminds participants in the digital asset space that AML/CFT obligations apply to “financial institutions,” such as:

- broker-dealers and mutual funds obligated to register with the SEC,
- futures commission merchants and introducing brokers obligated to register with the CFTC, and
- money services businesses (MSBs) as defined by FinCEN.

AML/CFT obligations include the requirement to establish and implement an effective anti-money laundering program (“AML Program”) and to comply with recordkeeping and reporting requirements, including suspicious activity reporting requirements.

For purposes of the 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. Participants in the digital asset space may refer to “digital assets” using different labels including “virtual assets,” “crypto-assets,” “digital tokens,” “digital coins,” “cryptocurrencies,” “convertible virtual currencies,” and “digital currencies.” However, the Joint Statement reminds the digital assets industry that 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 the asset, activity or service, including its economic reality and use, that determines: (i) the general categorization of the asset, (ii) the specific regulatory treatment of the activity involving the asset, and (iii) whether the persons involved are “financial institutions” for purposes of the BSA.*** An analysis of the nature of the digital asset-related activity is key in determining whether and how a person must register with the SEC, CFTC or FinCEN, according to the Joint Statement.

In terms of BSA oversight, the Joint Statement clarifies that one or more of the Agencies (and possibly other agencies) will oversee compliance with AML/CFT obligations for purposes of the BSA. For example: (i) the SEC, FinCEN, and the Financial Industry Regulatory Authority (FINRA) will oversee the AML/CFT activities of a broker-dealer in securities; (ii) the CFTC, FinCEN, and the National Futures Association (NFA) will oversee the AML/CFT activities of a futures commission merchant; and (iii) FinCEN will oversee the AML/CFT activities of an MSB.

The Joint Statement explains that the BSA obligations (including AML Program requirements) that apply to the particular type of financial institution will flow from the FinCEN regulations applicable to that type of financial institution.¹ These obligations include the implementation of a risk-based AML Program and the reporting of suspicious activity.

Participants in the digital asset space seeking guidance in determining whether their activity requires registration with the SEC, CFTC, or FinCEN and/or assistance with the review or enhancement of their AML Programs may contact any of the authors in this Alert or their GT counsel of preference. GT’s financial services team can assist with any questions regarding the Joint Statement and/or any other BSA/AML compliance matters.

Authors

This GT Alert was prepared by **Carl A. Fornaris**, **Marina Olman-Pal**, and **Anthony J. Fernandez**. Questions about this information can be directed to:

- **Carl A. Fornaris** | +1 305.579.0626 | fornarisc@gtlaw.com
- **Marina Olman-Pal** | +1 305.579.0779 | olmanm@gtlaw.com
- **Anthony J. Fernandez** | +1 305.579.0797 | fernandezaj@gtlaw.com

¹ FinCEN regulations for brokers or dealers in securities (31 C.F.R. § 1010.100(h)) are covered under 31 C.F.R. § 1023, futures commission merchants (31 C.F.R. § 1010.100(x)) are covered under 31 C.F.R. § 1026, introducing brokers in commodities (31 C.F.R. §§ 1010.100(bb)) are covered under 31 C.F.R. § 1026, and mutual funds (31 C.F.R. §§ 1010.100(gg)) are covered under 31 C.F.R. § 1024.

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