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August 23, 2022

The Honorable Janet Yellen
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Yellen:

On August 8, 2022, the Office of Foreign Assets Control (OFAC) issued first-of-their-kind sanctions targeting funds illicitly obtained by the Democratic People's Republic of Korea. These sanctions are unique, however, in that they were not levied against a person or an entity, but against "privacy-enabling" code. OFAC has a long, commendable history of utilizing financial sanctions to enhance the national security of the United States. Nonetheless, the sanctioning of neutral, open-source, decentralized technology presents a series of new questions, which impact not only our national security, but the right to privacy of every American citizen.

Specifically, OFAC's sanctions on the virtual currency anonymizing software Tornado Cash in accordance with Executive Order 13694 are the first sanctions issued against something other than an individual or entity determined "to be responsible for or complicit in" malicious cyber-enabled activities that pose a threat on United States national security, foreign policy, economic health, or financial stability.¹ Considering Executive Order 13694 defines "entity" as a "partnership, association, trust, joint venture, corporation, group, subgroup, or other organization," adding Tornado Cash to OFAC's SDN list appears to be a divergence from previous OFAC precedent because several of the Tornado Cash Ethereum addresses (specifically listed below) are not, to our knowledge, an individual or entity.² Rather, they are smart contract addresses whose operation is determined exclusively by open-source software found on the Ethereum blockchain. In other words, the addresses do not appear to be a person, entity, or property (all properly the target of sanctions); they are, instead, widely distributed technological tools and they are not under the control of any entity or natural person.

Brian Nelson, the Under Secretary of the Treasury for Terrorism and Financial Intelligence, claimed that Tornado Cash "repeatedly failed to impose effective controls designed to stop it from laundering funds for malicious cyber actors."³ As privacy-enhancing software, Tornado Cash functions as blockchain contracts that, once given the appropriate inputs, automatically execute. That said, the smart contracts that are Tornado Cash are not maintained, updated, or

¹ Executive Order 13694

² Ibid.

³ "U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash," *Department of the Treasury*, August 8, 2022, <https://home.treasury.gov/news/press-releases/jy0916>.

controlled by any human being(s); rather, the software itself is self-sufficient, as it is decentralized and open-source and will operate as an anonymizing software powered by code as long as the Ethereum network continues to operate.

This distinction is best highlighted in the May 9, 2019, FinCEN guidance on the application of FinCEN regulations to certain business models involving virtual currencies. The guidance draws a distinction between "providers of anonymizing services" (including "mixers") and "anonymizing software providers." The guidance makes clear that providers of anonymizing *services* are subject to Bank Secrecy Act obligations while providers of anonymizing *software* are not.⁴ Specifically, the guidance determines this distinction to rest on the fact that "suppliers of tools (communications, hardware, or software) that may be utilized in money transmission, like anonymizing software, are engaged in trade and not money transmission."

We recognize that OFAC is not bound by FinCEN regulations. Nevertheless, FinCEN as an arm of the Treasury Department developed a definition of what can reasonably be called a "mixer," a person who accepts and transmits anonymized funds on behalf of customers, and "anonymizing software provider," a person who merely provides software that may be used by mixers or other persons. It is our understanding that Tornado Cash is simply the anonymizing software deployed on the blockchain, which manages any tokens sent to it by Ethereum users.

Provided this distinction, I respectfully request your office provide clarity on the following questions:

1. As privacy technology, Tornado Cash is a collection of several Ethereum smart contract addresses that are not controlled by a person (individual or entity). While this fact is reflected in the code, are any of the Ethereum addresses specified in the August 8, 2022, SDN list believed to be owned and controlled by a person who accepts and transmits value for customers? If so, which ones?
2. Given this apparent shift in OFAC interpretation of what is or is not sanctionable, it would be helpful for Congress and blockchain developers to understand the factors considered in OFAC's designation of technology to the SDN list. With that in mind, how are the following SDN-listed Ethereum addresses either aliases of a person (individual or entity) or the property of a person? If the addresses are considered aliases of a person, please describe for each address how paying or otherwise interacting with that address is equivalent to paying or interacting with that person?

0xd96f2B1c14Db8458374d9Aca76E26c3D18364307
0x4736dCf1b7A3d580672CcE6E7c65cd5cc9cFBa9D
0xD4B88Df4D29F5CedD6857912842cff3b20C8Cfa3
0x910Cbd523D972eb0a6f4cAe4618aD62622b39DbF
0xA160cdAB225685dA1d56aa342Ad8841c3b53f291
0xFD8610d20aA15b7B2E3Be39B396a1bC3516c7144
0x22aaA7720ddd5388A3c0A3333430953C68f1849b

⁴ "Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies," *Financial Crimes Enforcement Network*, May 9, 2019, <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

0xBA214C1c1928a32Bffe790263E38B4Af9bFCD659
0x169AD27A470D064DEDE56a2D3ff727986b15D52B
0x0836222F2B2B24A3F36f98668Ed8F0B38D1a872f
0x07687e702b410Fa43f4cB4Af7FA097918ffD2730
0x12D66f87A04A9E220743712cE6d9bB1B5616B8Fc
0x47CE0C6eD5B0Ce3d3A51fdb1C52DC66a7c3c2936
0x23773E65ed146A459791799d01336DB287f25334
0x610B717796ad172B316836AC95a2ffad065CeaB4
0x178169B423a011fff22B9e3F3abeA13414dDD0F1
0xbB93e510BbCD0B7beb5A853875f9eC60275CF498
0x2717c5e28cf931547B621a5ddd772Ab6A35B701
0x03893a7c7463AE47D46bc7f091665f1893656003
0xd96f2B1c14Db8458374d9Aca76E26c3D18364307
0x4736dCf1b7A3d580672CcE6E7c65cd5cc9cFBa9D

3. Mr. Nelson cited Tornado Cash's alleged failure to impose controls for illicit activity. I understand measures were taken to filter the tornado.cash front-end. Given that the Tornado Cash back-end will operate unchanged as an anonymizing technology as long as the Ethereum network continues to operate, who or what entity did OFAC believe was reasonably responsible for imposing controls on the Tornado Cash blockchain contracts?
4. Understandably, Tornado Cash, as a privacy technology, was also used by law-abiding citizens to anonymize legal, on-chain personal transactions. Can innocent U.S. persons who now have funds trapped in the Tornado Cash smart contract reclaim their funds? If so, how should they go about this?
5. Are otherwise innocent U.S. persons who receive unsolicited funds from SDN-listed addresses in breach of law or regulation? What actionable steps should people in this situation take to comply with sanctions obligations while recognizing that on blockchain, individuals can receive funds unknowingly and unwillingly? Will OFAC release guidance to provide clarity for individuals in this situation?
6. To the extent valuable property is held at the sanctioned addresses, and to the extent a law-abiding person is the only person able to remove said valuable property from that address through the creation of an Ethereum transaction that they alone form and undertake, is that property accurately described as belonging to that law-abiding person, or does it, through some mechanism or legal fiction, belong to a person listed on the SDN list?
7. It is customary to afford due process to individuals and entities to appeal a sanction to OFAC when they can demonstrate changed circumstances or submit additional relevant information not previously made available to OFAC. How does OFAC intend to uphold the appeals process for the sanctioned addresses that have no ability to appeal the sanction to OFAC because the above-mentioned blockchain addresses are smart contracts with no agency, corporate or personal, and as such cannot speak for themselves or those whose funds they hold?

I share OFAC's concerns regarding the illicit use of the Tornado Cash smart contract and appreciate OFAC's continued work to protect the security, foreign policy, and economy of the United States. The growing adoption of decentralized technology will certainly raise new challenges for OFAC. Nonetheless, technology is neutral, and the expectation of privacy is normal.

Thank you for your response to my questions. Please do not hesitate to contact Lizzy.Fallon@mail.house.gov if you require additional information.

Sincerely,

A handwritten signature in blue ink that reads "Tom Emmer". The signature is written in a cursive style with a large, sweeping initial "T" and a long, horizontal flourish at the end of the name.

Tom Emmer
Member of Congress