THE BITCOIN FOUNDATION

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August 29, 2017

To the attention of the members of the United States Senate Committee on the Judiciary
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

RE: S. 1241, "Combating Money Laundering, Terrorist Financing and Counterfeiting Act of 2017"-Section 13 & Prosecutions under 18 U.S.C. § 1960

Dear Committee members:

The Bitcoin Foundation, Inc. ("the Foundation") is a non-profit organization founded in September 2012. Comprised of senior leaders in the Bitcoin community, the Foundation coordinates joint efforts of the Bitcoin community, helping to create awareness of the benefits of Bitcoin, its use and its related technology requirements. The Foundation's audience includes technologists, regulators, and the media, and its reach is global. The Foundation has been at the forefront of campaigning for an unimpeded economic system for the future. In November 2013, Patrick Murck, general counsel of the Foundation, testified before a United States Senate Committee convened to assess digital currencies. After engaging with federal regulators and lawmakers, a near-unanimous consensus that the federal government needed to be careful to avoid hampering the growth of the world's first completely decentralized payment network resulted.

First, the Foundation wishes to express its strong and unequivocal opposition to a specific section of a bill titled "Combating Money Laundering, Terrorist Financing and Counterfeiting Act of 2017" (S. 1241) (hereinafter "S. 1241" or "the Bill"), Section 13, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, dealing with "Records and Reports on Monetary Instruments Transactions."

Second, we request that your Committee formally investigates, whether directly or through the U.S. Government Accountability Office (GAO), the U.S. Department of Justice ("DOJ")'s policy of prosecuting individuals who exchange bitcoin for cash or other financial instruments under the federal money transmitting statute, 18 U.S.C. § 1960.

1. **Section 13 of S. 1241 to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, should be withdrawn**

Section 13 of the Bill, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code raises significant concerns as it may criminalize Bitcoin and other "virtual currency" activities which are perfectly legitimate.

First, Bitcoin lacks the characteristic of monetary instruments or financial products which S. 1241's Section 13 attempts to regulate. Several states, as well as federal agencies have already taken conflicting positions on both the economic nature of "virtual currencies" such as Bitcoin, as well as on the legal approach to regulate such a new technology. Additionally, there has even been widespread conflicts regarding the economic nature of Bitcoin across both state and federal courts. Therefore, an analysis of the economic nature of Bitcoin does not provide a rational, legal or common sense basis for Congress to decide, without further serious technical and economic research, either through committee hearings or through assigning the GAO for that purpose, that it should be considered a monetary instrument for purposes of Subchapter II of Title 31 of the U.S. Code.

In the news release announcing the Bill's introduction, Senator Grassley explicitly states that he is targeting digital currencies because of its potential use by terrorist organizations. Contrary to this assertion, there is little to no systemic evidence that terrorist organizations use virtual currencies. In fact, the use of cash or other assets, such as art trafficking, represents a much greater risk for the law enforcement community. Further, by no means will a change in U.S. law prevent these terrorist organizations from still using unregulated overseas platforms. However, based on how blockchain works, the U.S. government already has the ability under existing laws to investigate potential criminal activity because blockchain leaves a digital footprint that investigators can follow. This may already be a deterrent for criminal actors, who would rather use money orders, cash transfers, or anonymous prepaid cards which remain much harder to track.

Not only would Section 13 of the Bill, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, have no impact on current or potential criminal activity, it would most certainly stifle technological advances and would in fact over-criminalize any legitimate use of Bitcoin in normal business activities. Therefore, this section, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, should be withdrawn.

2. Congress should investigate the DOJ's policy of prosecuting individuals in certain Bitcoin-related transactions under 18 U.S.C. § 1960

Over the past few years, the DOJ has used the federal money-transmitting statute to prosecute individuals who exchange bitcoin for cash or other financial instruments under the federal money transmitting statute, 18 U.S.C. § 1960. *See United States v. Faiella*, 39 F. Supp. 3d 544 (S.D.N.Y. 2014); *United States v. Mansy*, No. 2:15-cr-198-GZS, 2017 U.S. Dist. LEXIS 71786 (D. Me. May 11, 2017); *United States v. Klein*, No. 17-03056-01-CR-S-MDH, 2017 U.S. Dist. LEXIS 74799 (W.D. Mo. May 17, 2017). However, these individuals should never have been charged in the first place for the reasons indicated below.

THE BITCOIN FOUNDATION

18 U.S.C. § 1960 is used to prosecute those who do not comply with the money transmitting business registration requirements described in 31 U.S.C. § 5330. The registration statute specifically defines "money transmitting business." The definition of money transmitting business does not include terms that would suggest that Bitcoin is to be included. Since Bitcoin, and other cryptocurrencies or virtual currencies are not explicitly listed in 31 U.S.C. § 5312(a)(3), neither the DOJ, nor a court may read the statute to extend those categories. Therefore, Bitcoin does not fall within 18 U.S.C. § 1960 and the DOJ is not authorized to stretch the definition to bring Bitcoin within the scope of the statute to justify their prosecutions of Bitcoin transactions. If Congress wants Bitcoin to be included, it can amend the statute to do so.

Recent and current congressional action demonstrates that Bitcoin is not currently controlled by 31 U.S.C. § 5312(3) because Congress has been attempting to include digital currencies as a category of monetary instruments or financial products controlled by the 31 U.S.C. § 5312(a). The DOJ was therefore twice on notice that the federal money transmitter statute could not be extended to Bitcoin activities because Congress demonstrated that a congressional authorization was required to allow prosecutions under this statute. Therefore, all prosecutions of Bitcoin activities under the federal money transmitter statute since October 08, 2011 should be reviewed and challenged by Congress.

Most of these prosecutions appear to rely on a memorandum order dated August 14, 2014 issued by a federal judge in the matter *United States v. Faeilla*, which relies on an absurd analysis of the word "funds." This holding was rejected by other judges who concluded that Bitcoin lacks the characteristics of financial instruments, financial products or money.

The DOJ's prosecutions violate a defendant's right to fair warning that their conduct will give rise to criminal penalty. It is a fundamental right that people are given fair warning that their conduct will give rise to criminal penalties. A person cannot have fair warning when there are varying positions taken by the United States Department of Treasury.

18 U.S.C. § 1960 requires that a person *knowingly* conducts, controls, manages, supervises, directs, or own an unlicensed money transmitting business to be found guilty. Therefore, a Bitcoin operator must know they are conducting a money transmitting business. With the conflicting views and public statements from government agencies, as well as the various court pronouncements, a person cannot have the requisite knowledge that they are violating 18 U.S.C. § 1960. Therefore, we respectfully request that Congress uses its oversight jurisdiction to review and investigate the DOJ's continuing policy of prosecuting individuals in Bitcoin-related businesses under 18 U.S.C. § 1960.

For purposes of your Committee's counsel reviewing the legal analysis supporting these requests, we have attached, as Exhibit A, a letter from our legal counsel, the Ciric Law Firm, PLLC, detailing these arguments.

We thank you in advance for your support and your time. If you have any questions please let me know.

THE BITCOIN FOUNDATION

Yours sincerely,

Llew Claasen
Executive Director
The Bitcoin Foundation

Cc: Members of the United States Senate Committee on Finance
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EXHIBIT “A”

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August 29, 2017

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RE: S. 1241, "Combating Money Laundering, Terrorist Financing and Counterfeiting Act of 2017"-Section 13 & Prosecutions under 18 U.S.C. § 1960

Dear Mr. Claasen:

The Ciric Law Firm, PLLC has been recently retained by the Bitcoin Foundation, Inc. as its legal counsel.

You have asked us: (1) to review the bill titled "Combating Money Laundering, Terrorist Financing and Counterfeiting Act of 2017" (S. 1241) (hereinafter "S. 1241" or "the Bill"), Section 13, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, dealing with "Records and Reports on Monetary Instruments Transactions" and whether it should be withdrawn; and (2) to what extent the U.S. Department of Justice (hereinafetr "DOJ") should be investigated for its policy of prosecuting individuals who exchange bitcoin for cash or other financial instruments under the federal money transmitting statute, 18 U.S.C. § 1960. Below is our feedback.

1. **S. 1241's Section 13, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, should be withdrawn because Bitcoin lacks the characteristics of a monetary instrument or financial product and because no evidence of systematic use of Bitcoin by terrorist organizations exists to support federal legislative intervention.**

Section 13 of the Bill, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code raises significant concerns as it may criminalize Bitcoin and other "virtual currency" activities which are perfectly legitimate.

(1) Bitcoin lacks the characteristic of monetary instruments or financial products which S. 1241's Section 13 attempts to regulate.

Bitcoin was collaboratively developed by an independent community of Internet programmers without any financial backing from any government and is the result of transparent mathematical formulas, which lack the attributes of traditional financial products or transactions. Bitcoin consists of four different components: (1) a decentralized peer-to peer network (the Bitcoin protocol), (2) a public transaction ledger (the blockchain), (3) a decentralized mathematical algorithm, and (4) a decentralized verification system (transaction script). Andreas M. Antonopoulos, MASTERING BITCOIN: UNLOCKING DIGITAL CRYPTOCURRENCIES (2014).

As with traditional commodities, like crude oil and gold, the value of Bitcoin is highly volatile and dependent upon supply and demand. Like gold, Bitcoins are a finite resource. "[O]nly 21 million bitcoins will ever be created." *Frequently Asked Questions*, BITCOIN, https://bitcoin.org/en/faq#is-bitcoin-a-bubble (last visited Aug. 16, 2016). Furthermore, acquiring Bitcoin is analogous to acquiring other commodities. A person who wishes to obtain a commodity, like gold, for example, can either purchase gold on the market or can mine the gold himself. Similarly, a person who wishes to obtain Bitcoins can either purchase them on the market or "mine" them himself through participation in Bitcoin's transaction verification process. *See* Stephen T. Middlebrook & Sarah Jane Hughes, *Regulating Cryptocurrencies in the United States: Current Issues and Future Directions*, 40 WM. MITCHELL L. REV. 813, 818 (2014). Therefore, Bitcoin, which is nothing but programming code, lacks all the characteristics of monetary instruments, financial products, currencies, or money.

Several states, as well as federal agencies have already taken conflicting positions on both the economic nature of "virtual currencies" such as Bitcoin, as well as on the legal approach to regulate such a new technology. California has already attempted to introduce legislation twice before withdrawing such attempts due to concerns about potential impacts on new technology start-ups. Georgia, New Jersey, North Carolina and Pennsylvania have already passed legislation that corrects ambiguities in their money transmission laws to create certainty for innovators. New Hampshire also enacted a statute exempting digital currency traders from the state's money transmission regulations on June 2, 2017.

Widespread conflicts regarding the economic nature of Bitcoin exist across both state and federal courts. *See Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016) (concluding that "it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money" most notably because it is not accepted by all merchants, the value fluctuates significantly, there is a lack of a stabilization mechanism, they have limited ability to act as a store of value, and Bitcoin is a decentralized system.). *See also United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016).

Furthermore, a Bitcoin Foundation member, Theo Chino, is currently challenging the controversial "Virtual Currency" regulation (Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations), also known as the "BitLicense," promulgated by the New York Department of Financial Services in August 2015. A copy of a recently filed Amended Complaint dated May 29, 2017 is available at https://www.article78againstnydfs.com/docs/Index-101880-15/11-FiledAmmendedComplaint/01-AmendedComplaint.pdf The petitioner in this case has argued that the NY State regulator acted beyond the scope of its authority when it promulgated the regulation because Bitcoin lacks the characteristic of a financial product or service, because there is no rational basis to impose undue burdens on or prevent startups and small businesses from participating in such economic activity, and because such regulation violated the First Amendment rights of small businesses under the compelled commercial speech and the restricted commercial speech doctrines. *Chino vs. N.Y. Dep't Fin, Servs.* ("NYDFS") (Index No. 0101880-2015).

In this action, Chino showed that, during hearings held by the New York State Department of Financial Services on the topic of virtual currency on January 28 and January 29, 2014 in New York City ("the Hearings"), Mark T. Williams, a member of the Finance & Economics Faculty at Boston University, was the only witness present at the Hearings who introduced in the written record direct testimony as to an analysis regarding the economic nature of Bitcoin. His testimony establishes that Bitcoin should be treated as a commodity, and not as a currency. New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014)(statement of Mark T. Williams, Member of the Finance & Economics Faculty, Boston University, *available at* http://www.dfs.ny.gov/about/hearings/vc_01282014/williams.pdf). Furthermore, Chino's papers show that the New York State regulator failed to discuss, probe, or question Mark T. Williams' written testimony during the Hearings, and did not seek to discuss under which circumstances Bitcoin should be considered a currency or whether Bitcoin should be considered a financial product or a monetary instrument under New York state law. *See* New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014), http://www.dfs.ny.gov/about/hearings/vc_01282014_indx.htm.

Finally, significant disagreement exists amongst various federal agencies, such as the CFTC and the IRS, as to the economic nature of Bitcoin. *See In re Coinflip, Inc.*, CFTC No. 15-29 at 3 (Sept. 17, 2015). *See also* Notice 2014-21, IRS, *available at* https://www.irs.gov/irb/2014-16_IRB/ar12.html (recognizing that Bitcoins "[do] not have legal tender status in any jurisdiction.")

Therefore, an analysis of the economic nature of Bitcoin does not provide a rational, legal or common sense basis for Congress to decide, without further serious technical and economic research, either through committee hearings or through assigning the U.S. Government Accountability Office (GAO) for that purpose, that it should be considered a monetary instrument for purposes of Subchapter II of Title 31 of the U.S. Code.

(2) No evidence of systematic use of Bitcoin by terrorist organizations exists to support federal legislative intervention.

In the news release announcing the Bill's introduction, Senator Grassley explicitly states that he is targeting digital currencies because of its potential use by terrorist organizations. Press Releases, Chuck Grassley, United States Senator, Money Laundering Bill Targets Terrorists, Tax Evaders, Cartels & Crooks (May 25, 2017), *available at* https://www.grassley.senate.gov/news/news-releases/money-laundering-bill-targets-terrorists-tax-evaders-cartels-crooks.

Contrary to this assertion, there is little to no systemic evidence that terrorist organizations use virtual currencies. In fact, the use of cash or other assets, such as art trafficking, represents a much greater risk for the law enforcement community. A recent report by the European Commission found little actual usage of cryptocurrency for these illegal activities due to the relatively high barriers to usage, noting that "… the technology is quite recent and in any case requires some knowledge and technical expertise which has a dissuasive effect on terrorist groups. The reliance on virtual currencies to fund terrorist activities has some costs and is not necessarily attractive." Further, "… virtual currencies present some commonalities with e-money but the IT expertise at stake for virtual currencies means that organized crime would have lower capability to use them than e-money which is more widely accepted." Secretary-General of the European Commission, Jordi Ayet Puigarnau, Director, *Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and to the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border situations*, COUNCIL OF THE EUROPEAN UNION, Jul. 4, 2017, *available at* http://europeanmemoranda.cabinetoffice.gov.uk/files/2017/07/10977-17-ADD-2.pdf.

As it is, organizations or individuals involved in using virtual currency for illegal activities are not using registered or licensed wallets or exchanges to acquire or transfer virtual currencies, and rather use overseas platforms that are not required to adhere to U.S. anti-money laundering and "Know Your Customer" requirements or peer-to-peer systems. By no means will a change in U.S. law prevent these terrorist organizations from still using these overseas platforms. However, based on how blockchain works, the U.S. government already has the ability under existing laws to investigate potential criminal activity because blockchain leaves a digital footprint that investigators can follow. This may already be a deterrent for criminal actors, who would rather prefer to use money orders, cash transfers, or anonymous prepaid cards which remain much harder to track.

Not only would the Bill's Section 13, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, have no impact on current or potential criminal activity, it would most certainly stifle technological advances and would in fact over-criminalize any legitimate use of Bitcoin in normal business activities.

Therefore, S. 1241's Section 13, to the extent it includes "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code, should be withdrawn.

2. The Bitcoin Foundation should ask Congress to investigate the DOJ's policy of prosecuting individuals in certain Bitcoin-related transactions under 18 U.S.C. § 1960 because such prosecutions may be barred by due process and statutory analysis concerns.

(1) The DOJ has misapplied 18 U.S.C. § 1960 to prosecute individuals involved in exchanging Bitcoin for cash or other financial instruments.

Over the past few years, the DOJ has used the federal money-transmitting statute, 18 U.SC. § 1960, to prosecute individuals who exchange bitcoin for cash or other financial instruments under the federal money transmitting statute, 18 U.S.C. § 1960.

On September 4, 2014, Charles Shrem pleaded guilty to one count of aiding and abetting the operation of an unlicensed money transmitting business in Southern District of New York. *United States v. Faiella*, 39 F. Supp. 3d 544 (S.D.N.Y. 2014).

In May 2017, Sal Mansy, a Detroit, Michigan resident, pleaded guilty to violating 18 U.S.C. § 1960 for not registering a money transmitting business. *United States v. Mansy*, No. 2:15-cr-198-GZS, 2017 U.S. Dist. LEXIS 71786 (D. Me. May 11, 2017). Mansy argued, unsuccessfully, that he was not operating a money transmission business and contended that his business fell outside the purview of 18 U.S.C. § 1960 because bitcoins are not "money" or "funds" within the meaning of the statute. There were no other crimes committed.

Also in May 2017, Jason Klein pleaded guilty before a Missouri court to charges of "conducting an unlicensed and unregistered money transmitting business." *United States v. Klein*, No. 17-03056-01-CR-S-MDH, 2017 U.S. Dist. LEXIS 74799 (W.D. Mo. May 17, 2017). No other crime was ever committed in this case.

In all of these cases, because these defendants all took plea deals, no jury or circuit court ever decided whether it was legally sound or justified whether Bitcoin should fall under the jurisdiction of 18 U.S.C. § 1960.

In fact, for the reasons explained below, these individuals should have never been charged in the first place. There are serious issues with the misapplication of 18 U.S.C. § 1960 to

prosecute Bitcoin users for executing certain transactions exchanging Bitcoin for cash or other financial instruments.

(3) Bitcoin is not within the scope of 18 U.S.C. § 1960 and 31 U.S.C. § 5312.

a. Under traditional statutory interpretation principles, Bitcoin cannot be brought within the ambit of 31 U.S.C. § 5312(a).

When a statute includes an explicit definition, then "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of the term." *Meese v. Keene*, 481 U.S. 465, 484-485 (1987); *see Burgess v. United States*, 553 U.S. 124, 130 (2008) ("When a statute includes an explicit definition, we must follow that definition" (internal quotation marks omitted)). Thus, where Congress subjects specific categories to government action, but fails to cover another category, either by specific or by general language, courts refuse to extend the coverage. To do so, given the "particularization and detail" with which Congress had set out the categories, would amount to "enlargement" of the statute rather than "construction" of it. *Iselin v. United States*, 270 U.S. 245, 250 (1926). *See also Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted").

18 U.S.C. § 1960 is used to prosecute those who do not comply with the money transmitting business registration requirements described in 31 U.S.C. § 5330. The registration statute specifically defines "money transmitting business" as any business that provides "provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system." 31 U.S.C. § 5330(d)(1)(A).

The definition of money transmitting business does not include terms that have an ordinary meaning which would suggest that Bitcoin is to be included. Furthermore, the language in the statutory definition of a "monetary instrument" in 31 U.S.C. § 5312(a)(3), provides for a limitative definition, including "United States coins and currency, […] coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material; and […] checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form."

Since Bitcoin and so called "crypto-currencies" or "virtual currencies," are not explicitly listed in 31 U.S.C. § 5312(a)(3), neither the DOJ, nor a court may read the statute to extend those categories.

Therefore, Bitcoin does not fall within 18 U.S.C. § 1960 and the DOJ is not authorized to stretch the definition to bring Bitcoin in the ambit of the statute to justify their prosecutions of Bitcoin transactions.

Further, at the time of drafting 18 U.S.C. § 1960, Bitcoin did not exist so Congress could not have intended to include it within the statute. If Congress wants Bitcoin to be included, it must amend the statute to do so and consult with the industry to prevent legislative overreach.

b. Congressional attempts to amend 31 U.S.C. § 5312(a) provided notice to the DOJ that its prosecutions of Bitcoin transactions were inappropriate.

Recent and current congressional action demonstrates that Bitcoin is not currently controlled by 31 U.S.C. § 5312(3). On October 08, 2011, Senator Grassley, the sponsor for S. 1241, introduced a similar bill to S. 1241, S. 1731 (112th) similarly titled "Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2011", *available at* https://www.govtrack.us/congress/bills/112/s1731. Both bills similarly attempt to include "digital currencies" for purposes of Subchapter II of Title 31 of the U.S. Code.

Because Congress has been attempting to include digital currency as a category of monetary instruments or financial products controlled by the 31 U.S.C. § 5312(a) since 2011, the DOJ was therefore twice on notice, and at least since October 08, 2011, that the federal money transmitter statute could not be extended to Bitcoin activities because Congress demonstrated that a congressional authorization was required to allow prosecutions under this statute.

The DOJ cannot have its cake and eat it too: it cannot seek to encourage or support statutory changes to the money transmitter statute to Bitcoin-related activities and at the same time charge individuals under the current version of this statute before Congress has expressly authorized the DOJ to do so!

Therefore, all prosecutions of Bitcoin activities under the federal money transmitter statute since October 08, 2011 should be reviewed and challenged by Congress through its oversight power.

c. *Under traditional statutory interpretation rules, U.S. v. Faeilla was wrongly decided.*

Most of the criminal prosecutions of bitcoiners under the federal money transmitter statute appear to rely on a memorandum order dated August 14, 2014 issued by a federal judge in the matter *United States v. Faeilla*, which relies on an absurd analysis of the word "funds," concluding that Merriam-Webster's definition of funds as "a supply of something" allows to bring Bitcoin within the ambit of the statute. *United States v. Faeilla*, No. 14-cr-00243, ECF No. 43 (S.D.N.Y. Aug. 14, 2014)(Memorandum Order).

First, courts should rely on an ordinary or plain meaning analysis of a statutory term ONLY when such terms are not terms of art or when such terms are not statutorily defined. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (confirming that courts should construe a statutory term in accordance with its ordinary or natural meaning in the absence of a statutory definition). Here, both the terms "financial instrument" and "financial institution" are explicitly and restrictively defined. Therefore, the presence of these precise statutory definitions should have precluded the court from adopting a plain meaning analysis.

Second, under the approach adopted by the court, relying on a supply of any asset to trigger this definition would suddenly transform art dealers, who control inventories or "a supply" of artworks, or computer stores which control inventories or "a supply of" of computers into money transmitters. Such an absurd result should have easily permitted the court to reject such an interpretation, as is usually the case if an interpretation supported by a plain meaning analysis leads to an absurd result. *See, e.g., United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation said to lead to an absurd result); *Dewsnup v. Timm*, 502 U.S. 410, 427 (1992) (Scalia, J., dissenting) ("If possible, we should avoid construing the statute in a way that produces such absurd results.").

d. *Later judicial opinions plainly contradict Faeilla.*

In fact, the *Faeilla* holding was rejected by the Magistrate Judge in *United States v. Petix*. In *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016), Magistrate Judge Scott, in his Report and Recommendation dated December 1, 2016, gave a detailed analysis concluding that Bitcoin is not money or funds under 18 U.S.C. § 1960, a federal statute prohibiting unlicensed money transmitting businesses. Magistrate Judge Scott noted that money and funds must involve a sovereign: "'[m]oney,' in its common use, is some kind of financial instrument or medium of exchange that is assessed value, made uniform, regulated, and protected by sovereign power." "Bitcoin is not 'money' as people ordinary understand the term." "Like marbles, Beanie Babies™, or Pokémon™ trading cards, bitcoins have value exclusively to the extent that people at any given time choose privately to assign them value. No governmental mechanisms assist with valuation or price stabilization, which likely explains why Bitcoin value fluctuates much more than that of a typical government-backed fiat currency."

Similarly, in *Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016), a state judge concluded, in a prosecution of a bitcoiner under the state money transmitter statute, that "it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money" most notably because it is not accepted by all merchants, the value fluctuates significantly, there is a lack of a stabilization mechanism, they have limited ability to act as a store of value, and Bitcoin is a decentralized system).

(4) <u>The DOJ's prosecutions of bitcoiners under 18 U.S.C. § 1960 violate a defendant's right to fair warning that their conduct will give rise to criminal penalty.</u>

It is a fundamental right that people are given fair warning that their conduct will give rise to criminal penalties. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977). In *Mcboyle v. United States*, 283 U.S. 25, 27 (1931), the court ruled "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Id.* 283 U.S. at 27. When a rule of conduct is laid down in words that evoke in the common mind only one things, the statue should not be extended beyond the common word simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. *Id.*

The fair warning doctrine has been applied in various criminal and civil cases. *See, e.g., Yates v. United States*, 135 S. Ct. 1074 (2015) (rejecting the Government's unrestrained reading of "tangible object" under a provision of the Sarbanes-Oxley Act to include fish); *Bond v. United States*, 134 S. Ct. 2077 (2014) (rejecting the government's sweeping interpretation of the Chemical Weapons Convention Implementation Act of 1998).

As demonstrated above, the DOJ cannot extend the statute to include Bitcoin simply because it may seem that the statute applies, or because of speculation that if the legislature had thought of it, broader words would have been used.

Further, a person cannot have fair warning if the United States Department of Treasury has come out with different positions on how to treat Bitcoin. The Internal Revenue Service, a bureau of the Department of Treasury, came out with a Notice that states, "[f]or federal tax purposes, virtual currency is treated as property." Notice 2014-21, IRS, https://www.irs.gov/irb/2014-16_IRB/ar12.html. Then the Financial Crimes Enforcement Network, another bureau of the Department of Treasury, issued a Guidance that "a person that creats units of convertible virtual currency and sells thos eunits to another rperson for real currency or its equivalent is engaged… is a money transmitter." Guidance FIN-2013-G001, FinCEN, https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf. When two bureaus of the same federal agency come out with inconsistent positions of whether Bitcoin is money, there is no way an ordinary person can have fair warning/notice that their actions will give rise to criminal penalty under 18 U.S.C. § 1960.

(5) <u>The requisite "knowledge" in 18 U.S.C. § 1960 cannot be met.</u>

18 U.S.C. § 1960 requires that a person *knowingly* conducts, controls, manages, supervises, directs, or own an unlicensed money transmitting business to be found guilty. Therefore, a Bitcoin operator must know they are conducting a money transmitting business. This is impossible because of the varying interpretations of Bitcoin.

Since there is confusion amoung bureaus of the Department of Treasury as to whether Bitcoin should be treated as a financial instrument or money, any individual cannot *knowingly* operate an unlincensed money transmitting business. With the conflicting views and public

statements from government agencies, as well as the various court pronouncements, a person cannot have the requisite knowledge that they are violating 18 U.S.C. § 1960.

Therefore, prosecutions of bitcoiners under 18 U.S.C. § 1960 should be closely reviewed and investigated by the relevant congressional committees.

If you have any questions, please let me know.

Sincerely yours,

Pierre Ciric
Member of the Firm