

Forbes

New Anti-Crypto Movement Escalates Congress's Assault On Privacy

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August 2, 2023

Last week, while many members of the House Financial Services and Agriculture Committees were making progress toward improving U.S. cryptocurrency policy, other members of Congress escalated the long-running attack on financial privacy. The main perpetrator in the House was Rep. Bill Foster (D-IL).

During one of the Financial Service Committee's markups, Foster introduced an amendment to require every cryptocurrency wallet to be registered with FinCEN, an idea he likened to license plate requirements for automobiles. (See the 1:44:35 mark.) According to Foster, this "licensing regime" is necessary because crypto markets are rife with fraud. He claims between 50 percent and 70 percent of crypto transactions are fraudulent, and self-hosted wallets are "the lifeblood of the fentanyl distribution industry and human trafficking."

Aside from the fact that license and registration requirements for automobiles have not stopped criminals from using cars to commit crimes, the world's leading investigator of crypto transactions, Chainalysis, estimates the share of illicit transaction volume is less than 1 percent. Either way, Foster seems oblivious to both the basic structure and the ineffectiveness of the existing Bank Secrecy Act regime.

Foster insists that federal agencies should not be able to simply "push a button" to access personal information attached to digital wallets, and that a licensing regime should have "a higher bar for ordinary payments made by ordinary citizens." (See the 2:50:15 mark.) He even wants citizens to have the right to be notified if any government authority de-anonymizes their account, and (at 2:48:00) suggests that stablecoins users should only have their accounts de-anonymized by the courts.

What's bizarre, of course, is that the existing BSA regime does not afford American citizens these privileges for basic (non-crypto) financial transactions.

If Foster supports moving to a warrant-only style reform for the BSA framework, he should say so. (Other members, including Representatives John Rose (R-TN), Pete Sessions (R-TX), and Andrew Ogles (R-TN), support just such a reform.) Regardless, Foster should not pretend that

expanding any part of the existing BSA framework to crypto is going to be an effective criminal deterrent. Decades of expanding regulation and government intrusion, at an enormous cost to citizens, have already failed that test.

In addition to its ineffectiveness, a core problem with the current approach is its failure to uphold the constitutional protections that are afforded to all citizens. Every citizen – not just “ordinary citizens” making “ordinary payments,” however defined – is supposed to be guaranteed a presumption of innocence with the right to privacy.

People should not have to seek permission from the federal government to use their own money, and the Constitution is supposed to protect citizens against unreasonable searches and seizures. The government should have to obtain a warrant by showing probable cause before obtaining access to an individual’s person, house, papers, and effects – including their financial transactions. That’s the idea that should guide BSA reforms as well as any new cryptocurrency framework.

Given Foster’s proposed amendment, he may or may not see things this way. It is clear, however, that multiple members of the U.S. Senate do not.

In December, Senators Elizabeth Warren (D-MA) and Roger Marshall (R-KS) introduced the Digital Asset Anti-Money Laundering Act of 2022. This bill requires people who normally do not gather – and in some cases have no way to gather – personal information on people who plan to use cryptocurrency. Formally, it requires FinCEN to classify (among others) “unhosted wallet providers” as *money service businesses*, thus subjecting them to the requirements of the existing BSA regime.

The bill also requires FinCEN to promulgate a rule that would make it difficult to legally transact with a cryptocurrency that has been anonymized by a mixer, and also forces Americans to report when they transact more than \$10,000 in cryptocurrency with someone outside the United States.

But things did not stop there.

On July 27, Warren and Marshall reintroduced their bill, this time with two new cosponsors, Senators Joe Manchin (D-WV) and Lindsey Graham (R-SC). As my colleague Nick Anthony pointed out, the new version of the Digital Asset Anti-Money Laundering Act gives Treasury/FinCEN even greater discretion than the original bill, raising even more questions about implementation. The bill would also classify various industry participants, “including individual miners and validators,” as *financial institutions*, thus subjecting them to the BSA regime.

And just two days prior, another group of Senators – Jack Reed (D-RI), Mike Rounds (R-SD), Mark Warner (D-VA), and Mitt Romney (R-UT) – went even further by introducing the Crypto Asset National Security Enhancement (CANSEE) Act. As Anthony pointed out, this bill “broadly defines terms to create sweeping surveillance, potentially violates the First Amendment, and gives the Treasury the authority to effectively prohibit cryptocurrency use in the United States.”

The bill threatens the very decentralized nature of cryptocurrencies and applies penalties to (potentially) anyone that merely publishes software code, possibly in violation of the First Amendment.

These bills are just the latest in the long-running effort to sacrifice Americans' rights in the name of security. Thanks to Congress, in the name of stopping criminals, the rights of millions of law-abiding citizens are being increasingly ignored.

And it hasn't worked.

After decades of experience, billions of wasted dollars, and millions of reports filed every year, the federal government still can't make the case that the BSA regulatory regime has made any appreciable dent in criminal activity. Rather than force private businesses to serve as law enforcement and impose ludicrously high costs and inefficient regulations on citizens – all while running roughshod over their rights – it would be far better to divert resources to catch criminals.

Instead, most members of Congress, as well as administration after administration, are perfectly willing to maintain and expand the BSA framework. It defies all common sense and reason because the existing approach clearly does not work.

Congress needs to scrap the existing approach and start from the assumption that American citizens should not be forced to report their financial transactions to the government if that agency cannot obtain a valid warrant. That's not a new idea and it shouldn't be controversial.

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